Criminal Justice, Indigenous People, and Political Power in Canada

by

Brian Edward Keith Teddy Harrison

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Abstract

My dissertation contributes to the work of reconciling radically different justice concepts with a view to designing institutions that can be accepted as legitimate by Indigenous and non-Indigenous Canadians alike. The project is principally a work of political theory within Canadian politics, but it draws upon and contributes to literatures in political philosophy, empirical political science, criminology, and law. The central question of my dissertation is, how can criminal justice in Canada be rendered legitimate for Indigenous people? I argue that legitimate criminal justice is possible, but only if Canadian criminal justice practices are altered to incorporate fundamental insights from Indigenous theories of justice. Chapter two surveys the failures of Canadian criminal justice for Indigenous people, including overincarceration, underrepresentation on juries, the epidemic of missing and murdered Indigenous women, and over- and under-policing. Drawing on Indigenous voices, I argue that these are symptoms of an underlying problem: the criminal justice system is not legitimate for Indigenous people. In the third chapter, I argue that the prominent liberal theories of legitimacy that undergird the Canadian polity cannot legitimate the Canadian constitutional framework or the institutions of criminal justice. Instead, criminal justice institutions must establish a form of freestanding legitimacy by deploying practices that themselves are acceptable to Indigenous people. In

chapter four I make the case that a separate system of justice for Indigenous people cannot provide legitimacy. The lives of Indigenous and non-Indigenous Canadians are sufficiently intertwined that justice problems would inevitably cross jurisdictional boundaries (defined territorially or by identity), leaving many caught in the other system. In matters of justice, separation cannot obviate the need for reconciliation. In chapter five, I work to reconcile Indigenous and non-Indigenous understandings of a concept fundamental to Canadian justice: impartiality. I develop an inclusive model of impartiality implicit in Indigenous practices of circle justice that can supplement the Canadian model of impartiality as disinterestedness. In the conclusion, I note that the level of punitiveness of Canadian justice is unjustified, and a less punitive approach for all would open up more juridical and legal space for Indigenous approaches to justice.

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Chapter 1
Introduction

1.1 Preface

My name is Teddy Harrison. I was born and raised in Vancouver, British Columbia and educated at the University of British Columbia, the University of Oxford, and the University of Toronto. Put another way, I was born on unceded Musqueam[1] territory on the shores of the Salish sea, and lived the first 22 years of my life as an uninvited guest on that territory. After two years as a resident alien in the United Kingdom,[2] I moved to land purchased from the Mississaugas of New Credit under Crown Treaty No. 13. My father was born in Alert Bay, at the other end of the Salish sea on unceded Kwakwaka'wakw territory, and my mother was born and raised New Brunswick in the traditional territory of the Peskotomuhkati. My ancestors came to Turtle Island from England, Scotland, Ireland, and Norway between three and twelve generations ago. I am a non-Indigenous Canadian, but I have no place but this place.

Many readers will be familiar with this form of self-location, while for others it is a jarring way to preface an academic work. The practice of self-location is one that I have learned through studying Indigenous justice, although it is common in other fields and among feminist scholars. I provide this information so that others know where I am coming from, literally and figuratively. Who am I shapes how I understand the issues I study, where I have chosen to focus my energy, and to whom I address the bulk of my critique. If the reader finds this irrelevant, I begin again in more conventional form with section 1.2 – but for those want to know, the next few paragraphs give a sense of how my situation has shaped my project.

This is a dissertation about criminal justice and Indigenous people in Canada and looking back, it is a little odd that I have come to write it. I did not grow up with an interest in Criminal justice: I didn't really like murder mysteries, I've still never seen Law & Order, and avoided news about

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[1] In a small irony, my Canadian spellchecker refuses to recognize even the word "unceded."

[2] The status was a little more complicated: as a commonwealth citizen and subject of Her Majesty the Queen, I had more rights than a typical metic but fewer than a citizen.

crime. I was also one of the majority of Canadians who lived with little contact with Indigenous people. If I visited the Musqueam reserve, it was to see non-Indigenous leasees. I did, however, grow up with at least a surface-level understanding of the injustice of the Canadian relationship with Indigenous people. Early on, this came from an awareness of environmental issues and the struggles of Indigenous people to protect their traditional lands, particularly in Clayoquot Sound. Later, as a youth representative to the Anglican Synod, I learned about the horrors of residential schools and efforts at reconciliation.[3] Land claims were also a major political issue during my formative years, with the development of the British Columbia Treaty Process and the signing of the Nisga'a treaty. In my time at UBC, land acknowledgements were ubiquitous, and some events included Indigenous elders. Nevertheless, we were encouraged to be "global citizens" and so my focus was directed out at injustice in the wide world, rather than injustice at home.

My attempts to be a good global citizen led me to an academic interest in genocide and crimes against humanity. My Oxford MPhil thesis was on political leadership in transitional justice and examined truth and reconciliation commissions and international criminal tribunals. After completing the degree, I returned to Canada and joined the federal public service where I ended up working as a policy advisor in the Aboriginal Affairs portfolio of the Department of Justice. It was through that work that I learned about the problems Indigenous people face in Canada's criminal justice system. In careful government-speak, the issue was "violence and disorder in Aboriginal communities" and what Canada could do about it. It was also abundantly clear, however, that the criminal justice system itself posed many problems for Indigenous people. The "challenge" (never problem) of "overrepresentation of Aboriginal people in the Canadian Criminal justice system," that is, the dramatic overincarceration of Indigenous people was only getting worse. Our office had a small library with a shelf where the recommendations of past commissions and inquiries sat literally gathering dust, but in their pages I learned of "starlight tours" and other abuses of Indigenous people by the institutions meant to protect them.

The government of the day was unsympathetic to such concerns. Under Stephen Harper's Conservatives, the punitiveness of the criminal justice was ratcheted up and the discretion of

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[3] Synod is the governing body of the Anglican church – in this case the Diocese of New Westminster (Greater Vancouver, essentially). Synod had to decide to raise funds towards the Indian Residential Schools Settlement Agreement.

justice system officials limited. We were instructed not to use the term colonialism in official documents, and when the civil service was cut by 5%, the Aboriginal Affairs portfolio of Justice was cut by 50%. Nevertheless, the federal government – often with provincial partners – sponsored a number of initiatives aimed at addressing the "challenge" of overrepresentation. This included the funding of Aboriginal Courtworkers, to help Indigenous people navigate the alien system of justice, and the funding of community-led diversion programs to take certain cases out of the mainstream justice system entirely. Both programs had been running since the early 1990s, under a "grants and contributions" model. Essentially, governments acted as funding agencies, providing resources to NGOs who actually did the work. This meant that there were a lot of people working busily to try and fix the problem, but nobody with the time to really think about what the problem was or how the best way was to go about fixing it at the federal level. Workers at community organizations were dramatically underpaid (as they weren't government employees) and overworked, with burnout and turnover enormous problems. Federal civil servants, on the other hand, were largely engaged in a defensive maneuver: our challenge was to ensure that a hostile government renewed the funding for these programs so they could continue to operate.

When I left government and returned to academia, it seemed obvious then to use the newfound time to think to think more deeply about what I had been working on there. Perhaps my academic work could in turn be useful to my public servant successors. I started with a central puzzle that had never been adequately explained in my time at justice. When it comes to self-government negotiations, substantive criminal justice is a "list three" issue. That is to say, it is on a list of issues for which the federal government reserves exclusive jurisdiction and will not negotiate with Indigenous governments; criminal justice is quite literally off the table in negotiating self-government agreements.[4] At the same time, however, the federal-provincial Aboriginal Justice Initiative[5] saw a functional transfer of the responsibility for the administration

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[4] Indian and Northern Affairs Canada, "The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government," Government Policy, 1995, https://www.rcaanc-cirnac.gc.ca/eng/1100100031843/1539869205136.

[5] At the time I worked there, the Aboriginal Justice Strategy. I am unsure of the reason for the downgrading from Strategy to Initiative: perhaps it is merely the shifting fashions of bafflegab, but perhaps it is a recognition that a limited, pilot-scale grants and contributions program is not any kind of strategy commensurate to the scale of the

of justice to community organizations. These organizations, although financially accountable for their grants, were not formally accountable to the Canadian legal system for their operations and were not bound to operate according to substantive Canadian Criminal law. Taken at face value, this seemed like a major contradiction: the power systematically denied to Indigenous governments was haphazardly assigned to Indigenous community organizations. It was also not a case of the left hand not knowing what the right hand was doing, as the same office was responsible for legal advice on both files.

Although I was at first inclined to view this as the product of a combination of incompetence and hypocrisy, I have come to see it instead as a form of institutional compromise evolved to fit its political circumstances. Canadian governments began to seriously try to address Indigenous overrepresentation in the criminal justice system in the early 1990s, just as they gave up on the prospect of major constitutional reform.[6] Because formal transfer of jurisdiction would require constitutional reform, indirect avenues were pursued to open up juridical space for *some* Indigenous control over the administration of justice according to principles of justice acceptable to Indigenous people. This took the form of community-run diversion programs, which take individual cases out of the mainstream justice system. From the perspective of Canadian governments, this was a safe first step: most diverted cases are relatively minor and are diverted at the discretion of justice system officials. For Indigenous communities, this system has the virtue of creating a space that, though drawing on government resources, is relatively free of the disciplining forces of government oversight because governments remain largely unaware of what happens within community justice projects. In many ways, this is a typically Canadian messy compromise. It is manifestly insufficient to its stated task of reducing overrepresentation, which has only increased since such programs began operating. It also falls drastically short of meeting Indigenous claims for control over criminal justice. However, the experience of Canadian criminal justice for Indigenous people over the last three decades suggests a degree of Burkean caution is warranted before dismissing such a messy compromise outright. Attempts to redesign the practice of Canadian justice from *a priori* principles to create separate justice

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crisis in criminal justice.

[6] Peter Russell, “The End of Mega Constitutional Politics in Canada?,” *PS: Political Science and Politics* 26, no. 1 (1993): 33–37, https://doi.org/10.2307/419501.

systems for Indigenous and non-Indigenous Canadians have made no progress since they were recommended in the early 1990s by the Manitoba Justice Inquiry and the Royal Commission on Aboriginal Peoples.[7] At the same time, thousands of people have engaged in practical experiments in Indigenous control over criminal justice through community justice projects, and accumulated a great deal of practical experience in what works and what does not. As these projects have worked to a "tolerable degree", we should not tear them down unless we are absolutely sure that we can build something better in their place.[8] As Joe Carens has argued, we can give such practices standing in our theorizing – to see what we can learn from them – without giving them a normative priority.[9]

In other words, I came to see that the apparent contradiction of Canadian policy hid a degree of accumulated institutional understanding of the feasibility of creating space for Indigenous control of criminal justice within the existing constitutional order. Although that accumulated experience is decentralized and difficult to access in a systematic manner, my experience supporting such programs suggested that the existing messy compromise created much more space for Indigenous control of justice and Indigenous justice practices than was commonly recognized. Indeed, the Aboriginal Justice Strategy was one worthwhile Canadian initiative that was far from boring, but instead opened up interesting avenues for political theorization and the creative reform of justice practices. By delving into the theoretical issues raised by this conundrum, my dissertation evolved to its current form. It focuses on the central question of the legitimacy of criminal justice for Indigenous people in Canada. I argue that, as it stands, criminal justice is not legitimate for Indigenous people, and then explore possibilities for reforming the practice of criminal justice in such a way that it can be accepted as legitimate by Indigenous and non-Indigenous people alike. The way forward I propose draws on the accreted

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[7] A. C. Hamilton and C. M. Sinclair, *Report of the Aboriginal Justice Inquiry of Manitoba: The Deaths of Helen Betty Osborne and John Joseph Harper.*, vol. 2 (Winnipeg: Province of Manitoba, 1991), ch 17; Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (Ottawa: Royal Commission on Aboriginal Peoples, 1996), 177.

[8] Edmund Burke, *Reflections on the Revolution in France*, ed. L. G. Mitchell, World's Classics (Oxford ; New York: Oxford University Press, 1993), 61.

[9] Joseph H. Carens, "A Contextual Approach to Political Theory," *Ethical Theory and Moral Practice* 7, no. 2 (April 2004): 122.

wisdom of the messy compromise: we must look to create conceptual and legal space along the justice spectrum for Indigenous justice practices to be successful.

Because of my standpoint, my work here is directly largely at the Canadian state: what can state agents do to better respond to the justified demands of Indigenous people in the field of criminal justice? This also has meant that, in shaping a work around the parameters of the Canadian state and state policy, the approach taken in the dissertation will be limited in ways that will not satisfy all readers. In particular, it engages less with some of the most important recent developments in Indigenous political thought than I would have liked, and less than many readers may expect. In part, this is a simple deficiency that I will correct in future research. However, it also flows from a desire to avoid two possible mistakes. Ideally, I would avoid the tendency to treat anything as pan-Indigenous and speak only in terms of the legal traditions of specific nations or quote specific Indigenous academics and knowledge-keepers. One challenge is that in trying to do justice to the tremendous diversity of Indigenous legal traditions and positions on justice, I would end up obscuring the urgent concerns about the current operation of criminal justice that are broadly shared by many Indigenous people. But to I have in mind here the task of persuading state agents to take these concerns seriously. Even some well-meaning civil servants seem to react to having to come to grips with the diversity and complexity of Indigenous views by seeing it as all too hard, giving up, and perpetuating the status quo. I do not want to pander to the desire to over-simplify, but I do want to be able to bring such people along with the argument I make. The second challenge is that I frequently find myself asked to provide typologies of Indigenous thought. I do not find it ethically appropriate for me to do. That is, I am not well positioned to categorize the diverse thoughts of Indigenous people or the diversity of Indigenous legal traditions into tidy packages for outside consumption. Thus, where I do engage with Indigenous thinkers, I try to either quote specific authors on the one hand or stick to broadly shared positions on the other. This imposes a major limitation on my work. However, I do think that persuading agents of the Canadian state to respond *at least* to the clear and broadly shared demands of Indigenous people is a worthwhile starting place.

1.2 Introduction

The central question address in this dissertation is, how can criminal justice in Canada be rendered legitimate for Indigenous people? The argument proceeds in two phases. First, I

establish that the current practice of criminal justice lacks legitimacy for Indigenous people, and that the usual liberal approaches to restoring legitimacy will not work in this case. Second, I argue that legitimate criminal justice is possible only if Canadian criminal justice practices are significantly altered to incorporate fundamental insights from Indigenous understandings of justice. As such, the dissertation contributes to the work of reconciling radically different justice concepts and designing institutions that can be mutually recognized as legitimate by Indigenous and non-Indigenous Canadians. I argue that the Canadian approach to legitimation must be governed by a recognition that Canadians owe Indigenous people two forms of respect: respect as equal co-citizens and respect *as Indigenous people*. I argue that reconciliation is imperative in the Canadian situation, but that the burden of change imposed by that reconciliation should fall most heavily on the institutions of Canadian criminal justice rather than on Indigenous communities. The project is principally a work of political theory within the context of Canadian politics, but it draws upon and contributes to literatures in political philosophy, empirical political science, criminology, and law. I adopt a modified version of Joe Carens's contextual approach to political theory in order to achieve these aims.[10]

1.3 Chapter Outline

In chapter two, I operate in a critical-empirical mode. I survey the empirical evidence of the failures of the Canadian criminal justice system for Indigenous people. This includes evidence of systemic problems, including the dramatic and ever-worsening overrepresentation of Indigenous people as victims and offenders in the criminal justice system, widespread overt racial bias and systemic discrimination, and the epidemic of missing and murdered Indigenous women and girls. I also examine cases where the criminal justice system crosses the line into outright abuse of Indigenous people. Drawing on Indigenous voices, I argue that what sometimes appears as a series of crises or flashpoint events are all actually symptoms of an underlying chronic crisis stemming from and reinforcing the lack of legitimacy of Canadian criminal justice for Indigenous people. Criminal justice is trapped in a vicious cycle of illegitimacy: experienced from the start as an alien imposition, it continues to fail to deliver security or justice, and so undermine its own operation and its own legitimacy.

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[10] Carens, "A Contextual Approach to Political Theory."

In chapter three, I examine legitimacy in a more theoretical mode. Here, I argue that Indigenous challenges to the legitimacy of the criminal justice system reach deep enough to challenge the validity of the liberal democratic theories of legitimacy that underly the Canadian legal order. I survey Indigenous challenges to the legitimacy of Canadian law alongside the theoretical concept of legitimacy and liberal democratic conceptions of legitimacy. I argue that Indigenous challenges undermine liberal democratic theory "all the way down", making it impossible to reconstruct the legitimacy of challenged institutions through normal means. Instead, I argue that such institutions must take on the unfamiliar burden of establishing a "free-standing" legitimacy independent of the contested underlying constitutional order through cross-cultural dialogue among their participants.

In chapter four, I argue in a critical-constructive mode that reconciliation is an inescapable imperative. I examine the idea of a separate justice system for Indigenous people in Canada, and argue even were the practical obstacles to establishing such a system in the medium term overcome, it would not solve and could even exacerbate the problem of legitimacy for the Canadian criminal justice system. I propose a medium-term approach that emphasizes cross-cultural dialogue to establish the legitimacy of a spectrum of shared and separate institutions within a single, overarching system. I compare this approach to four non-exclusive alternative approaches: separate justice systems along the American model, David Milward's "Culturally Sensitive Interpretation of Legal Rights, the *Gladue* approach, and the revitalization of Indigenous legal traditions. I argue that each approach brings strengths but also faces important limitations, and that no approach emphasizing separation can overcome the ultimate need for some reconciliation between the existing legal order and Indigenous legal traditions under one institutional roof.

In chapter five, I continue in the critical-constructive mode and give an example of the kind of conceptual reconciliation that is a necessary prerequisite to institutional reform. I examine the conception of impartiality that is central to the practice of Canadian criminal justice, arguing that it is a limited and culturally specific formulation. Drawing on contemporary Indigenous justice practices, I then argue that adopted a fuller conception of impartiality could help open conceptual and juridical space for Indigenous justice practices. Such a conceptual reconciliation could also help to reform existing Canadian justice institutions to make them more

legitimate for Indigenous people. One possibility would be to reconstruct juries so that they fulfill the function of including all relevant perspectives.

In the conclusion, I focus on the road ahead for my own research and for legitimizing criminal justice in Canada. I offer some considerations on other major concepts that will require substantial reconciliation in order to develop legitimate institutions. Principally, I argue that considerable work will need to be done to reconcile Indigenous and non-Indigenous attitudes to punishment and the use of incarceration. I also suggest some specific possibilities for cross-cultural dialogue within institutions along the criminal justice continuum.

1.4 Method

As a preliminary methodological consideration, it is important to be clear about my standpoint and the types of conversations I wish to engage in. My standpoint is simple: as a non-Indigenous Canadian citizen, trained in Western political theory, I am doubly a member of the existing settler colonial political order. From that standpoint, I hope to engage in a complex, multi-layered conversation. It makes me the member of various collectives: non-Indigenous Canadians, all Canadians, liberal democratic political theorists, and all those engaged in theoretical discussion. I do not want to engage in a discussion *about* Indigenous people without engaging in discussion *with* Indigenous people. Especially given the substantive emphasis my theory places on dual respect for Indigenous Canadians, it is crucial to embody that respect in the way I engage in research. Making Indigenous people objects of non-Indigenous study rather than partners in dialogue is disrespectful. There are Indigenous interlocutors inviting non-Indigenous people to participate in a conversation about Indigenous law – I wish to take up that invitation. In that conversation, however, I believe my role is primarily to listen, and perhaps also to communicate my response and level of understanding. I do not think I have an argument to address to Indigenous people about their traditions and laws, nor do I find it my place to do so. On the other hand, I will address arguments to others situated as I am about how best to participate in the broader social conversation, and how best to respond to Indigenous demands. This means that my work ends up being state-centric, as the focus is on what the Canadian criminal justice system can and should do to respond to Indigenous critiques. It also means that my work remains primarily an exercise in Western political thought. There are comparative elements, but I have not adopted Indigenous methodologies or operated according to Indigenous

ways of knowing. Instead, I attempt to engage with Indigenous thought and Indigenous critiques from my standpoint as a Canadian citizen and theorist. Throughout, I try to note that this does not mean that Indigenous initiative independent of the state are unimportant, merely that I do not see a role for myself in the discussion over their shaping. They are and should be directed by Indigenous people according to Indigenous way of knowing. As I indicate later, the boundaries between these conversations cannot be dictated by the Canadian state but must instead be negotiated in a mutually respectful cross-cultural dialogue.[11]

I propose to adopt a modified version of Joe Carens's contextual approach to political theory to address my research question. Carens identifies five elements to such an approach.[12] First and most generally, it advocates the use of examples to illustrate theoretical formulations. Second, and most importantly, this means the normative exploration of actual cases where the fundamental concerns addressed by the theory are in play. The implications of this are fleshed out in the final elements: theorists should pay attention to whether their theoretical formulations are actually compatible with the normative positions that they themselves take on particular issues (3), search for cases that are especially challenging to their own theoretical positions (4), and consider a wide range of cases, especially those that are unfamiliar and illuminating because of their unfamiliarity (5).[13]

Rather than starting from a theory and testing it against various real-world examples, I propose to start from a real-world context and, in that context, test various theories against one another. Why perform such an inversion? Partly, this is a product of the nature of my interest in this problem. I am interested in the challenges Indigenous legal traditions pose to liberal political theories of punishment, but I feel the urgency of the failures of the criminal justice system as a citizen. This standpoint of citizen-theorist already locates me in a particular context. The inversion is also a product of the nature of the theoretical problem, which can only exist contextually. There cannot be an ideal theory of criminal justice: punishment comes into play

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11 I elaborate this in chapter four, drawing on Melissa Williams's work on the third normative space and James Tully's model of constitutional dialogue.

12 Carens, "A Contextual Approach to Political Theory," 118.

13 Carens, 118.

only in second-best world when "strict compliance" is unavailable. Moreover, the particular problem of how to reconcile competing theories and practices of judgement arises only in a context where different legal traditions are brought together under the same political umbrella. There can be no abstract theory to answer such a question; problem and answer alike must be richly informed by history and context. Furthermore, the context already includes a variety of practices and theories of criminal justice which form the starting point for normative analysis.

The context – Canada, with its colonial history and varied legal traditions (common law, civil law, Indigenous legal traditions) – fulfils many of the desiderata of Carens's approach. The theories of justice at play in Canada will be best illustrated by examples of their actual articulation and institutional embodiments. These normative positions can find within the Canadian context cases and examples that are particularly challenging (as Indigenous theories pose fundamental challenges to liberal theories of justice, and settler justice practices overwhelmingly challenge Indigenous legal traditions). There is not a need to look far and wide for unfamiliar and illuminating cases; the unfamiliar and illuminating is here already (within or all around, depending on your perspective). Nevertheless, I occasionally draw on complementary examples from other contexts to illustrate how things could be different.

Starting from context in this way also means starting from received theories of justice, as embodied in Canada's legal traditions. For criminal matters, this means the Canadian common law tradition and various Indigenous legal traditions. My project will thus involve an interpretive step: these traditions must be articulated in a way that enables an even-handed comparison. Fortunately, much of the work of such articulation has been done by others; I will rely on their work as much as possible. This includes scholarly writing about theories of justice and descriptions of criminal justice practices, for both common law and Indigenous legal traditions. It also includes documentary sources not often considered by political theorists, including government statements of policy and guidelines from professional bodies for justice practitioners. I will argue that these documents contain a great deal of implicit theory that must be given articulation to understand the theoretical underpinnings of justice practice in Canada.

Working from received theory, I will not attempt to construct my own grand theory of criminal justice, but I will make normative arguments, critiquing existing practices and theories and suggesting improvements. This is necessarily a work of comparative political theory. Unlike

much of what is currently termed comparative political theory, however, it is not historically or textually based. Instead, I propose to compare living theories as different answers to common problems in a "community of shared fate" characterized by radical pluralism.[14] To make such comparisons, my instincts are to proceed in a roughly (but highly contextual) normative, analytic manner in the Anglo-American tradition. However, I intend to be ecumenical about argumentative method as needed. The type of contextualized comparison lends itself to a certain form of dialogic immanent critique, in which a case can be made for a practice from one tradition by arguing that it better fulfils the normative commitments of another tradition than the second tradition's own practices do. This is itself an extension of the "reflective disequilibrium" Carens advocates, juxtaposing theory and practice to disturb "complacent certitudes."[15]

This methodological approach comes through most clearly in chapters three and five, where I operate in a clearly theoretical plane. Chapter three uses Indigenous critiques to disturb the "complacent certitudes" of received liberal democratic theories of legitimacy. The resultant disequilibrium opens the reflective space for the remainder of the project. In chapter five, I similarly point to how Indigenous critiques unsettle the model of impartiality embedded in Canadian practices of criminal justice. Here, I suggest avenues of institutional reform to create a new, more inclusive equilibrium. In the other chapters, the method is still at play, although it is more implicit. In chapters one and three, I do more of the work of describing and interpreting the case at hand (i.e. Criminal justice in Canada, especially with regard to Indigenous people) in order to give the appropriate context to the theoretical chapters. Theorizing is blended throughout, however, especially in the evaluation and critique of the empirical case.

The approach I adopt operates within the general theory of the second best. This derives from economics, and states that if it is not possible to optimize all variables, then the best possible outcome may involve moving other variables away from the values that would

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[14] Melissa S. Williams, "Citizenship as Agency within Communities of Shared Fate," in *Unsettled Legitimacy: Political Community, Power, and Authority in a Global Era*, ed. Steven Bernstein and William D. Coleman (University of British Columbia Press, 2009), 43.

[15] Carens, "A Contextual Approach to Political Theory," 123.

otherwise be optimal.[16] In political terms, this means that if practical constraints make an ideal solution impossible, the best possible solution may *not* be the solution that is closest to the ideal. In the specific context of this dissertation, this mostly plays out in a distinction between medium- and long-term solutions. In the long term, I argue, the solution to problems in the field of criminal justice is likely to involve a much broader decolonization of the underlying constitutional order. That does not imply, however, that in the short and medium term the best solution is in all cases the one that most resembles a long-term decolonization. This is most significantly explored in chapter four, where I discuss second-best alternatives to a separate justice system grounded in fully revitalized Indigenous legal traditions, but it is also operative in institutional suggestions in other chapters.

1.5 A Note on Terminology

Accepted terminology about Indigenous peoples has changed dramatically in Canada during the time period from which I draw my sources. Many terms are associated with racist and offensive attitudes, and thus are generally to be avoided. However, some generally offensive terms have technical legal or constitutional relevance, and thus may be used in specific contexts. Throughout, I prefer to use the term “Indigenous” as the general term, but use the names of specific peoples, such as Musquem or Anishinaabek, where possible. The following are other terms which may appear in the text:

“Aboriginal” was commonly used as a general term for Indigenous people, but has fallen out of favour (partly through being associated with state activity and a pan-Indigenous statist attitude). “Indigenous” is generally preferred, as the internationally accepted term generated by Indigenous peoples themselves. However, “Aboriginal” remains the term in the Canadian *Constitution*, and thus “Aboriginal peoples” and “Aboriginal rights” have important legal meanings. The term will be used in such contexts.

“First Nations”, “Inuit”, and “Métis” denote subgroups of the Indigenous population, and likewise have constitutional standing.

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[16] R. K. Lancaster and R. G. Lipsey, “The General Theory of Second Best,” *The Review of Economic Studies; Oxford, Etc.* 24 (January 1, 1956): 12.

"Indian" or commonly "Status Indian" retains legal meaning through the continued force of the *Indian Act*. I will use the term only when necessary to denote this legal status or when quoting a source.

1.6 Why Criminal Justice?

With very few exceptions, criminal justice is strangely neglected by contemporary political theory. For much of the history of political thought, the power to judge and punish wrongdoing was taken to be a central and constitutive feature of political power. Yet once it became a discipline, the study of politics largely ceded the field of criminal justice to the disciplines of criminology, law, and sociology.[17] From Plato and Aristotle to Kant and Hegel, canonical thinkers addressed punishment as both a political necessity and a political power. Locke puts forward the clearest picture of the mutual constitution of punishment and political authority: political society is created by individuals giving up their private judgement and natural power of punishment to create a decisive, common judge on earth.[18] From Nietzsche to Foucault, there is a tradition that is critical of the moralistic pretensions of criminal justice, while nonetheless acknowledging its centrality to political practice. The strict compliance theory of John Rawls forms a peculiarly radical departure from tradition, setting aside concerns of wrongdoing and punishment to focus on concerns of distributive justice. In just over 500 pages of his revised *A Theory of Justice*, there are three brief mentions of punishment. Principles of punishment, far from being constitutive of political power, are presented as fully subordinate to and derivable from the principle of liberty, a rationally-adopted stabilizing measure for principles of distribution, and, in the criminal realm, a straightforward enforcement of natural duty.[19] In a footnote, Rawls literally leaves further questions to legal philosophy (in the figure of HLA Hart).[20] While Rawls may be the worst offender, he displays a common tendency of

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[17] Keally D. McBride, *Punishment and Political Order* (Ann Arbor: University of Michigan Press, 2007), 3, http://www.loc.gov/catdir/toc/ecip0620/2006029795.html.

[18] John. Locke, *Second Treatise of Government* (Indianapolis, Ind.: Hackett Pub. Co., 1980), 46–48.

[19] John. Rawls, *A Theory of Justice* (Cambridge, Mass.: Belknap Press of Harvard University Press, 1999), 211–12, 276–77, 504–5.

[20] Rawls, 212.

contemporary political thought to focus on other issues (distributive justice, procedures of democracy, identity claims) and treat criminal justice as a societal sub-system on the periphery of politics.

Criminal justice thus finds itself marginalized in political theory. Meanwhile, the practice of criminal justice marginalizes many of the most vulnerable citizens and estranges them from ordinary politics.[21] Yet occasionally, at the margins of criminal justice we find problems that erupt to become central to practical politics. The deaths in police custody of Indigenous people prompted tremendous attention and judicial inquiries in the 1990s, and the shocking numbers of missing and murdered Indigenous women today create persistent headlines, protests, and calls for action. Part of what I propose to do with this dissertation is to put criminal justice back into the centre of political theory, in order to help illuminate the ways in which punishment is always a political power and the ways practices of punishment structure the political reality of citizens – particularly the most marginalized. As Keally McBride notes in one of the only recent books on the topic, most people safely ignore prison and punishment as it does not affect our daily lives.[22] Yet for others, the criminal justice system is the *primary* point of contact with the state, dwarfing the impact of other social institutions and acting as the primary site of civic education.[23] This is particularly worrying – and particularly politically salient – when a democracy massively over-incarcerates a segment of its population, as the United States and Canada both do with racialized minorities.[24]

Criminal justice is not a marginal issue for Indigenous people. This is unusually apparent at the moment, as we have just had several major flashpoints that brought the issue to national

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[21] Vesla Weaver and Amy Lerman, "Political Consequences of the Carceral State," *American Political Science Review* 104, no. 4 (November 1, 2010): 817–33.

[22] McBride, *Punishment and Political Order*, 1–2.

[23] Weaver and Lerman, "Political Consequences of the Carceral State," 818.

[24] Canada does not collect data on race or ethnicity in criminal justice but does collect data on Aboriginal identity. Aboriginal people make up 30% of admissions to correctional custody, while only being 4% of the population. For a more detailed discussion, see Chapter Two. In the United States, Black and Hispanic Americans and American Indians are all disproportionately incarcerated. Jennifer Bronson and E. Ann Carson, "Prisoners in 2017," Prisoners Series (Bureau of Justice Statistics, April 25, 2019), https://www.bjs.gov/content/pub/pdf/p17.pdf.

attention. Most significantly, the long campaign for an inquiry into the epidemic of murdered and missing Indigenous women culminated in a national public inquiry that published its final report in 2019. Significant attention was also drawn to two acquittals in 2018 of non-Indigenous men in the murders of Indigenous youth, the acquittal of Raymond Cormier in the killing of Tina Fontaine and the acquittal of Gerald Stanley in the killing of Coulten Boushie. These cases have drawn attention to the underlying issue, which is that the Canadian criminal justice fails to extend the same protections to Indigenous people as to other Canadians, meaning that Indigenous people dramatically disproportionately face the effects of crime and violence in their daily lives. While I discuss this in detail in chapter two, here I merely wish to note that the practice of Canadian criminal justice is a central part of the lived experience of Canadian colonialism for too many Indigenous people.

Criminal justice is not merely an area where the problems are real and pressing; it is also an area where I think there is tremendous scope for positive change in state policy. In many areas of conflict between Indigenous people and the state, the conflict is a matter of clashing interests. It is often perceived as a zero-sum game. Land is, of course, the central issue for many Indigenous people. In disputes over land, however, the dispute is driven primarily by conflicting interests in land use: Indigenous people wish to care for the land according to their ways, while the state wishes the land to be open for use by others (for non-Indigenous development or resource extraction). To the extent that one type of use and control excludes the other, the conflict is seen as zero-sum.[25] Conflicts over levels of service provision for Indigenous people are also frequently seen in a zero-sum light, with money spent on service for Indigenous people seen money that could be spent elsewhere. This understanding is clearly but uninterestingly wrong. Once factual misunderstandings about "special treatment" for Indigenous people are corrected, it becomes clear that services for Indigenous Canadians should be supported at comparable levels to the rest of the population, with the concomitant gains for all Canadians that come from the provision of public goods such as education. Efforts to reframe this as a positive-

25 There is, of course, tremendous scope for finding solutions to conflicts over land by reconceptualizing the conflict as positive sum. As environmental consciousness grows, for example, there is a growing understanding that Indigenous control over and care for lands and waters may have tremendous benefits for non-Indigenous Canadians, in that by caring for the land they care for us all. Nevertheless, the predominant understanding of the conflict is as a matter of conflicting interests in a scarce resource.

sum issue seem to have borne some fruit. For example, increases in government funding for Indigenous education are often justified as being in everyone's interest, as the relatively young Indigenous population will make up a growing share of Canada's future workforce.[26] Leaving aside the propriety of such instrumental justifications in a matter of basic equality rights, these efforts at reframing do not seem to have been successful with the broader population. Nearly a third of Canadians believe that Indigenous people get *more* economically than they deserve.[27] When I teach about Indigenous issues, the most common misconception I hear from students is that Indigenous people do not pay taxes, and "we" spend so much on services for "them" (often quoting the total budget for Indigenous services, rather than the inadequate per-capita amounts). Shockingly, more Canadians believe that the government is paying too much attention and spending too much on Indigenous people than too little.[28]

Conflicts in the field of criminal justice, however, are not zero-sum conflicts of interests between Indigenous and non-Indigenous people. Everyone – Indigenous and non-Indigenous – *shares* an interest in reducing crime and ensuring that citizens can enjoy protection from criminal activity. Addressing many persistent problems, such as a lack of housing or clean water, or substandard educational and health provision, costs a tremendous amount of money (even if the benefits exceed the costs). Effectively reducing crime, on the other hand, has the added benefit of saving tremendous amounts of public money: incarceration of federally held offenders in Canada cost an average of $114,587 per inmate per year in 2016-17.[29] Rather than a conflict of competing material interests, the conflict in the domain of criminal justice is instead primarily at the level of ideas, and specifically at the level of ideas of what to do in response to crime. The

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[26] Employment and Social Development Canada, "Government of Canada Announces Funding for First Nations Organization in Thunder Bay," accessed September 3, 2019, https://www.newswire.ca/news-releases/government-of-canada-announces-funding-for-first-nations-organization-in-thunder-bay-859657402.html.

[27] Keith Neuman, "Race Relations in Canada 2019" (Environics Institute for Survey Research, 2019), https://www.environicsinstitute.org/docs/default-source/project-documents/race-relations-2019-survey/race-relations-in-canada-2019-survey---final-report-english.pdf?sfvrsn=ef8d61e3_2.

[28] "Truths of Reconciliation: Canadians Are Deeply Divided on How Best to Address Indigenous Issues," *Angus Reid Institute* (blog), June 7, 2018, http://angusreid.org/indigenous-canada/.

[29] Ben Segel-Brown, "Update on Costs of Incarceration" (Parliamentary Budget Officer, March 22, 2018), http://publications.gc.ca/collections/collection_2018/dpb-pbo/YN5-152-2018-eng.pdf.

ideas of justice embedded in Canadian justice practice differ radically from those in many Indigenous legal traditions. The disagreements are deep, encompassing who should be involved in administering justice (specialized professionals or the whole community), whether incarceration is an appropriate response to crime, and central concepts such as impartiality. Nevertheless, this suggests that there is an important role for theory in moving forward the discussion about criminal justice. If these conflicting conceptions of justice can be in some way reconciled to produce practices of justice viewed as mutually legitimate, then there is no underlying conflict of interests to prevent progress in the area of criminal justice.

Another reason to focus on criminal justice is that it is one area of policy in Canada where the concerns of Indigenous people are clearly of central importance and cannot be ignored. In many issue areas, Indigenous people are considered to be relatively marginal to the central issues, because of their low share of the population (4.9%), marginalized socio-economic position, and distinctive legal framework (such that many areas of provincial policy are dealt with federally for Indigenous peoples). In criminal justice, however, Indigenous overrepresentation as victims and offenders makes them much more central. Thirty percent of those incarcerated are now Indigenous. To put this in Canadian perspective, overrepresentation turns the share of the population from the easily-marginalized 4.9% to greater than the share of always-central Quebec or francophones (23.2% and 20.6% respectively).[30] In many areas, overrepresentation is more severe, meaning that the criminal justice system principally deals with Indigenous people in the Manitoba, Saskatchewan, Yukon, the Northwest Territories, Nunavut, and in the northern regions of Quebec, Labrador, Ontario, Alberta, and British Columbia.[31] The fact of Indigenous centrality in criminal justice opens up substantially more space for fundamental reform of Canadian criminal justice to accommodate Indigenous concerns than is the case in other policy areas.

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[30] all figures from the 2016 Census: Statistics Canada Government of Canada, "Census Profile, 2016 Census - Canada [Country] and Canada [Country]," February 8, 2017, https://www12.statcan.gc.ca/census-recensement/2016/dp-pd/prof/details/Page.cfm?Lang=E&Geo1=PR&Code1=01&Geo2=&Code2=&Data=Count&SearchText=Canada&SearchType=Begins&SearchPR=01&B1=All&GeoLevel=PR&GeoCode=01.

[31] Statistics Canada Government of Canada, "Adult Custody Admissions to Correctional Services by Aboriginal Identity," December 27, 2017, https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3510001601.

A number of major institutions are involved in the practice of criminal justice in Canada, principally including police, Crown prosecutors, courts, and corrections. The practices of these institutions can be organized temporally along a continuum relative to a particular offence as follows: crime prevention → policing → arrest → charge → bail/remand → trial → sentencing → correctional supervision → release. Not every case proceeds along the full continuum, and some are diverted to other mechanisms at various points. Much of the analysis I present operates at a general level and is thus intended to apply to the justice system as a whole and to practices all along the justice continuum. At other times, I will refer principally to specific institutions. In chapter five, my considerations are primarily with court institutions, while in the conclusion I discuss a future need for a focus on punishment and corrections. At no point, however, do I offer a comprehensive study of a particular institution within the justice system.

1.7 Why Indigenous People?

If am writing about criminal justice in Canada, why focus on Indigenous people? Why not write more generally, or at least more generally about overrepresented groups in criminal justice? Part of the answer is a simple question of finding the appropriate focus for a PhD dissertation. I do believe that comparative work on forms of overrepresentation in criminal justice is likely to be very interesting and will be undertaking such work in the future. Nevertheless, I believe that the situation of Indigenous people with regards to criminal justice is unique and uniquely interesting for political theory. Although other groups are overrepresented in criminal justice in Canada,[32] Indigenous people are unique both in the scale of their overrepresentation (see above) and, crucially, in their relationship to the legal order that underpins the criminal justice system. Although immigrants may come from countries with widely varying legal orders, it can be argued they give their consent to the Canadian legal order as a condition of immigration. The legal orders of Indigenous peoples pre-exist the Canadian legal order, which was imposed on them without consent. Indigenous peoples thus have a plausible case for demanding that criminal justice operate according to Indigenous legal orders,

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[32] see for example, on racial profiling: Scot Wortley and Akwasi Owusu-Bempah, “The Usual Suspects: Police Stop and Search Practices in Canada” 21, no. 4 (December 1, 2011): 395–407.

in a way that immigrants do not.[33] Something similar could be said for the descendants of African slaves, who were forcibly brought to the Americans and subjected to an alien legal order. However, we do not usually see the same demands for a separate legal system from African-Americans in the US. At various times, African-American leaders have in fact advocated the adoption of severely punitive criminal justice measures, as documented by James Forman.[34] Instead, the objection is to the racist application of the criminal justice system as a tool of racial control to perpetuate white supremacy.[35] This leads to calls for equal treatment within the existing system or reforms of particular practices, rather than the creation of separate systems of justice. For example, the practice of felony disenfranchisement combines with mass incarceration to massively skew political power in the United States away from African-Americans, but there is a clear solution (adopted by most other established democracies) in abandoning felony disenfranchisement. From a theoretical perspective, I have focused on the Indigenous case because the conflict over legal orders and theories of justice is more likely to provide valuable theoretical insights. To what extent are separate justice systems required to accommodate such conflicts, and to what extent can these competing theories of justice be reconciled within existing practices? What can Canadian criminal justice learn from Indigenous theories of justice to improve its practices in the quest for legitimacy?

1.8 Why Canada?

The contextual theory approach I have adopted demands that theorization flow from a grounding in a real-world case. Canada was the obvious choice for me, partly due to the dual motivations that flow from my dual identity as a theorist and citizen (discussed above). I am also best qualified to discuss the Canadian case, for a number of reasons. Because I both study in Canada and have worked within the Canadian public service, I have a much deeper

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33 I do not wish to claim that no groups within Canada except Indigenous people have a claim for a separate legal system, merely that the Indigenous claim is the clearest because of the pre-existence of indigenous legal traditions. This is offered as a consideration toward greater action on Indigenous justice, not against reforms in other areas.

34 James Forman, *Locking up Our Own: Crime and Punishment in Black America* (New York: Farrar, Straus and Giroux, 2017).

35 Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (New York: New Press, 2010).

understanding of the Canadian legal and constitutional order from which to begin my analysis. This is especially important when we consider the methodological commitment to give standing not merely to formally articulated theories (which can be more easily studied from afar) but also to theories embedded in practice, which requires an articulation of implicit knowledge. The purpose of the study is thus largely to contribute to the Canadian academic and societal debate over criminal justice practices and Indigenous people. However, the Canadian case has features that should make it of interest to those who do not have a vested interest in Canadian practice. The situation of Canadian Indigenous peoples is similar in many ways to that of Indigenous people in other European settler colonies, especially the United States, Australia, and New Zealand. There are, however, major differences that set Canada apart. Unlike the other two federal systems, substantive criminal law in Canada is exclusively a matter of federal jurisdiction, creating a major barrier to the operation of separate criminal justice systems. Unlike New Zealand, Canadian Indigenous peoples belong to a host of different nations, making the sorts of federal political representation adopted in New Zealand for the Maori more difficult. Although a full comparison between these four cases would be instructive, it is beyond the scope of this dissertation. Nevertheless, lessons learned in Canada may be instructive for those in similar countries.

Chapter 2
Revisiting the Failure of Canadian Criminal Justice for Indigenous People

2 A System in Chronic Crisis

2.1 Introduction

In 2011, retired Supreme Court justice Frank Iacobucci was appointed to conduct an independent review of the lack of representation of First Nations people on juries in Ontario. When he reported in 2013, he presented a bold conclusion: the justice system, as it relates to First Nations peoples, is in crisis.[36] That the justice system could be in crisis is a shock to the self-image of stable, affluent Canada – a country grounded in the principles of peace, order, and good government. Yet if this crisis comes as a surprise, it is only because we have not been paying attention. In 1999, the Supreme Court declared in *R. v Gladue* that stark figures on the overrepresentation of Aboriginal peoples in the criminal justice system "may fairly be termed a crisis." [37] In the decade before, no fewer than twelve commissions and inquiries documented the "crushing failure" on a "massive scale" of the justice system for Aboriginal people.[38] The Aboriginal Justice Inquiry of Manitoba, for instance, found discrimination at every stage of the system: Aboriginal people were more likely to be denied bail, spent more time in pretrial detention, were more likely to be charged with multiple offences, spent less time with their lawyers, and were more likely to be incarcerated.[39] Many of the problems documented in these

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[36] Frank. Iacobucci, *First Nations Representation on Ontario Juries: Report of the Independent Review Conducted by The Honourable Frank Iacobucci* ([S.l.]: Ontario Ministry of the Attorney General, 2013), 9, http://myaccess.library.utoronto.ca/login?url=http://books.scholarsportal.info/viewdoc.html?id=/ebooks/ebooks2/ogdc/2013-07-31/1/321038.

[37] R. v. Gladue, 1 SCR 688 (C 1999).

[38] Larry Chartrand and Celeste McKay, "A Review of Research on Criminal Victimization and First Nations, Métis and Inuit Peoples 1990 to 2001" (Policy Centre for Victim Issues, January 2006), 106; R. v. Gladue, 1 SCR at 722.

[39] Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide*, 32.

inquiries were not new even then. Overincarceration, for instance, had been documented and condemned since at least 1967.[40]

In the past 25 years, there have been a variety of government-sponsored initiatives to address this crisis through reform of the criminal justice system. These have spanned the justice spectrum, including changes to policing, provision of Aboriginal court workers, diversion to community justice projects, sentencing circles, reform of sentencing principles, and culturally-based correctional initiatives. Yet despite these changes, the headline figures on criminal victimization and the overrepresentation of Aboriginal people in prisons have only worsened. An Alberta task force reporting in 1991 predicted that, *without* action, Aboriginal people in Alberta would go from 29.5 per cent of admissions to prison in 1989 to 38.5 per cent in 2011.[41] *Despite* action, the eventual figures were even worse than predicted: 40.6 per cent in 2010-2011 and 41.9 per cent in 2011-2012.[42] This pattern has been replicated nationally: in 2017/2018, 30% of all adults admitted to custody in Canada were Aboriginal, up from 17% in 2000.[43] The scale and persistence of problems make it clear that, when it comes to the Indigenous people of Canada, the criminal justice system is in a state of chronic crisis.

From a non-Indigenous perspective, it can appear that Canada's criminal justice system functions well most of the time. Even when the underlying crisis forces itself into public consciousness, it can appear as discrete problems rather than a systemic crisis. Thus, much attention was paid to the deaths of Helen Betty Osborne and John Joseph Harper in Manitoba, police “starlight tours” in Saskatchewan, without a public consciousness of the crisis emerging. For far too many Indigenous people in Canada, the crisis is a constantly lived reality that is impossible to ignore. Not only do they face greater threats from crime, but the very justice system that is supposed to address crime exacerbates injustice. The Royal Commission on

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[40] Royal Commission on Aboriginal Peoples, 29.

[41] Royal Commission on Aboriginal Peoples, 31.

[42] Statistics Canada, “Adult Custody Admissions to Correctional Services by Aboriginal Identity,” data table, accessed September 15, 2019, https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3510001601.

[43] Statistics Canada.

Aboriginal Peoples quoted Anishinaabe elder Art Solomon, describing Indigenous people caught under the wheels of injustice, slowly and forever grinding away at their lives.[44] Although this Indigenous perspective has been clearly and repeatedly articulated over decades, it is marginalized by non-Indigenous Canadians' only ever fitful awareness. The resultant reactive half-measures have allowed another generation to be crushed beneath the wheels of injustice.

In this chapter, I will begin by examining some of the times the crisis has erupted into the consciousness of non-Indigenous Canadians. I will then examine and critique the dominant overrepresentation lens through which the crisis is understood between eruptions. To deepen our understanding, I survey a number of elements of the crisis that are obscured by the focus on overrepresentation. Finally, I argue that, understood properly, the crisis is severe enough to threaten the legitimacy of the criminal justice system as a whole and warrant more radical change than has been attempted so far.

2.2 Moments of Crisis

Most of the time, most non-Indigenous Canadians have little awareness of the ways the criminal justice system fails Indigenous people. When discussing my research with other Canadians, I often find it expedient to explain the overrepresentation of Indigenous people in prison by analogy to the mass incarceration of African-Americans in the United States, which is somehow more familiar. Occasionally, however, a particular event will cause the underlying crisis to erupt into the regional or national consciousness. While past trigger events shared elements of societal and institutionalized racism, each showed a particular face of the underlying crisis. Donald Marshall Jr. was a Mi'kmaq man who was wrongfully convicted in 1971 and served 11 years for a murder he did not commit through the incompetence and racism of the police and judicial system.[45] Helen Betty Osborne was a Cree high school student murdered by four men in 1971, but only one was ever convicted – 16 years later. In this case, an inquiry found that the murder itself was motivated by racism, and that aspects of the investigation were

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[44] Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide*, 2.

[45] Royal Commission on the Donald Marshall, Jr. Prosecution, *Royal Commission on the Donald Marshall, Jr., Prosecution: Digest of Findings and Recommendations.* ([Halifax, N.S.]: The Commission, 1989), 1.

discriminatory and lacking in respect, but that the delay in prosecution was not itself caused by police racism.[46] John Joseph Harper was an Oji-Cree man who was shot and killed by a police officer in Winnipeg in 1988. The same inquiry found that the police encounter with Harper was unnecessary and racially motivated, and that subsequent investigation was biased and attempted to place the blame on Harper for his own death.[47] Perhaps most egregious was the practice of police "starlight tours" whereby police drove inadequately dressed Indigenous people to the outskirts of Saskatoon in freezing weather, leaving them to walk home. At least three men died as a result, but the practice only came to light because Darrel Night survived and mentioned the incident by chance to another police officer at an unrelated traffic stop.[48] Initial investigations had cleared police officers of wrongdoing, but officers were found criminally culpable in Night's case.[49]

Taken on their own, these cases are horrific and shocking, but they are even more troubling when considered as merely particular incidences of a broader, ongoing problem. Each of these eruptions prompted sufficient outcry that it led to an inquiry of some sort. It is through the best of these inquiries that individual events that have forced themselves into the public consciousness can come to be understood in their broader context. The Aboriginal Justice Inquiry of Manitoba, for example, was called in response to the deaths of Helen Betty Osborne and John Joseph Harper, but produced what remains the most sweeping and systematic review of the crisis of the criminal justice system. In such a report, and for as long as the issue remains in public consciousness, the Indigenous experience of injustice can become legible to non-Indigenous Canadians. But such reports are long, and few actually read them. In other cases, inquiries keep the focus on a specific incident (e.g. the Stonechild inquiry). Sometimes, the recommendations of such inquiries lead to action, ranging from the hiring of more Indigenous

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[46] Hamilton and Sinclair, *Report of the Aboriginal Justice Inquiry of Manitoba: The Deaths of Helen Betty Osborne and John Joseph Harper.*

[47] Hamilton and Sinclair.

[48] Elizabeth. Comack, *Racialized Policing : Aboriginal People's Encounters with the Police* (Winnipeg: Fernwood Pub., 2012), 118–19.

[49] Comack, 126.

police officers and the creation of police advisory boards to fundamental changes to the law of evidence (after the Marshall Commission). Yet for the most part, more wide-ranging and radical recommendations, such as the creation of an Aboriginal-controlled justice system, are left to moulder on a shelf.

The current eruption is slightly different from most past instances. Instead of a single triggering event, the ongoing courageous action of Indigenous women and their supporters has gradually forced the continuing crisis of missing and murdered Indigenous women and girls into the national consciousness. Initial pressure persuaded the Liberal government to fund the Native Women's Association of Canada's Sisters in Spirit Project in 2005, which documented nearly 600 cases of missing or murdered Aboriginal women. While the subsequent Conservative defunded Sisters in Spirit in 2010 and resisted calls for a public inquiry, continued pressure gave the issue sufficient prominence that the current Liberal government called a national public inquiry. Alongside dramatically increased media attention, this has substantially increased public awareness. The inquiry presented its final report in 2019, in which is framed the epidemic of missing and murdered Indigenous women and girls as part of the larger, ongoing colonial race-based genocide of Indigenous people.[50] The inquiry calls for action on a “monumental” scale equal to the colonial actions and systems that have created the problem in the first place.[51] Although the calls to action do not focus solely on the justice system, they do renew the recommendations from earlier commissions and inquiries to create a separate criminal justice system for Indigenous people and to radically reform the existing criminal justice system.[52]

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[50] National Inquiry into Missing and Murdered Indigenous Women and Girls (Canada) and Canada, eds., *Reclaiming Power and Place: Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*, vol. 1a (Ottawa: Privy Council Office, 2019), 49.

[51] National Inquiry into Missing and Murdered Indigenous Women and Girls (Canada) and Canada, eds., *Reclaiming Power and Place: Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*, vol. 1b (Ottawa: Privy Council Office, 2019), 167.

[52] National Inquiry into Missing and Murdered Indigenous Women and Girls (Canada) and Canada, 1b:183–85.

2.3 Overrepresentation Myopia

Apart from these rare moments of focused attention, public consciousness of the problems Indigenous people face in the criminal justice system remains low. Consistent non-Indigenous attention comes largely from civil servants at the margins of criminal justice policy, supplemented by a few activists and academics. For those civil servants charged with coming to grips with the problems, there is a natural tendency to focus on its measurable dimensions. The trouble with such an approach is that if the bulk of the true crisis is hidden or submerged, the focus gets shifted to only those elements that are visible enough to be measured. In this case, that means a major focus on over-representation, that is, on the disproportion of Indigenous people involved with the criminal justice system relative to their overall proportion of the population. While understandable, this focus is distorting. It is not that other aspects of the crisis are reduced to over-representation or ignored entirely, but rather that they are viewed primarily through the lens of over-representation. In fact, the entire crisis comes to be understood as a crisis of over-representation, with over-representation the central policy problem requiring a solution (or, in full bureaucratese, "challenge" that needs to be "addressed"). Other aspects of the crisis, which may in fact be *more* fundamental, such as systematic racism or colonial disruptions of Indigenous lifeways, are considered primarily as contributors to over-representation.

Inquiries in the 1990s, particularly the Aboriginal Justice Inquiry of Manitoba, documented over-representation of Aboriginal people at every stage of the criminal justice process.[53] Outside of inquiries, though, Canada is remarkably resistant to collecting criminal justice statistics on race or ethnicity.[54] Other similar countries, including the United States and the United Kingdom, do routinely collect and publish such data; despite continuing pressure from academics and activists, Canada does not. There are two primary regular data sources: Canada does collect and publish statistics on Aboriginal identity at the point of admission to the correctional system, and the General Social Survey (held every five years) includes questions on Aboriginal identity and victimization. Even these data have serious limitations. The GSS is

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[53] Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide*, 32.

[54] Wendy. Chan and Dorothy E. Chunn, *Racialization, Crime and Criminal Justice in Canada* (North York, Ontario: University of Toronto Press, 2014), xvi.

infrequent and has a relatively small sub-sample of Aboriginal people. Each year, at least some provinces do not report their correctional figures, while changes in methodology make comparisons over time difficult. Data are only available for admissions, not the number of discrete individuals incarcerated at any given time. This means that comparisons to population statistics are inappropriate – but inevitably made.[55] Aboriginal identity is self-reported, and changes in social stigma within prisons may change the willingness to self-identify as Aboriginal over time. Furthermore, many jurisdictions report very high levels of "Aboriginal identity unknown" which undermines any claims made about proportions.

Unsuccessful attempts have been made to collect comprehensive data on Aboriginal identity at other steps of the criminal justice process. Statistics Canada has surveyed police forces but faced a number of what they moderately term "challenges" - outside of bureacratese, insuperable obstacles that render the data unusable. Many police forces refuse to collect data on Aboriginal identity, or simply report all identity as "unknown." Even many of those forces that do collect data, do so through "police observation" or visual identification. That is, the police officer writes down whether they think someone looks Aboriginal. In Statistics Canada's terms, this is "subject to error and is a method that lacks support by national Aboriginal groups."[56] In plain language, it is both useless and offensive. Even where a police force does collect racial data, they may refuse to release it for third party analysis. Racial profiling practices of the Toronto Police Service, for instance, only came to light after freedom of information requests and a lengthy court battle by the Toronto Star.[57]

The lack of other data leaves the discussion to focus largely on the overrepresentation of Aboriginal people in corrections. Yet even here, use of the data without a recognition of its limitations can be misleading. For years, even articles decrying the "national shame of

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[55] Ronald Melchers and Julian V. Roberts, "The Incarceration of Aboriginal Offenders: Trends from 1978 to 2001," *Canadian Journal of Criminology and Criminal Justice*, April 2003, 218, Academic OneFile.

[56] Jodi-Anne Brzozowski, Andrea Taylor-Butts, and Sara Johnson, "Victimization and Offending among the Aboriginal Population in Canada," Juristat (Statistics Canada, June 2006).

[57] Comack, *Racialized Policing*.

Aboriginal incarceration" understated the problem.[58] Everyone was relying on a single report from Statistics Canada, which excluded data from several provinces, including Alberta.[59] Alberta is a large enough population (and has enough of an Aboriginal population, and a high rate of admission to corrections) that its absence shifted the entire national representation from over a quarter to more like a fifth. Crucially, naive comparison of this with the reported numbers from previous years suggested that overrepresentation had plateaued, masking the underlying trend of continued growth. This was not merely a mistake in newspaper comment pieces: the same statistics Canada report was relied on for policy development in the civil service.

Despite their limitations, it is certainly reasonable to pay attention to the figures on victimization and incarceration. Taken together, they depict a system in crisis, and give some idea of the dimensions of that crisis and its growth over time. The 1999, 2004, and 2009 GSS all found that Aboriginal people were two to three times more likely to be the victims of violent crime than non-Aboriginal people. This was true even accounting for the effects of other risk factors; simply being Aboriginal can triple your risk of violent victimization.[60] Analysis of the most recent GSS data (from 2014) suggested that the rate of violent victimization among Aboriginal people remained double that of non-Aboriginal people. Higher rates for Aboriginal men could be accounted for by higher rates of risk factors, including childhood maltreatment, perceived neighborhood social disorder, past homelessness, drug use, and mental health status.[61] For women, however, Aboriginal identity remained an independent risk factor for violent victimization.[62] Aboriginal women are particularly vulnerable: not only are they three times more likely to be the victims of violence than other women, but the violence is also more likely

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[58] Emile Therien, "The National Shame of Aboriginal Incarceration," *The Globe and Mail*, 06 2011, http://www.theglobeandmail.com/globe-debate/the-national-shame-of-aboriginal-incarceration/article587566/.

[59] Samuel Perreault, "The Incarceration of Aboriginal People in Adult Correctional Services," Juristat (Statistics Canada, June 2009), 20.

[60] Brzozowski, Taylor-Butts, and Johnson, "Victimization and Offending among the Aboriginal Population in Canada."

[61] Jillian Boyce, "Victimization of Aboriginal People in Canada, 2014," Juristat (Statistics Canada, June 28, 2016), https://www150.statcan.gc.ca/n1/pub/85-002-x/2016001/article/14631-eng.htm#r13.

[62] Boyce.

to result in injury or cause the victim to fear for their life.[63] Aboriginal people are also much more likely to be the victims of homicide. In 2017, Aboriginal people were 24% of all homicide victims in Canada, meaning they were six times more likely to be murdered than non-Aboriginal people.[64]

The overrepresentation of Aboriginal people as offenders is best documented in the correctional system. The headline figure should be shocking enough: despite being less than four per cent of the general population, Aboriginal people are now 30% of all those admitted to correctional custody.[65] A deeper look at the numbers only makes them more disturbing. Aboriginal women make up 42 per cent of admissions to provincial and territorial sentenced custody.[66] Aboriginal youth make up 8% of the youth population but 43% of admissions.[67] To put these numbers in perspective, in the United States 37 per cent of the incarcerated adult male population and 21 per cent of the incarcerated adult female population are black – but black people are over 12 per cent of the general population. Relative to overall population, the overrepresentation of Aboriginal people in Canadian corrections is *much more severe* than the overrepresentation of black people in the United States, yet it receives far less attention. Overrepresentation is also unevenly distributed geographically, with Aboriginal people a large majority of admissions to custody in the Saskatchewan, Manitoba, and the territories, significant proportions in BC, Alberta, Ontario, and Newfoundland, and a lower proportion in Quebec and the Maritime Provinces.[68]

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[63] Shannon Brennan, "Violent Victimization of Aboriginal Women in the Canadian Provinces, 2009," Juristat (Statistics Canada, 2011), http://www.statcan.gc.ca/pub/85-002-x/2011001/article/11439-eng.htm.

[64] Sara Beattie, Jean-Denis David, and Joel Roy, "Homicide in Canada, 2017," Juristat (Statistics Canada, November 21, 2018), https://www150.statcan.gc.ca/n1/pub/85-002-x/2018001/article/54980-eng.htm.

[65] Statistics Canada, "Adult Custody Admissions to Correctional Services by Aboriginal Identity."

[66] Jamil Malakieh, "Adult and Youth Correctional Statistics in Canada, 2017/2018," Juristat (Statistics Canada, May 9, 2019), https://www150.statcan.gc.ca/n1/pub/85-002-x/2019001/article/00010-eng.htm.

[67] Malakieh note that this data does not include Nova Scotia, Quebec, Alberta, and Yukon.

[68] Statistics Canada Government of Canada, "CANSIM - 251-0022 - Adult Correctional Services, Custodial Admissions to Provincial and Territorial Programs by Aboriginal Identity," June 3, 2016, http://www5.statcan.gc.ca/cansim/a26.

Long-term trends are particularly difficult to assess because of changes in data reporting over time. Jurisdictions both change their methodology and simply fail to report correctional data. For population data, there have been changes over time in the way Aboriginal identity is counted and in rates of self-identification of Aboriginal people. As far back as there are statistics, however, we can see that Aboriginal people were overrerpresented in admissions to sentenced custody, making up between 14% and 19% of admissions to provincial sentenced custody between 1978 and 2001.[69] In the years since, that overrepresentation has rapidly and steadily increased to make up 30% of admissions to sentenced custody. In just the decade from 2007/8 to 2018/2018, Aboriginal adults went from 21% to 30% of admissions to provincial and territorial custody.[70] This increase took place in times of rising and falling crime, and of rising and falling overall admissions to sentenced custody. It also took place despite concerted policy efforts to combat it.[71] Most recently, this has involved dramatic increases in the number of Aboriginal people admitted to custody: a 28% increase for adult males, 66% increase for adult females over the past decade.[72]

These figures undoubtedly form an important part of any picture of the crisis in the justice system. The trouble comes when they are taken to *be* the crisis, that is, when overrepresentation itself is taken to be the problem that needs a solution. This is the dominant framing of the policy discourse, with examples found in newspaper articles, inquiries, government reports, and watchdogs.[73] In the usual formulation, overrepresentation is taken to be a major, longstanding, and worsening problem. Other elements of the crisis, rather than being regarded on their own terms, are considered through the lens of overrepresentation. Thus,

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[69] Melchers and Roberts, “The Incarceration of Aboriginal Offenders.”

[70] Malakieh, “Adult and Youth Correctional Statistics in Canada, 2017/2018.”

[71] Melchers and Roberts, “The Incarceration of Aboriginal Offenders.”

[72] Malakieh, “Adult and Youth Correctional Statistics in Canada, 2017/2018.”

[73] Therien, “The National Shame of Aboriginal Incarceration”; The Correctional Investigator Canada, “Annual Report of the Office of the Correctional Investigator 2014-2015,” June 26, 2015; Cheryl Marie Webster and Anthony Doob, “Thinking about the Over-Representation of Certain Groups in the Canadian Criminal Justice System: A Conceptual Framework,” 2008, http://canada.metropolis.net/pdfs/webster_doob_e.pdf.

socioeconomic marginalization of Aboriginal people, overt and systemic racism, and the effect of colonial policies (most notably residential schools) are portrayed as causes of overrepresentation. Aboriginal justice programming – whatever the original objective – is presented as a response to overrepresentation. Standard bureaucratic incentives align to ensure the dominance of this framing over time. Once Aboriginal justice programming (such as the Aboriginal Courtwork Program and the Aboriginal Justice Strategy) is in place, the imperative to secure ongoing support from governments of varying ideologies encourages a stripped-back and, crucially, depoliticized framing. Statistics on overrepresentation look like the kind of ideologically neutral, technocratic evidence that can best fill this role. More controversial and politically contested elements of the crisis, such as colonialism or racial bias in policing, are sidelined in favour of the depoliticized argument that overrepresentation is expensive and embarrassing, inviting as it does domestic and international criticism. This depoliticization can be effective in protecting funding, with even the Harper Conservative government, which marketed itself as tough on crime and tended to deny Canadian colonialism, convinced enough by the problem of overrepresentation to largely keep in place funding for Aboriginal justice programming. Funding for programs seen as more political, such as Sisters in Spirit, was cut. Even bureaucratic incentives within the civil service support the focus on overrepresentation. Breaking down and explaining the statistics makes a satisfying briefing note, while detailing change over time is good “trends analysis” and projecting future worsening counts as a “risk assessment” – all ways for a working level civil servant to contribute to the priorities of their superiors. Academically, the urge to be scientific about claims pushes towards the only available data, while the temptation to be relevant pushes one to engage with the dominant policy discourse on its own terms.

This dominant framing is unworkable, in part because it cannot deliver on its own promises, and in part because it distorts our understanding of the real nature of the crisis. The overrepresentation framing promises a depoliticized approach organized around statistics to come to an understanding of the causes of overrepresentation and propose technocratic solutions to the problem. This approach has not delivered results (overrepresentation has only worsened over nearly thirty years of policy interventions) and in fact *cannot* present a solution. For one thing, the data are simply not of the quality necessary to support the causal analysis that are asked of them. The data limitations discussed above, and especially the reluctance to collect data

in other parts of the justice system, mean that the most that can be expected is a coarse picture with some idea of the overall trend. Teasing out the relative causal effect of different factors is not possible. It is also next to impossible to understand the effect of various interventions on the headline figures: are they ineffective? Have they prevented overrepresentation from becoming even worse than it has? Coarse, national data simply cannot answer these questions about the effectiveness of small-scale, local policy interventions. While individual projects can be evaluated on more specific metrics, such as reducing recidivism, the links to overrepresentation cannot be drawn through the data.

More fundamentally, the overrepresentation framing distorts our understanding of other elements of the crisis. It is not a matter of denying the existence of other aspects, but rather of viewing them through the lens of overrepresentation. Thus socioeconomic marginalization, systemic racism, and brutal colonial policies such as residential schooling and forced relocation are considered in as much as they are causes of overrepresentation. While overrepresentation of Indigenous people as victims of crime and in incarceration is an effect of these things, they are important and problematic in their other aspects. Even if a policy response were found to sever the link between these problems and overrepresentation (say, a direct sentencing discount for Indigenous offenders, or an amnesty), the crisis in the criminal justice system would remain. Any real solution must address these contentious, political issues on their own terms. This is a reality that is emphasized repeatedly by inquiries into justice matters, which contend that problems of violence against Indigenous people cannot be successfully addressed by the criminal justice system in isolation. This is starkly illustrated by the calls for justice issued by the national inquiry into missing and murdered Indigenous women and girls, which cover culture, health and wellness, recognition of human rights, and education in as much detail as the criminal justice system.[74]

The overrepresentation framing further distorts understandings by encouraging a particular kind of coarse quantitative reasoning that fixates on an indicator and performs evaluation in terms of whether there is more or less of that indicator. Because this cannot

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[74] National Inquiry into Missing and Murdered Indigenous Women and Girls (Canada) and Canada, *Reclaiming Power and Place*, 2019, 1b:176–203.

possibly capture the complexity of Indigenous people's problems with the criminal justice system, it frequently leads to confusion or ambivalence. Take, for example, overrepresentation itself. If it is the case that overrepresentation of Aboriginal people in prison is the problem, then the implicit solution is to find policy responses that reduce the number of Aboriginal people entering prison, such as increased use of conditional sentencing or community diversion. However, the overrepresentation of Aboriginal women as victims of violence leads to calls for reduced impunity, which, barring major changes to the justice system as a whole, means *more* Aboriginal offenders entering prison. Attempts to reduce overrepresentation of one kind, then, may make another kind worse. This, too, emerges as a theme from the report of the national inquiry into missing and murdered Indigenous women and girls. The inquiry both calls for *Gladue* reports to be considered a right *and* for governments to evaluate such reports to ensure that they are not leading to impunity for violence against Indigenous women and girls.[75] [76] The inquiry also called for violence against Indigenous women, girls, and 2SLGBTQQIA people to be treated as an aggravating factor at sentencing, in line with changes to the criminal codes advocated by Senator Lillian Dyck.[77] The likely result of such changes will be more incarceration for Indigenous offenders.[78] On the other hand, the push for such changes from female Indigenous leaders highlights that simply reducing the figures on over-incarceration should not be the sole focus of government action, especially if it comes at the cost of protecting vulnerable people from violence. A similar ambivalence emerges in policing. On one hand, Indigenous people are said to be "over-policed" in that they are disproportionately the target of

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[75] A *Gladue* report is a specialized pre-sentencing report to help the judge discharge their obligation to take into account contextual factors in the sentencing of Indigenous people. The provision of *Gladue* reports is currently tremendously inconsistent across and within Canadian Provincial court systems. See Chapter 4 section 4.1 for a detailed discussion.

[76] National Inquiry into Missing and Murdered Indigenous Women and Girls (Canada) and Canada, *Reclaiming Power and Place*, 2019, 1b:185, 156.

[77] National Inquiry into Missing and Murdered Indigenous Women and Girls (Canada) and Canada, 1b:185.

[78] Maura Forrest and Brian Platt, "Government to Accept Criminal Code Changes Pushing for Harsher Sentences in Crimes against Indigenous Women | National Post," *National Post*, June 17, 2019, sec. Canadian Politics, https://nationalpost.com/news/politics/government-to-accept-criminal-code-changes-pushing-for-harsher-sentences-in-crimes-against-indigenous-women.

invasive interventions and coercive measures.[79] On the other hand, they are said to be "under-policed" in that they are insufficiently protected from violence and other crime, or not taken seriously as "real victims."[80] This ambivalence can only be overcome by realizing that it is not a question of more or less policing, but rather there is a need for a different kind of policing and a different relationship between police and Indigenous people. The First Nation Policing Program (FNPP) enabled First Nation and Inuit communities to either administer their own police forces or have greater say in a dedicated RCMP detachment, has had impressive results in this regard, especially considering the limited resources devoted to the task.[81] This more radical, qualitative shift moves the discussion away from the narrowly technocratic back to a political domain – for who controls the police is clearly a political question. It is also more contentious and politicized terrain. A widely circulated story within the civil service describes how one Conservative minister of Public Safety, on first learning of the FNPP, exclaimed, "Indians policing Indians? That can't be right!" Apocryphal or not, this was generally taken to accurately capture the government's view of the program. The subsequent liberal government, on the other hand, has dramatically increased resources for the program, for both operating funds and capital expenditures.[82]

2.4 A Chronic Crisis of Legitimacy

What, then, is the nature of the chronic crisis in our criminal justice system for Indigenous people? Overrepresentation plays a part, to be sure. Indigenous people are and have been subject to high rates of crime and violence in Canada. Indigenous people are also more likely to be perpetrators of crime and violence. This in no way negates the victimization of other Indigenous people, and in many cases perpetrators have themselves been victimized. More

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[79] Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide*, 35–36.

[80] Royal Commission on Aboriginal Peoples, 37–39; Comack, *Racialized Policing*, 167.

[81] Public Safety Canada, "Evaluation of the First Nations Policing Program 2014-15" (Public Safety Canada, March 17, 2016), https://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/vltn-frst-ntns-plcng-2015/index-en.aspx#a42.

[82] CBC News, "Canadian Government to Spend $291M on First Nations Policing Program," *CBC*, January 11, 2018, sec. Politics, https://www.cbc.ca/news/politics/liberals-indigenous-policing-funding-1.4480570; Kathleen Harris, "Ottawa to Spend $90M to Build, Repair First Nations Police Stations," *CBC*, November 15, 2018, sec. Politics, https://www.cbc.ca/news/politics/first-nations-policing-infrastructure-1.4566311.

significantly, however, Canadian institutions meant to address crime and victimization are not working as they should. They are failing to properly protect Indigenous people while disproportionately targeting them for intrusive interventions and coercive measures. In some ways, these institutions are actively worsening the underlying problem, through overt and systemic racism, carceral criminogenesis, and direct violence against Indigenous people. Furthermore, many Indigenous people experience the Canadian justice system in its entirety as an alien, colonial imposition. All this adds up to a fundamental crisis that threatens the very legitimacy of the criminal justice system in Canada.

The crisis cannot be understood in this way purely through statistics. It also would not be solved if we found some technical solution that would reduce the headline numbers on overrepresentation. Instead, we must listen carefully to the voices of Indigenous people who tell us how they experience injustice in Canada. We must also take seriously areas where there is insufficient evidence to make strong social scientific claims about what is going on, especially where the lack of evidence is due in part to resistance by justice system officials. In the next section, I will briefly survey several underlying elements of the crisis: pervasive violence, racism and discrimination, abuse perpetrated by justice system officials, colonial policies, and feedback systems.

Pervasive violence is the first major element of the crisis. As noted above, Indigenous people are substantially more likely than non-Indigenous Canadians to be victims of violent crime. Indigenous people, particularly women and youth, are more vulnerable to all forms of violence, but are even more vulnerable to the most serious forms. Indigenous people are more likely to have been repeat victims of violence, to have been victims of sexual assault, to be injured by the violence, to fear for their lives, and dramatically more likely to be murdered.[83] Community-based research often finds even higher rates of male partner violence against Indigenous women than are reported in national surveys. [84] Sustained campaigning by

[83] Samuel Perreault, "Violent Victimization of Aboriginal People in the Canadian Provinces, 2009," Juristat (Statistics Canada, March 11, 2011).

[84] Douglas A. Brownridge, "Male Partner Violence Against Aboriginal Women in Canada: An Empirical Analysis," *Journal of Interpersonal Violence* 18, no. 1 (January 1, 2003): 66, https://doi.org/10.1177/0886260502238541.

Indigenous women and their supporters, has focused attention on the disproportionate numbers of missing and murdered Indigenous women and girls. Methodologies and exact numbers are contested (particularly for who should count as missing) and have been revised upward by each subsequent investigation. The Native Women of Canada's Sisters in Spirit initiative was able to identify 582 cases of murdered or missing Indigenous women.[85] A subsequent RCMP investigation found 1,017 Aboriginal female victims of homicide from 1980-2012, 16 per cent of all murdered women, and a further 11 per cent of missing women.[86] This would make Indigenous women nearly five times as likely to be victims of homicide in 2011. The final report of the national inquiry into murdered and missing women noted that averages over time can be deceiving, and that Indigenous women and girls are now nearly a quarter of all female homicide victims.[87] The report also cites analysis by Maryanne Pearce that concludes Indigenous women are 12 times more likely to be murdered or missing than other women in Canada.[88] This violence is not itself the fault of the criminal justice system, except in cases, as we shall see below, where it is perpetrated by justice system officials. The heightened vulnerability of many Indigenous people to violence is, however, a product of state action over time, and the failure to provide Indigenous people with the level of protection from violence that is afforded to non-Indigenous Canadians is an ongoing failure of the criminal justice system.

Indigenous people continue to face racism and discrimination in the criminal justice system. Negative views of Aboriginal peoples remain common, with nearly 13% of survey respondents openly expressing negative views as their top-of-mind impression of Aboriginal

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[85] Native Women's Association of Canada, "What Their Stories Tell Us: Research Findings from the Sisters in Spirit Initiative" (Ohsweken, Ont.: Native Women's Association of Canada, 2010), http://go.utlib.ca/cat/8992328, http://myaccess.library.utoronto.ca/login?url=http://site.ebrary.com/lib/utoronto/Top?id=10406323.

[86] Royal Canadian Mounted Police, *Missing and Murdered Aboriginal Women: A National Operational Overview.*, accessed August 18, 2016, http://resource.library.utoronto.ca/eir/EIRdetail.cfm?Resources__ID=1746929.

[87] National Inquiry into Missing and Murdered Indigenous Women and Girls (Canada) and Canada, *Reclaiming Power and Place*, 2019, 1a:55.

[88] National Inquiry into Missing and Murdered Indigenous Women and Girls (Canada) and Canada, 1a:55.

people in 2016.[89] In 2019, a plurality of Canadians believe that the public, government, and Indigenous people themselves are equally to blame for Indigenous disadvantage in Canada, while 29% single out Indigenous people – just 14% blame primarily the government and 8% primarily the public.[90] General negative attitudes, including blaming Aboriginal people for the problems they face and denying the existence of Aboriginal rights, roughly correspond regionally with high levels of overrepresentation in the justice system.[91] Criminal justice system officials are not immune from racist attitudes. The eruptions of interest detailed at the start of this paper often followed some of the most egregious incidents of outright racism, but these are more than just isolated incidents. Aboriginal people regularly report being subject to racist verbal abuse by police officers, unreasonable force and violent interrogations, and being "red-zoned" or banned from certain neighbourhoods.[92] Racialized women, including Indigenous women, are less likely to be taken seriously as victims of crime, due to negative attitudes and stereotypes.[93] The families and friends of missing Indigenous women also feel that the disappearance of an Indigenous woman is often dismissed too easily by police.[94] The everyday racism of our society can become systemic discrimination through the exercise of discretion by justice system officials. Police seem to engage in racial profiling to more frequently stop Indigenous people. The proffered justification for such stops is that they "fit the description" of a suspect, but in many cases – including at least one documented shooting death – the only way the individual matches the description is the nebulous "looking Aboriginal" (reliable physical characteristics,

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[89] Keith Neuman, "Canadian Public Opinion on Aboriginal Peoples" (The Environics Institute for Survey Research, June 2016), http://aptn.ca/news/wp-content/uploads/sites/4/2016/06/Canadian-Public-Opinion-on-Aboriginal-Peoples-2016-FINAL-REPORT1.pdf.

[90] Environics Institute, "Toward Reconciliation: Indigenous and Non-Indigenous Perspectives" (Environics Institute for Survey Research, October 2019), https://www.environicsinstitute.org/docs/default-source/default-document-library/3rd-confed-survey-report-final-oct8409422a163c841928b54f1d5bfbaa24e.pdf?sfvrsn=c731d090_0.

[91] Environics Institute; Neuman, "Canadian Public Opinion on Aboriginal Peoples"; Government of Canada, "CANSIM - 251-0022 - Adult Correctional Services, Custodial Admissions to Provincial and Territorial Programs by Aboriginal Identity."

[92] Comack, *Racialized Policing*.

[93] Chan and Chunn, *Racialization, Crime and Criminal Justice in Canada*, 18.

[94] Tanya Talaga, "UN to Investigate Missing Aboriginal Women | Toronto Star," *Toronto Star*, January 6, 2012, https://www.thestar.com/news/insight/2012/01/06/un_to_investigate_missing_aboriginal_women.html.

such as height and weight, are ignored).[95] Within corrections, Aboriginal inmates are more likely to be referred to the parole board for a "detention review" that will refuse them statutory release because correctional officials are more likely to informally assess them to be dangerous.[96] The Correctional Investigator of Canada has questioned whether the "Reintegration Potential Reassessment Scale" used by Correctional Services Canada propagates bias within the correctional system, noting that it has not been validated in an Aboriginal context but that through it, Aboriginal offenders are consistently classed as higher risk than non-Aboriginal offenders.[97] Indigenous people are also widely underrepresented on juries across Canada, with substantial evidence of discriminatory exclusion through peremptory challenges by both Crown and defence attorneys.[98]

Systemic discrimination can occur even in the absence of overt racial bias. Lack of cultural understanding of Indigenous people by justice system officials can have a negative effect. In some Indigenous cultures, for instance, it is considered rude to look a figure of authority directly in the eye. Rupert Ross describes how the respect shown to judges by Indigenous accused in Northern Ontario courtrooms was regularly interpreted as a sign of untrustworthiness or guilt, to their detriment.[99] Court proceedings are almost always held in English or French, which disadvantages speakers of Indigenous language by forcing them to rely on (often inadequate) interpretation services.[100] Many Indigenous cultures also place a high premium on truth-telling, including the admission of responsibility for wrongdoing. In the adversarial system of Canadian justice, Indigenous people lose out by too readily pleading

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[95] Comack, *Racialized Policing*, 162.

[96] Webster and Doob, "Thinking about the Over-Representation of Certain Groups in the Canadian Criminal Justice System: A Conceptual Framework," 18.

[97] Michelle M. Mann, *Good Intentions, Disappointing Results: A Progress Report on Federal Aboriginal Corrections* (Ottawa, Ont.: Office of the Correctional Investigator of Canada, 2009), 17, http://myaccess.library.utoronto.ca/login?url=http://site.ebrary.com/lib/utoronto/Top?id=10350442.

[98] Iacobucci, *First Nations Representation on Ontario Juries*, 39.

[99] Rupert. Ross, *Dancing with a Ghost: Exploring Aboriginal Reality* (Toronto: Penguin Canada, 2006), 4.

[100] A. C. Hamilton and C. M. Sinclair, *Report of the Aboriginal Justice Inquiry of Manitoba: The Justice System and Aboriginal People.*, vol. 1, 2 vols. (Winnipeg: The Inquiry, 1991).

guilty.[101] Facially neutral policies can also interact with the various forms of disadvantage suffered by Indigenous people to produce discriminatory outcomes. The granting of bail, imposing of fines, and especially imprisonment for non-payment of fines, when applied equally regardless of income will have a disproportionately negative effect on Indigenous people, who are more likely to have low incomes than other Canadians.

The weight of this evidence of racism and discrimination in the criminal justice system should not be taken as an argument that the system is entirely discriminatory or full of racist officials. There have certainly been efforts to reform the system and to take into account Indigenous reality. Some data actually suggest that Aboriginal offenders are likely to receive shorter sentences than non-Aboriginal offenders for similar offences.[102] Yet the continued increasing overrepresentation of Indigenous offenders clearly shows that various other forms of disadvantage and discrimination cannot be corrected at sentencing. As Justice Iacobucci reported, Indigenous people see the criminal justice system as a foreign system, imposed upon them without consent, which does not reflect their values and works against, rather than for them.[103] It is worth noting that this perception is correct, at least in as much as it is true that the Canadian criminal justice system is foreign to Indigenous people (deriving largely from British common law), was imposed upon Indigenous people without clear consent, operates in an imposed, foreign language, and remains, for the most part, something *done to* Indigenous people by largely non-Indigenous justice system officials. Much of the damage done to Indigenous people and cultures through Canada's colonial history has been done by seemingly well-intentioned non-Indigenous officials. Residential schools were not cultural genocide because they housed perpetrators of physical and sexual abuse, but because the goal was to separate Indigenous children from their parents and assimilate them to non-Indigenous culture.[104] That

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[101] Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide*, 62, 97.

[102] E. J. Dickson-Gilmore and Carol. LaPrairie, *Will the Circle Be Unbroken? Aboriginal Communities, Restorative Justice, and the Challenges of Conflict and Change* (Buffalo: University of Toronto Press, 2005), 45–47.

[103] Iacobucci, *First Nations Representation on Ontario Juries*, 4.

[104] 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* ([S.l.]: Truth and Reconciliation

the justice system, and particularly the RCMP, played their part in enforcing these policies, from separating children from their families to forced relocations, understandably contributes to lasting mistrust – and would do so even in the absence of any overt racism from justice system officials.

Even today, criminal justice system officials sometimes go beyond racist and discriminatory behaviour to outright abuse. In some cases, the reasons behind violent treatment can be hard to disentangle from systemic discrimination. For instance, Aboriginal inmates are disproportionately likely to be subject to the use of force in prison.[105] In other cases, violence is clearly abusive and racist. The "starlight tours" mentioned above provide a particularly vivid and horrifying illustration. In a well-documented, widespread practice which is frequently applied to Indigenous people, police will take individuals deemed to be troublesome out of an area and "breach" or "dump" them elsewhere.[106] The "starlight tour" variation of stranding Indigenous people out of town without adequate clothing in freezing temperatures is tantamount to murder. The practice is not specific to Saskatoon and has not been eliminated, with a documented case in Ontario as recently as 2011 and allegations of ongoing cases (termed "geographic therapy") in Quebec.[107] Recently, many Indigenous women have come forward to allege serious physical and sexual abuse by police officers in Quebec.[108] Elizabeth Comack has diagnosed a discourse of

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Commission of Canada, 2015), 1–2, http://myaccess.library.utoronto.ca/login?url=http://site.ebrary.com/lib/utoronto/Top?id=11070416.

[105] The Correctional Investigator Canada, "Annual Report of the Office of the Correctional Investigator 2014-2015," 38.

[106] Comack, *Racialized Policing*, 115.

[107] Jesse McLean and Jayme Poisson, "Nearly 350 Officers from Police Services in the Greater Toronto Area — Toronto, Peel, York, Halton and Durham — and the OPP Have Been Disciplined for What Their Own Services Call 'Serious' Misconduct, a Star Investigation Has Found.," *The Toronto Star*, September 19, 2015, http://www.thestar.com/news/canada/2015/09/19/hundreds-of-officers-in-the-greater-toronto-area-disciplined-for-serious-misconduct-in-past-five-years.html; CBC News, "Quebec Promises Action after New Allegations of Abuse against Aboriginal Women," *CBC News*, March 31, 2016, http://www.cbc.ca/news/canada/montreal/aboriginal-abuse-allegations-filing-complaints-1.3515570.

[108] Josée Dupuis and Anne Panasuk, "More Quebec Indigenous Women Break Their Silence about Police Abuse," *CBC News*, May 13, 2016, http://www.cbc.ca/news/aboriginal/quebec-investigation-alleged-abuse-aboriginal-women-1.3577527; Sarah Leavitt, "More Indigenous Women Alleging Sexual Abuse by Police," *CBC News*, March 31, 2016, http://www.cbc.ca/news/canada/montreal/quebec-police-aboriginal-indigenous-sex-abuse-allegations-1.3512459.

denial, through which Aboriginal people are not believed and police services design investigations to exonerate their members.[109] Certainly, there have been repeated instances where initial police findings that exonerated officers have been questioned or overturned by subsequent investigation. It is little surprise, then, that many Indigenous people say they do not report abuse because they do not expect to be believed.[110]

I have already noted that the justice system is a historical imposition on Indigenous people, and is experienced as such by many. It is important to recognize that much of the underlying crime and violence dealt with by the justice system is also a product of Canadian colonialism. This is more controversial than it should be; as many Canadians blame Aboriginal people themselves for their problems as recognize the harmful effects of government policy.[111] The shattering impact of successive waves of colonization is well documented. Catastrophic population collapse through introduced disease and the loss of traditional territories to settlers threatened the continuity of Indigenous cultures. Those cultures were then themselves directly targeted through decades of racist and discriminatory Indian Act policies, cultural bans (e.g. on the Potlach and Sun/Thirst dance), and residential schools. Residential schools, in particular, subjected many Indigenous children to physical and sexual violence while robbing families of normal parent-child relationships and stripping children of language and culture. The intergenerational trauma continues to play out in violence and abuse in Indigenous communities today. While Indigenous people consistently emphasize these harmful effects of colonialism, as an explanation for high rates of crime and violence it has been overlooked or downplayed by Canadian governments. It is difficult to empirically demonstrate a causal link between such complex historical events and current patterns of crime. It is not implausible, however, that historical traumas would affect current rates of crime. Homicide rates among African Americans in the southern United States, for instance, have been shown to vary in proportion to lynching

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[109] Comack, *Racialized Policing*, 220–22.

[110] Comack, 224–25; CBC News, “Quebec Promises Action after New Allegations of Abuse against Aboriginal Women.”

[111] Neuman, “Canadian Public Opinion on Aboriginal Peoples,” 22.

rates from a century earlier.[112] Some aspects of the linkage between colonialism and violence are impossible to refute, if easy to overlook. Violent crime with Aboriginal victims is overwhelmingly like to involve alcohol or illegal drug use by the perpetrator (67% of cases).[113] The use and abuse of alcohol by Indigenous people is entirely a product of colonization.

Once high levels of violence, crime, and overrepresentation in the criminal justice system are established, feedback systems emerge that perpetuate such patterns. Victims of violence, particularly domestic violence, are more likely to be victims of further violence and more likely to perpetrate violence themselves.[114] Carceral criminogenesis, whereby justice system interventions breed rather than reduce future crime, is one feedback system. Young offenders, shockingly, are *more* likely to go on to commit crimes as adults if they are processed by the justice system than if they have no contact (that is, the justice system is worse at reducing recidivism than doing nothing at all).[115] Canada's major Indigenous gangs, responsible for a great deal of violence and drug trade in Indigenous communities, draw much of their recruitment and strength from activities in prisons.[116] Another feedback system comes through racial profiling. Critics of racial profiling view it as an inherently discriminatory practice that is partly responsible for overrepresentation in the first place.[117] Defenders argue that it is a proportionate response to existing patterns of offending. In either case, racial profiling is self-perpetuating. Once profiling is in place, the targeted group will be stopped more by the police, leading to a

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[112] Webster and Doob, "Thinking about the Over-Representation of Certain Groups in the Canadian Criminal Justice System: A Conceptual Framework," 7–8.

[113] Perreault, "Violent Victimization of Aboriginal People in the Canadian Provinces, 2009," 5.

[114] Perreault, 11; Gillian Balfour, "Falling Between the Cracks of Retributive and Restorative Justice," *Feminist Criminology* 3, no. 2 (2008): 101–20, https://doi.org/10.1177/1557085108317551.

[115] Webster and Doob, "Thinking about the Over-Representation of Certain Groups in the Canadian Criminal Justice System: A Conceptual Framework," 13.

[116] Jana Grekul and Patti LaBoucane-Benson, "An Investigation into the Formation and Recruitment Processes of Aboriginal Gangs in Western Canada" (Public Safety Canada, 2006), https://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/brgnl-gngs-nvstgtn-2006/index-en.aspx.

[117] Chan and Chunn, *Racialization, Crime and Criminal Justice in Canada*; Comack, *Racialized Policing*.

higher charge rate *even if* rates of offending drop.[118] Such profiling also has real costs for the people targeted. Aboriginal people living in disadvantaged neighbourhoods report being stopped and made to feel like criminals frequently enough that it interferes with regular life by making them change their routines and avoid or fear police officers.[119]

The crisis in the criminal justice system is thus much more than a simple matter of overrepresentation. It also does not exist in isolation from the other challenges faced by Indigenous people. Indigenous people remain socioeconomically marginalized, being on average poorer, less educated, and less likely to be employed than the general population. These factors contribute to high rates of crime and victimization, although they only provide a partial explanation. In multivariate analysis with other risk factors, Aboriginal identity remains a strong independent predictor of being a victim of violent crime.[120] Similarly, Aboriginal people are dramatically overrepresented in custody even when accounting for age, employment, and education.[121] Indigenous people are also much more likely to live in substandard and overcrowded housing, a major factor in domestic violence.[122] The high rates of suicide that afflict many (but not all) Indigenous communities are also linked to crime and violence. Finally, the child welfare system has disturbing links and parallels to criminal justice for Canadians.

Prisons have been called Canada's new residential schools, but the title more appropriately belongs to the child welfare system.[123] More Indigenous children are taken from their families today than at the height of the residential school system. The child welfare system

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[118] Comack, *Racialized Policing*, 14.

[119] Comack, 162; Chan and Chunn, *Racialization, Crime and Criminal Justice in Canada*, 78.

[120] Brzozowski, Taylor-Butts, and Johnson, "Victimization and Offending among the Aboriginal Population in Canada."

[121] Perreault, "The Incarceration of Aboriginal People in Adult Correctional Services."

[122] Statistics Canada Government of Canada, "Census in Brief: The Housing Conditions of Aboriginal People in Canada," October 25, 2017, https://www12.statcan.gc.ca/census-recensement/2016/as-sa/98-200-x/2016021/98-200-x2016021-eng.cfm.

[123] Nancy Macdonald, "Canada's Prisons Are the 'New Residential Schools,'" *Macleans*, February 18, 2016, http://www.macleans.ca/news/canada/canadas-prisons-are-the-new-residential-schools/.

for Indigenous people is extremely controversial, with persistent problems that resist easy solutions. Relevant here, though, is the linkage between the criminal justice system and the child welfare system. There is a conceptual linkage, with a division of labour of the tasks previously undertaken by residential schools, with both successors being totalizing institutions that forcibly remove Indigenous people from their communities and re-educate them under a system of alien values. Certainly, there is a feedback loop between child welfare and criminal justice. Children taken into care are much more likely to become involved with the criminal justice system.[124] Two thirds of Aboriginal inmates in the prairie region were involved in the child welfare system as children (double the rate for non-Aboriginal inmates).[125] In a vicious cycle, the disproportionate incarceration of Indigenous parents (a majority of incarcerated Indigenous women are mothers of young children) disrupts family relations and sends yet more children into a dysfunctional child welfare system.[126]

From a non-Indigenous perspective, the criminal justice is often considered to work well. There is the ongoing embarrassment of figures on overrepresentation, and the occasional scandalous event that erupts into public consciousness. Having dug a little beneath the surface, we can see a different picture emerging. Not only is this crisis widespread, long-lasting, and growing, but it is composed of various mutually reinforcing elements. Any of these elements would be concerning on their own, but taken together, the concatenation of an inability to effectively reduce violence, the persistence of racism and systemic discrimination, and outright abusive treatment by justice system officials pose a threat to the legitimacy of the Canadian justice system as a whole for Indigenous people. The situation is not one of a broadly functioning justice system that happens to have an overrepresentation of Indigenous people. Instead, there is

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[124] BC Representative for Children, *Kids, Crime and Care: Health and Well-Being of Children in Care: Youth Justice Experiences and Outcomes* ([S.l.]: British Columbia Representative for Children and Youth, 2009), 29, http://myaccess.library.utoronto.ca/login?url=http://site.ebrary.com/lib/utoronto/Top?id=10330457.

[125] Public Works and Government Services Canada Government of Canada, “The Effect of Family Disruption on Aboriginal and Non-Aboriginal Inmates /: PS83-3/113E-PDF - Government of Canada Publications,” July 1, 2002, ii, http://publications.gc.ca/site/eng/380296/publication.html.

[126] Ka Ni Kanichihk Inc, “A Pilot Study Examining the Connection between Incarcerated Aboriginal Parents and Their Children through Narrative Inquiry.” (Winnipeg: Ka Ni Kanichihk, Inc., 2015), http://www.kanikanichihk.ca/wp-content/upLoads/2015/05/Pilot_Narratives_CW_Corrections_Rvsd2.pdf.

a justice system that consistently fails to provide justice for Indigenous people and often contributes to the perpetration of injustice against them.

There have been many attempts to address the problems faced by Indigenous people within the criminal justice system. Efforts at "Indigenization" of the system have tried, with limited success, to boost the numbers of justice system officials who are Indigenous. The First Nation Policing Program has in some cases given meaningful control over local policing to Indigenous communities, with communities that have forces under the FNPP much more satisfied than those without.[127] In the courts, the Aboriginal Courtwork Program provides workers to help Aboriginal people navigate the justice system. Some jurisdictions have tried to make more culturally competent courts, by incorporating Indigenous language, ceremony, and protocol into existing Provincial courts, or by setting up specific *Gladue* courts to give effect to section 718.2(e) of the *Criminal Code*. The Aboriginal Justice Strategy funds a variety of diversion projects that try to deal with some crimes outside of the conventional justice system entirely. In corrections, there is a combination of Aboriginal-specific correctional programming within regular correction facilities and a limited number of spaces in correctional facilities run by Aboriginal organizations or communities. These initiatives are all commendable and many have demonstrated their effectiveness in evaluations. However, they have been undertaken on too small a scale to have a clear effect on aggregate levels of overrepresentation or to change the overall experience of Indigenous people with the criminal justice system.

Paradoxically, the success of small-scale pilot projects only serves to further undermine the legitimacy of the conventional justice system. Diversion projects funded by the Aboriginal Justice Strategy are one example. In departmental evaluations, such programs were found to be cost-effective and to reduce recidivism when compared to the conventional justice system. It is worth noting that these programs are cost-effective when compared merely to the costs of processing a case through the courts; the astronomical costs of incarceration were not even

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[127] Public Safety Canada, "Evaluation of the First Nations Policing Program 2014-15."

considered.[128] If community justice programs operating on shoestring budgets are both more culturally competent and more effective at reducing crime, the question becomes, what are the expensive professionals of the criminal justice system for? Similarly, to the extent that the integration of Indigenous language and cultural practice improves the operation of some Provincial courts, it only highlights the oddity of having *any* courts operating with entirely non-Indigenous officials, in a non-Indigenous language, in Indigenous communities – even though this remains the norm. Similarly, the Correctional Investigator of Canada has also argued that the success of Aboriginal inmates in Aboriginal-specific programming within Correctional Services Canada institutions indicates that they would do even better in Aboriginal-run institutions or on supervised early release in partnership with Aboriginal communities.[129]

To resolve this paradox we must to turn to more radical change. The chronic crisis shows that the long experiment in the colonial imposition of the Canadian justice system on Indigenous people has been a failure. The success of various pilot projects and initiatives shows that there are ways to change the justice system in order to make it more legitimate and effective in delivering justice to Indigenous people (and other Canadians). Yet for these initiatives to actually address the crisis, they need to be applied to the justice system as a whole. This would require a major shift in mentality. Currently, these initiatives are largely considered as optional extras – largely a matter of tinkering at the margins. Disturbingly, this even seems to be the case where there is a legislative mandate to systematically change the treatment of Indigenous people. S.718.2(e) of the *Criminal Code* and s.81-84 of the *Corrections and Conditional Release Act* provide for systematic shifts that are delivered only sporadically. Instead of thinking of Indigenous justice as an add-on to the justice system, it needs to be a core element. In some cases, this could be as simple as scaling up existing programs. Funding for community diversion projects, for instance, should be made available for all Indigenous communities, rather than being set at an arbitrary level. A more fundamental change, however, would be to break down

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128 Department of Justice Evaluation Division, "Evaluation of the Aboriginal Justice Strategy December 2016" (Department of Justice Canada, 2017), http://www.justice.gc.ca/eng/rp-pr/cp-pm/eval/rep-rap/2016/ajs-sja/ajs-sja.pdf.

129 The Correctional Investigator Canada, "Annual Report of the Office of the Correctional Investigator 2014-2015," 41.

the divide between the mainstream justice system and alternative projects, by offering some of the solutions of community justice within the conventional system. This, of course, requires a far greater reconsideration of the operating principles of that justice system. Rather than this being left to the initiative of individual judges, as is done now, it would need to be mandated as a core provision, much like trials in French. Given that Indigenous people make up a similar proportion of those involved in the criminal justice system as Francophones do of the population of Canada, this seems reasonably proportionate. Taken together, the challenges posed to the criminal justice system require nothing less than a radical, systemic response.

Chapter 3
Legitimacy

3 Indigenous People and the Legitimacy of Criminal Justice in Canada

3.1 Introduction

Indigenous people pose strong challenges to the legitimacy of the Canadian criminal justice system and the political system that supports it. These challenges are fundamental enough to undermine the validity of liberal democratic theories of legitimacy in Canada. How might Canadian liberal democrats respectfully respond? I begin by surveying Indigenous challenges to the legitimacy of Canadian law. I then switch into a theoretical register, examining the concept of legitimacy, the relation between law and political legitimacy, and liberal democratic conceptions of legitimacy. I spend time detailing the understandings of three liberal democratic theorists, Bernard Williams, John Rawls, and Jurgen Habermas, because I think their understandings articulate the theory of legitimacy that underpins the Canadian constitutional order. However, I wish to highlight major weaknesses within this hegemonic understanding. With the pieces in place, I look at how Indigenous challenges specifically undermine theory, making it impossible to both maintain hegemonic liberal democratic approaches to legitimacy and respond respectfully to Indigenous concerns. In the final section, I briefly sketch the outlines of how liberal democrats could enter respectfully on the path to a legitimate solution. In the long term, this will involve negotiating a decolonized constitutional order with Indigenous peoples. In the short- and medium-term, this means that institutions, including the criminal justice system, will have to establish a degree of freestanding legitimacy by taking on the unfamiliar burden of legitimizing themselves independent of the underlying political and constitutional order.

3.2 Indigenous Challenges to the Legitimacy of Canadian Law

As discussed in chapter two, Indigenous people have many justified complaints against the operation of criminal justice in Canada. Compared to other Canadians, Indigenous people are incarcerated at much higher rates and are more likely to be victims of crime, particularly violent

crime.[130] Indigenous people have also been subjected to racism and abuse by police. The widespread practice of "starlight tours," in which Indigenous people were driven by police to the edge of town in winter and left to freeze to death is merely the most horrifying recent example.[131] The justice system also has a long history of enforcing racist Indian Act policies, forcibly removing children from their parents to residential school, and criminalizing Indigenous political dissent. Currently, the inadequate response of the justice system to the epidemic of missing and murdered Indigenous women and girls has attracted public attention. In the panoply of specific complaints, it is sometimes possible to miss the general challenge posed to the *legitimacy* of Canadian criminal justice.

John Borrows diagnoses a "crisis of legitimacy about the rule of law in Aboriginal communities" because Indigenous people do not see themselves and their normative values reflected in the conduct of law.[132] This harmonizes with the findings of the Royal Commission on Aboriginal Peoples (RCAP), which recognized the strong arguments made by Indigenous people to challenge the legitimacy of Canada's exercise of power over them.[133] RCAP asserted a principle that the "legitimacy of a system of justice rests on its being an expression of a society's basic values, expressed in the rules that govern people's rights and responsibilities and the way peace and order are maintained when disputes arise."[134] To this way of thinking, Indigenous peoples constitute distinct societies with different basic values from Canada as a whole. The justice system fails to reflect these values, and thus fails a basic test of legitimacy. The failure is

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[130] Brzozowski, Taylor-Butts, and Johnson, "Victimization and Offending among the Aboriginal Population in Canada," 1; Perreault, "Violent Victimization of Aboriginal People in the Canadian Provinces, 2009"; Brennan, "Violent Victimization of Aboriginal Women in the Canadian Provinces, 2009"; Correctional Services Program, "Adult Correctional Statistics in Canada, 2013/2014," Juristat, 2015, http://www.statcan.gc.ca/pub/85-002-x/2015001/article/14163-eng.htm.

[131] Comack, *Racialized Policing*, 115–51.

[132] John Borrows, "Creating an Indigenous Legal Community," *McGill Law Journal* 50, no. 1 (February 2005): 168.

[133] Quoted in Larry Chartrand et al., "Reconciliation and Transformation in Practice: Aboriginal Judicial Appointments to the Supreme Court," *Canadian Public Administration* 51, no. 1 (March 1, 2008): 146–47, https://doi.org/10.1111/j.1754-7121.2008.00008.x.

[134] Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide*, 77.

particularly egregious because non-Indigenous values are forcibly imposed on Indigenous people. The Osnaburg/Windigo Tribal Council Justice Review Committee thus argued:

> *"The justice system, in all of its manifestations from police through the courts to corrections, is seen as a foreign one designed to continue the cycle of poverty and powerlessness...It lacks legitimacy in their eyes. It is seen as a very repressive system and as an adjunct to ensuring the continuing dominance of Euro-Canadian society."*[135]

Mary Ellen Turpel argued that Canadian legal institutions falsely claim "cultural authority" over Indigenous people, that is, the authority "to create law and legal language to resolve disputes involving other cultures."[136] She argues that Canadian courts lack the cultural authority to adjudicate conflicts among Indigenous people, and illegitimately apply culturally inappropriate individual rights analysis.[137] In this, she is supported by Kristen Manley-Casimir, who argues that a lack of cultural understanding may even mean that judges are unable to cognize the wrongs suffered by Indigenous claimants.[138] Because the creation of legal meaning always takes place within a particular culture, non-Indigenous judges are not even in a position to define the content of pre-existing Aboriginal rights under Canadian law (let alone to resolve disputes among Indigenous people).[139] These theoretical concerns play out in the actual practices of justice in Indigenous communities. The provincial court in the Eskasoni Mi'kmaq Community in Nova Scotia, for instance, is criticized by Indigenous residents and even by non-Indigenous justice system officials. The crown prosecutor argues that its legitimacy is undermined because Indigenous people frequently sort out underlying problems before cases are heard, and reject the

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[135] Quoted in Royal Commission on Aboriginal Peoples, 49.

[136] Mary Ellen Turpel, "Aboriginal Peoples and the Canadian Charter: Interpretive Monopolies, Cultural Differences," *Canadian Human Rights Yearbook* 1989–1990 (1990 1989): 4.

[137] Turpel, 41.

[138] Kirsten Manley-Casimir, "Incommensurable Legal Cultures: Indigenous Legal Traditions and the Colonial Narrative," *Windsor Yearbook of Access to Justice* 30, no. 2 (May 26, 2015): 151.

[139] Manley-Casimir, 153.

legitimacy of the dispositions (particularly jail) on offer in court.[140] Some Indigenous residents also argue that the combination of the adversarial system of justice with a lack of cultural understanding enables ill-intentioned people to manipulate the system to escape accountability.[141]

Within this general framework, Indigenous people question the legitimacy of many specific Canadian justice practices. At the level of specific practice, it is important to recognize the diversity of Indigenous cultures and avoid over-generalizations about Indigenous/non-Indigenous difference. Indigenous justice is sometimes presented as non-punitive, putting it in stark contrast with Canadian retributive justice.[142] Patricia Montue and Turpel assert clearly, “Punishment is a concept which is not culturally relevant to Aboriginal social experience.”[143] While some Indigenous communities did practice remarkably non-punitive justice, others had punitive approaches including severe corporal punishment and execution.[144] Prison, on the other hand, was unknown in pre-contact Indigenous societies and remains alien to many communities' sense of justice. Removing offenders from social life “is seen as counter-productive, creating further obstacles to the restoration of balance and harmony after an anti-social act.”[145] Prison is often perceived to worsen crime through negative socialization and increasing recidivism after release.[146] For Indigenous communities that see criminal acts as indicators of an underlying

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[140] L. Jane McMillan, “Colonial Traditions, Co-Optations, and Mi’kmaq Legal Consciousness,” *Law & Social Inquiry* 36, no. 1 (2011): 190, https://doi.org/10.2307/23011874.

[141] McMillan, 192–93.

[142] For a table of dichotomies, see Len Sawatsky, “Self-Determination and the Criminal Justice System,” in *Nation to Nation: Aboriginal Sovereignty and the Future of Canada* (Concord, Ont.: Anansi, 1992), 92–93.

[143] P. A. Monture-Okanee and M. E. Turpel, “Aboriginal Peoples and Canadian Criminal Law: Rethinking Justice,” *University of British Columbia Law Review* 26 (1992): 248.

[144] David Leo. Milward, *Aboriginal Justice and the Charter: Realizing a Culturally Sensitive Interpretation of Legal Rights* (Vancouver: UBC Press, 2012), 21–23.

[145] Monture-Okanee and Turpel, “Aboriginal Peoples and Canadian Criminal Law,” 248.

[146] Milward, *Aboriginal Justice and the Charter*, 12–14.

disharmony of relationships, the imposition of incarceration – an alien, counter-productive, and punitive justice practice – is seen as particularly illegitimate.[147]

The adversarial nature of Canadian justice practices also undermines legitimacy. Although some Indigenous groups did have adversarial practices of justice, many place a primacy on the restoration of community harmony in a way that actively forbids adversarial behaviour.[148] Anishinaabek culture, for instance, includes a strong ethic of non-contradiction, that is, an ethical norm against directly contradicting other persons, which is considered to be a form of deep disrespect.[149] This means that cross-examination of witnesses is not only culturally inappropriate, but unethical.[150] Ethics of non-confrontation are also accompanied by a strong duty of truth-speaking, which can come into conflict with the right to silence in Canadian jurisprudence.[151] There can also be a strong emphasis on accepting responsibility that means Indigenous people may plead guilty even when they have valid legal defences.[152] In fact, taking these principles together, it can be unethical to plead not guilty precisely because it forces others to violate the ethic of non-confrontation by accusing you at trial.[153]

The legitimacy of various sources of law is strongly contested. Indigenous legal traditions draw on plural sources of law, including customary law, sacred law, natural law, deliberative law, and positivistic law.[154] The Canadian legal system rejects the legitimacy of some of these

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[147] Milward, 16–17.

[148] Bruce G. Miller, "The Individual, the Collective, and Tribal Code," *American Indian Culture and Research Journal* 21, no. 1 (January 1, 1997): 112, https://doi.org/10.17953/aicr.21.1.m283j8vq27124123; Milward, *Aboriginal Justice and the Charter*, 142–44.

[149] Darlene Johnston, "Aboriginal Traditions of Tolerance and Reparation: Introducing Canadian Colonialism," SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, 2005), 4, http://papers.ssrn.com/abstract=1879396.

[150] Milward, *Aboriginal Justice and the Charter*, 144.

[151] Milward, 166.

[152] Milward, 132; Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide*, 62, 97.

[153] Milward, *Aboriginal Justice and the Charter*, 132.

[154] John. Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010), 23–57.

sources (e.g. sacred law), provides limited recognition to others (e.g. some but not all Indigenous customary law), and contests the meaning of others (e.g. Western natural law tradition is different from laws "regarded as literally being written on the earth" and legible from observing the natural world).[155] Canadian criminal justice, by contrast, is based largely on positive law passed by the Canadian parliament (especially the *Criminal Code*) and an English-derived tradition of common law interpreted by the judiciary. The dual legitimations of law through judicial tradition and democratic authorization sit awkwardly together. While the latter suggests that the choice of the current population, through their elected representatives, should be determinate of legitimate law, the former gives great weight to precedent, that is the choices of past figures in positions of authority. Particularly challenged, though, is why they should legitimate the application of law *in Canada*. Given that Indigenous legal traditions pre-date Canadian law, Borrows argues that Canadian law needs to legitimate itself in light of them.[156] To justify Canadian "Crown" authority, Mariana Valverde argues that Canadian judicial discourse switches between a rational-modern discourse and a neo-medieval discourse on the mystical foundations of sovereign authority, while denying the same epistemic eclecticism to Indigenous interlocutors.[157] In other words, demands for Indigenous law to legitimate itself on solely rational-modern grounds are hypocritical, given that attempts to legitimate Canadian law seem to need to transcend that discourse in the search of persuasive foundations.

Indigenous challenges to the legitimacy of Canadian criminal justice thus operate at three levels. At the most specific level, Indigenous people challenge some specific laws, legal principles, and practices of justice. This includes questioning not only the right to silence, adversarial trials, and the use of incarceration, but also the requirement of impartial judges, the presumption of innocence, the right to counsel, the right against unreasonable search and seizure, the rules of evidence, and the prohibition on corporal punishment.[158] At the second level,

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[155] Borrows, 29.

[156] Borrows, 122–23.

[157] Mariana Valverde, "The Crown in a Multicultural Age: The Changing Epistemology of (Post)Colonial Sovereignty," *Social & Legal Studies* 21, no. 1 (March 1, 2012): 3–21, https://doi.org/10.1177/0964663911418719.

[158] For an extensive discussion, see Milward, *Aboriginal Justice and the Charter*.

Indigenous people sometimes challenge the legitimacy of the criminal justice system as a whole by challenging the cultural and legal authority of non-Indigenous justice over Indigenous people. On the third level, the legitimacy of the Canadian state as a whole can be brought into question in challenging its assertion of power over Indigenous people. As Gordon Christie notes, the law does not view broader issues about the legitimacy of the state as within its competence, and leaves them to politics.[159] Courts assume their own legitimacy and cannot problematize that legitimacy within existing jurisprudential frameworks. Yet the challenge at the political level rebounds onto the legitimacy of the legal system, as the legitimacy of such a system is usually thought to be conferred upon it by a legitimate constitution and legitimate political institutions.[160]

3.3 The Concept of Legitimacy

The multi-level Indigenous challenges to the legitimacy of Canadian law thus bring into view the basic question of the legitimacy of the Canadian state. To address these challenges, I turn now to a theoretical mode to examine the concept of legitimacy in Western political thought. Legitimacy is a fundamental concept for politics. The basic, still-operative sociological definition of political legitimacy comes from Max Weber: a political order enjoys legitimacy to the extent that subjects consider it to be binding.[161] Weber's initial analysis of legitimacy captures many important features. He identifies plural sources of legitimacy in tradition, “affectual attitudes,” rational belief in absolute value, and legality (through consent or recursive authority).[162] Crucially, Weber acknowledges the imbrication of prudential and normative considerations in actual submissions to authority, a problem that continues to bedevil the study of legitimacy by making it difficult to people who submit to authority to avoid punishment and

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[159] Gordon Christie, “Law, Theory and Aboriginal Peoples,” *Indigenous LJ* 2 (2003): 88–89.

[160] Silje A. Langvatn, “Legitimate, but Unjust; Just, but Illegitimate Rawls on Political Legitimacy,” *Philosophy & Social Criticism* 42, no. 2 (February 1, 2016): 134, https://doi.org/10.1177/0191453715615386.

[161] Max. Weber, *The Theory of Social and Economic Organization* (London: Collier Macmillan, 1964), 125.

[162] Weber, 130.

those who submit to authority because they view that authority as legitimate.[163] Because Weber's concern with legitimacy was centrally a social-scientific classification of "imperative coordination" (command-obedience relations), Weber collapsed the distinction by reducing the sociological measure of legitimacy to actual compliance.[164] This has left an unfortunate legacy in operationalizations of legitimacy in empirical social science, which frequently do not distinguish submission to power from obedience to legitimate authority.[165] Silje Langvatn summarizes the Weberian sociological definition of political legitimacy as, "the de facto ability of a political regime to secure acceptance based on belief...as opposed to securing compliance based on coercion alone.[166]

Bernard Williams gives us another approach to defining political legitimacy. He begins from the Hobbesian "first political question" of securing sufficient safety and order to provide the conditions of cooperation.[167] While Hobbes thought the conditions for solving the first problem sufficiently demanding to determine the rest of political arrangements, Williams demurs; multiple arrangements can solve the first political question, but not all will be legitimate. He posits a "basic legitimation demand" that emerges whenever the power to rightfully coerce is claimed. The demand is for a justification to be offered to each subject over whom such power is claimed; if rulers claim *rightful* authority, they must provide reasons why. The concept of legitimacy provides only a weak standard; any state that meets this basic demand is legitimate regardless of its other political virtues or defects.[168] This allows Williams to argue that

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[163] Weber, 126, 326.

[164] Weber, 326–27; Melissa S. Williams, "Reasons to Obey: 'Multiple Modernities' and Constructions of Political Legitimacy," in *East Asian Perspectives on Political Legitimacy: Bridging the Empirical-Normative Divide*, by Joseph Chan, Doh Chull Shin, and Melissa S. Williams (New York: Cambridge University Press, 2016), 35.

[165] Melissa S. Williams, Joseph Chan, and Doh Chull Shin, "Political Legitimacy in East Asia: Bridging Normative and Empirical Analysis," in *East Asian Perspectives on Political Legitimacy: Bridging the Empirical-Normative Divide*, by Joseph Chan, Doh Chull Shin, and Melissa S. Williams (New York: Cambridge University Press, 2016), 4.

[166] Langvatn, "Legitimate, but Unjust; Just, but Illegitimate Rawls on Political Legitimacy," 133.

[167] Bernard. Williams, *In the Beginning Was the Deed: Realism and Moralism in Political Argument* (Princeton, N.J.: Princeton University Press, 2005), 3.

[168] Williams, 4.

legitimacy is not an independent moral standard prior to politics, but is instead "inherent in there being such a thing as politics."[169] A situation of pure coercion is not political, but is the problem all political relations (in answering the first political question) seek to solve. He presents as axiomatic that the power of coercion cannot justify its own use.[170] The upshot is that demanding and offering justifications of coercive power is definitive of political relations. It also means that the weakness of the standard of legitimacy is deceptive; it is weak because it is merely a shell for people's actual beliefs about legitimacy which may have much more substantive content. As various justifications come to be questioned and rejected, the strength of the legitimacy standard in particular historical situations is ratcheted up; states must meet ever more stringent standards of legitimacy in response to their subject's demands, because they cannot fall back on the exercise of coercion to justify itself (without resorting to naked force and abandoning a claim to properly political authority).

Legitimacy also came to hold great importance in the late thought of John Rawls. Rawls sought a general concept of legitimacy that could go beyond the Weberian social-scientific understanding of actual obedience and provide a normative standard for appropriate acceptance of authority.[171] Yet he does not talk of moral legitimacy, but instead is in accord with Williams about the distinctly political nature of the legitimacy standard.[172] Political legitimacy is a composite quality, connected to moral justifiability (i.e. justice), legality, adherence to recognized procedures, and right pedigree.[173] Legitimacy is institutional, in that it is about correct processes for the creation of laws and the pedigree of political authorities.[174] The central notion is that of legitimate political authority: legitimacy creates political authority in the first

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[169] Williams, 5.

[170] Williams, 5–6.

[171] Langvatn, "Legitimate, but Unjust; Just, but Illegitimate Rawls on Political Legitimacy," 134.

[172] Langvatn, 135.

[173] Langvatn, 135.

[174] Langvatn, 134.

place, by creating a prima facie political-moral obligation on citizens to obey.[175] Within a political order, legitimacy has a nested structure: the constitution legitimates political institutions, which can in turn legitimate particular laws.[176] Rawls argues that while legitimacy is essentially connected to justice, it is a weaker standard requiring thresholds of sufficient procedural and outcome justice.[177] Thus, legitimacy is partially content-independent. Gross injustice negates legitimacy, but a law could be just and still illegitimate (if it produces just outcomes but was illegitimately adopted) or legitimate and unjust (so long as it is over the sufficiency threshold).[178] These features of legitimacy enable political stability under conditions of increasing value pluralism, including the pluralism of political values that animated the later Rawls. To mix the terminology and concerns of Rawls, Williams, and Weber: an overlapping consensus that a given constitution satisfies the basic legitimation demand can provide for a stable political order despite substantive disagreement on conceptions of justice or particular laws.

3.4 Law and Political Legitimacy

Law stands in a complex relation to political legitimacy. Law is not strictly a necessary condition of political legitimacy. Political regimes can be legitimated without recourse to law, as in Weber's examples of the accepted arbitrary authority of a traditional chief[179] or the charismatic authority of a prophet.[180] Yet there is broad agreement among liberal democratic theorists that law is a functional necessity in large-scale pluralistic societies.[181] Thus, under most conditions, the question of legitimacy arises with respect to a political order regulated by law.

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[175] Langvatn, 135–36.

[176] Langvatn, 134.

[177] Langvatn, 134.

[178] Langvatn, 135.

[179] Even the arbitrary rule of a traditional chief is sanctioned by a form of customary law.

[180] Weber, *The Theory of Social and Economic Organization*, 344, 359.

[181] Langvatn, "Legitimate, but Unjust; Just, but Illegitimate Rawls on Political Legitimacy," 137.

Under such conditions, law and political authorities stand in a dynamic equilibrium with regard to legitimacy; each draws legitimacy from and conveys legitimacy on the other.

For a law to be politically legitimate it must be authorized by the appropriate political authority (which much itself be legitimate). This is true for the direct authorization of statute law and for common law, in which tradition is given effective authorization by surviving ongoing judicial interpretation and legislative silence. Rawls' model of nested legitimacy clearly states the principle: the legitimacy of particular laws derives from their authorization by legitimate political institutions. For legal positivists, appropriate authorization is both a necessary and sufficient condition for the legitimacy of law. Some other theorists impose additional conditions on law. For instance, Lon Fuller argues that the principles of legality (he identifies eight) provide an internal morality of law that must be met in order for law to be law at all.[182] As law is a precondition for good or even legitimate law, meeting the test of legality would then be another necessary condition of legitimate law.[183] Rawls' formulation of the concept of legitimacy goes even further, incorporating as it does the test of sufficient justice that would render grossly unjust law – however authorized – illegitimate. For Fuller, this "external morality" of law is not the concern of judges,[184] but it is fair for us to say that it is a requirement of the political (if not legal) legitimacy of law.

On the other side of the equilibrium, many theorists take some degree of legality to contribute to the legitimacy of the very political institutions that authorize legitimate law. In his famous typology, Weber suggests that rational-legal forms of authority largely supersede traditional or charismatic authority in modern conditions.[185] Rawls also connects legitimacy to legality, although he has comparatively little to say on the subject.[186] To the extent that a conception of legitimacy is procedural, that is, concerned with the appropriate process for the

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[182] Lon L. Fuller, *The Morality of Law* (New Haven: Yale University Press, 1969).

[183] Fuller, 155–56.

[184] Fuller, 131–32.

[185] Williams, "Reasons to Obey: 'Multiple Modernities' and Constructions of Political Legitimacy," 37.

[186] Langvatn, "Legitimate, but Unjust; Just, but Illegitimate Rawls on Political Legitimacy," 137.

creation of authoritative commands, and the correct procedures are given by law, adherence to law will contribute to political legitimacy. Perhaps more importantly, violation of standing procedural laws will negate legitimacy within a given political order (this is how a law can be just but illegitimate). If Habermas and Rawls are right that law is functionally necessary for coordination in current conditions, then to the extent we accept the validity of Fuller's claims about the internal morality of law, the principles of legality will themselves shape conditions of legitimacy for law and political authority alike.

3.5 Legitimacy Now and Around Here

This discussion of law and legitimacy has introduced the idea that the social condition faced by a given political order may narrow down the range of possible responses to the basic legitimation demand. Legitimacy through personal authority may be more tenable in small-scale societies, in which people know one another directly, than it is in large-scale societies that require some form of law for successful coordination. In a society facing an existential threat, governments may be able to legitimately demand much more of subjects than in more fortunately situated societies. Bernard Williams suggests that critique can further narrow the range of viable legitimations, as people come to reject forms of authority that were once acceptable.[187] It becomes relevant to ask: given our historical situation, what can be legitimate to us? In Williams' terms, what are the conditions of political legitimacy “now and around here”?[188]

In contemporary Western political theory, the liberal democratic response to the basic legitimacy demand is hegemonic. Williams argues that, because the Enlightenment has made rival legitimations seem false and ideological, only a liberal solution is possible now and around here.[189] He even gives us a crude formula: Legitimacy + Modernity = Liberalism.[190] It is vital to note the explicit historicity of Williams’s account: the liberal state, insofar as it has foundations, is founded in its ability to satisfy the basic legitimation demand now and around here. Yet the

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[187] Williams, *In the Beginning Was the Deed*, 14.

[188] Williams, 8.

[189] Williams, 8.

[190] Williams, 9.

liberal state is based on the same historical process that makes it the only legitimate answer.[191] The liberal situation is historically particular, not universal. Williams indicates that there are a range of possible legitimate liberal regimes, but that all raise the standards of legitimacy by demanding greater protection of a broader range of individual interests.[192] Such regimes will take sophisticated steps to ensure that answers to the first political question do not become part of the problem, through recognizing free speech and the panoply of other political rights that help us avoid escaping pole-cats and foxes to be devoured by lions.[193] They will also protect a wider range of basic interests of citizens, reject rationalizations of disadvantage in terms of race and gender, and reject self-legitimating hierarchical structures that generate disadvantage.[194] Currently, at least some minimum requirement of participatory democracy is demanded as part of legitimacy, but the relative importance of this is contested and cannot be settled by transcendental argument.[195]

Rawls presents one of the most influential models of liberal political legitimacy in contemporary political theory. In fact, Silje Langvatn reconstructs three accounts of legitimacy in Rawls. In *A Theory of Justice*, she argues, legitimacy was a matter of being sufficiently close to the ideal of justice as fairness.[196] Realizing that this did not do sufficient justice to pluralism, in *Political Liberalism* Rawls presented his “liberal principle of legitimacy”: “our exercise of political power is fully proper only when it is exercised in accordance with a constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals acceptable to their common human reason.”[197] While this account

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[191] Williams, 8–9.

[192] Williams, 9, 7.

[193] Williams, 7; John Locke, *Two Treatises of Government*, ed. Peter Laslett (Cambridge: Cambridge University Press, 1988), 328, http://www.cambridge.org/gb/academic/subjects/politics-international-relations/texts-political-thought/locke-two-treatises-government?format=PB&isbn=9780521357302.

[194] Williams, *In the Beginning Was the Deed*, 7.

[195] Williams, 15–16.

[196] Langvatn, “Legitimate, but Unjust; Just, but Illegitimate Rawls on Political Legitimacy,” 138.

[197] John. Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), 137.

is the most familiar and perhaps thus most influential, I wish to devote more attention to the third formulation, which Langvatn presents as a "reasonable reconstruction" of Rawls from his latest works.[198] In his late works, Rawls based political legitimacy directly on the criterion of reciprocity.[199] Here, Rawls operated with an expansive idea of reasonable pluralism that includes not only a pluralism of comprehensive doctrines, but also a plural political conceptions of justice.[200] In the face of such pluralism, Rawls once again scaled back his ambitions for consensus. No longer do we aim for an overlapping consensus on justice, or even on a single most reasonable political conception of justice. Instead, Rawls merely aimed for an overlapping consensus that the political conceptions of justice operative in the constitution are in fact reasonable.[201] This leads Rawls to focus on the reasons people give to justify political power on fundamental issues. For Rawls, if the reasons people give for the exercise of political power are such that other citizens could accept as reasonable, then even losing minorities can accept decisions as legitimate and binding.[202] A legitimate constitution will be shaped by public reason over time, and will be able to confer legitimacy on ordinary laws and decisions.[203] With this formulation, Rawls wants to be able to make do with only minimal assumptions about the ideas political reasonable citizens will implicitly accept from their "public political culture": democracy or popular sovereignty, constitutionalism, citizens as free and equal, and society as a fair system of cooperation.[204] The extensive liberal-democratic nature of these assumptions clearly shows the local and historically specific nature of the public political culture; this too is firmly an account of legitimacy now and around here.

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[198] Langvatn, "Legitimate, but Unjust; Just, but Illegitimate Rawls on Political Legitimacy," 132.

[199] Langvatn, 140.

[200] Langvatn, 141.

[201] Langvatn, 143–44.

[202] Langvatn, 142–43.

[203] Langvatn, 145.

[204] Langvatn, 143.

Rawls's late focus on public reason brought his account of legitimacy closer to Habermas' pre-existing philosophical reconstruction of the legitimacy of legal order in Western democratic societies. Through his theory of communicative action, Habermas argues that free and unfettered communication can substitute for the metaphysical grounds of political legitimacy destroyed by the enlightenment's disenchantment of the world.[205] I cannot do justice to the complexity of Habermas' theory here, but it is worth sketching a brief outline. Communicative reason is speech oriented to mutual understanding, and embedded in the structure of languages are certain basic validity claims (truth, truthfulness, and rightness).[206] As Melissa Williams puts it, "Communicative action, then, as grounded in the mutual agreement of equal subjects, provides a non-coercive foundation for the coordination of social relations."[207] Habermas conceives of a public sphere with formal and informal components. In the diffuse and multi-centered informal public sphere, unfettered communication enables the formation of public opinion over time. In the formal public sphere, political institutions formalize public opinion as public will in law. The components of the public sphere are mutually constituting, with freedom of deliberation secured through basic rights that are themselves subject to critical evaluation and change over time. This too is a historically specific process, requiring a supportive political culture or a rationalized lifeworld that can meet rational political will-formation half-way.[208]

Both Habermas and Rawls see themselves as resolving tensions and overcoming the shortcomings of existing theories of legitimacy. In this, they converge on a form of deliberative democracy as a synthesis of liberal and civic republican traditions.[209] Roughly speaking, the liberal tradition is seen to focus on respect for rights, particularly negative rights, as the main source of governmental legitimacy, while the civic republican tradition places a greater emphasis on popular sovereignty, active participation, and shared speech. Habermas rejects the primacy of

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[205] Williams, "Reasons to Obey: 'Multiple Modernities' and Constructions of Political Legitimacy," 38–39.

[206] Williams, 38.

[207] Williams, 39.

[208] Williams, 39.

[209] Langvatn, "Legitimate, but Unjust; Just, but Illegitimate Rawls on Political Legitimacy," 141–42; Williams, "Reasons to Obey: 'Multiple Modernities' and Constructions of Political Legitimacy," 40.

one over the other, arguing that deliberative democracy can present private autonomy (liberal) and public autonomy (civic republican) as co-original.[210] The rights that underpin participation in the deliberative process of collective self-legislation are given content over time by that very process of shared deliberation.[211] In the theories of both Rawls and Habermas, a major component of political deliberation is the continual raising and answering of the basic legitimation demand. That is to say, in a Habermasian public sphere, citizens continually demand and receive justifications for exercises of political power. Under the Rawlsian conception of public reason, any challenges to political power that can be couched in publicly reasonable terms must be given answers that are themselves publicly reasonable. The depth and breadth of challenges to the legitimacy of rule in modern, pluralistic societies dictates that only a system that can continually answer challenges to its legitimacy can provide a stable answer to the basic legitimation demand.

Given the ever-present temptation to universalism in liberal democratic thought, it is vital to openly acknowledge the parochialism of liberal democratic conceptions of legitimacy. The concept of legitimacy has much broader currency than these conceptions. This is becoming increasingly clear as political thought catches up to globalization; with the emergence of the global village, democracy is no longer the only legitimacy game in town. East Asian patterns of political legitimation are different from what modernization theory predicts.[212] At any given level of economic development, citizens in East Asia express less attachment to democracy and the rule of law and greater support for authoritarian forms of rule.[213] Governments enjoy a "legitimacy premium", that is, people support governments at higher levels than you would expect from their judgements of state performance.[214] This so-called exceptionalism is only terribly puzzling if we insist on viewing it through the lens of Western standards of legitimacy.

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[210] Williams, "Reasons to Obey: 'Multiple Modernities' and Constructions of Political Legitimacy," 42.

[211] Williams, 42.

[212] Williams, 30.

[213] Williams, 29.

[214] Williams, 30.

Empirical and normative study have found other legitimacy standards operating in East Asia. Singapore, for instance, explicitly grounds political authority in a principle of meritocracy over and against democracy.[215] The Confucian-based concept of minben legitimacy also appears to be widespread. Minben, meaning roughly "the people as root," is taken to mean that political power should be guided by the well-being of the people, rather than the interests of their rulers, and is clearly operative alongside individual rights and the rule of law as a standard of legitimacy in Hong Kong.[216] Faced with such current, competing conceptions of legitimacy, liberal democratic theory can and does abandon universalist pretensions in a retreat to conscious parochialism, including Bernard Williams' "now and around here" and Rawls' "public political culture." Whether absenting oneself from the global conversation about legitimacy is advisable, the move is not even available to liberal democrats confronting challenges from Indigenous people, who are after all very much now and around here protest their exclusion from public political culture. Indigenous people also challenge their forced inclusion premised on acceptance of the terms of Western discourse.[217]

3.6 Indigenous Challenges to Theory

For liberal democrats in Canada (and elsewhere, especially Australia, New Zealand, and the United States), Indigenous challenges to legitimacy are uniquely inescapable. Because Indigenous people are both local and current, their claims cannot be avoided by any retreat of the "now and around here" form – not that this stops people from trying. The locality of Indigenous people is hardest to deny; the very term "Indigenous" denotes the priority of Indigenous claims to "around here." It is more common to try to present Indigenous cultures as atavistic, and to minimize their rights claims by freezing them in the past. This is the approach of Canadian courts in recognizing Aboriginal legal rights, by limiting them to pre-contact practices.[218] We

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[215] Williams, Chan, and Shin, "Political Legitimacy in East Asia: Bridging Normative and Empirical Analysis," 6.

[216] Williams, Chan, and Shin, 6.

[217] see for example Glen Sean. Coulthard, *Red Skin, White Masks : Rejecting the Colonial Politics of Recognition* (Minneapolis: University of Minnesota Press, 2014); Matthew Tomm, "Public Reason and the Disempowerment of Aboriginal People in Canada," *Canadian Journal of Law and Society* 28, no. 3 (2013): 293–314.

[218] R. v. Van der Peet, 2 SCR 507 (C 1996).

have already seen that the experience of East Asia questions the presumption of a single path to modernity. The Indigenous challenge is of another order; Indigenous people assert, here and now, some of the very principles of legitimacy Western modernity tried to define itself against and thought to have superseded. Thus, we see from Indigenous people assertions of the validity of sacred law, self-justifying traditional hierarchies, or the personal authority of outstanding individuals.[219] It is difficult for liberal democrats who tell a story about the rationalization of society or the progressive disenchantment of the world to understand these claims as anything but a throwback, but it is necessary to do if we are to take seriously the challenges posed by Indigenous people.

Some of the most acute challenges to the practice of Canadian justice do not pose a challenge for liberal democratic theories of legitimacy. In fact, those theories support the claims Indigenous people make against the state. One of the few basic features Bernard Williams identifies of all viable liberal theories of legitimacy is to forbid justifications of disadvantage based on race.[220] Such theories then provide theoretical resources in support of Indigenous critiques of racism embedded in the criminal justice system. Rawls' requirement of sufficient justice, meanwhile, provides a theoretical justification for a legitimacy critique based on concrete injustices. The more blatantly abusive practices, such as “starlight tours”, are clear instances of the sort of gross injustice that invalidates legitimacy independent of procedural justice. Similarly, the systematic underrepresentation of Indigenous people on juries in Ontario could be considered to put the system below the threshold of sufficient procedural justice.[221] Most notably, any liberal democratic theory of legitimacy that requires a justification for the use of power be offered to those over whom the power is claimed provides an avenue for Indigenous people to press their claim that the criminal justice system was imposed on them without such justification.

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[219] Borrows, *Canada’s Indigenous Constitution*, 24; Milward, *Aboriginal Justice and the Charter*, 101–2; Frontenac Ventures Corporation v. Ardoch Algonquin First Nation, No. C48642 (ONCA July 7, 2008).

[220] Williams, *In the Beginning Was the Deed*, 7.

[221] Iacobucci, *First Nations Representation on Ontario Juries*.

Unfortunately, liberal theories of public justification are a double-edged sword for Indigenous thought. As Matthew Tomm argues, they can help defend Indigenous people against unreasonable exercises of state power, but they also provide the normative justification for the exclusion of Indigenous viewpoints.[222] The Rawlsian conception of public reason can provide a powerful tool to protect Indigenous people from abuses of state power, by demanding that all power is justified to them.[223] *Prima facie*, it would seem that a broad conception of public reason would condemn the "conceptual hegemony" of liberal concepts of justice in Canada and give a reasonable account of its harms in silencing Indigenous people and failing to provide reasons that resonate for them.[224] Unfortunately, the specific content of Rawlsian formulations of public reason use the concept of "reasonable" to exclude many types of reasons, including many of those advanced by Indigenous people. By presenting a particular, Anglo-European conception of reason as definitive, such that only reasons grounded in that tradition count, the liberal tradition usurps decision-making power and subordinates Indigenous conceptions of justice.[225] If this were merely a matter of liberalism asserting the primacy of culturally-specific forms of reasoning and arguing, it could perhaps be corrected by more inclusive forms of deliberation. However, it is the very requirement of *public* reasons that prevents Indigenous people from deliberating on their own terms and in their own voice by offering reasons that are grounded in their particular worldview (and which others cannot accept).[226] This is not merely a pitfall for a Rawlsian formulation. Bernard Williams explicitly argues that legitimacy's requirement of offering a justification to each subject does not mean that it requires universal *acceptance* of those justifications. After all, there will always be "anarchists, or utterly unreasonable people, or

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[222] Tomm, "Public Reason and the Disempowerment of Aboriginal People in Canada," 293–94.

[223] Tomm, 300.

[224] Tomm, 294, 301.

[225] Tomm, 295, 302.

[226] Tomm, 294.

bandits, or merely enemies" who will reject such a justification.[227] It is not clear where in that list Williams would place "self-governing nations with independent legal traditions", but over time liberal Canada has cast Indigenous people trying to practice their culture variously as all four. At the moment, though, most of the work of exclusion is done by the idea that Indigenous demands are unreasonable. In fact, the practice of public reason in Canada sometimes performs this exclusionary function at the expense of its inclusive function, as when the court denies Indigenous claimants the same epistemic flexibility in forms of rationality it relies upon for its own authority.[228]

A major challenge posed directly to liberal democratic theories of legitimacy is the assertion by Indigenous people of the validity of non-public reason, or arguments from particularity. This constitutes a denial that public justification is required for all uses of political power. The very concept of Indigeneity invokes the meaningfulness of particularity, identifying the connection of a particular people to particular land. Many Indigenous arguments proceed from that particularity, asserting the validity of their law only for them on their territory.[229] Some Indigenous advocates bow to the necessity of the "hegemonic constraint" that requires conforming to the "moral lexicon and justificatory practices of the dominant culture in order to successfully assert their rights and interests."[230] Those who refuse to play by the liberal rules of the game are frequently excluded. Even when exceptions to normal rules are made, as when Canadian courts admitted oral history as evidence in *Delgamuukw*, the courts filter out Indigenous subjective normativity to hear only "objective" descriptive claims.[231] Dale Turner has argued for Indigenous "word warriors" to become fluent in the hegemonic discourse of

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[227] Williams, *In the Beginning Was the Deed*, 135–36; discussed in Edward Hall, "Bernard Williams and the Basic Legitimation Demand: A Defence," *Political Studies* 63, no. 2 (June 1, 2015): 472–73, https://doi.org/10.1111/1467-9248.12070.

[228] Valverde, "The Crown in a Multicultural Age."

[229] Tomm, "Public Reason and the Disempowerment of Aboriginal People in Canada," 302.

[230] Tomm, 294.

[231] John Borrows, "Listening for a Change: The Courts and Oral Tradition," *Osgoode Hall Law Journal* 39 (2001): 26–28; discussed in Tomm, "Public Reason and the Disempowerment of Aboriginal People in Canada," 305.

liberal democratic theory in order to articulate Indigenous claims effectively to the Canadian state.[232] Glen Coulthard argues that such an approach can lead Indigenous people to be trapped in and shaped by the power of state discourses.[233]

While Indigenous people may not claim that their reasons are the right reasons (or even normative at all) for others, many do make strong claims about the sufficiency of non-public reasons to govern their lives and the structures of political power in their communities. Two Kanien'kehá:ka women, Osennontion and Skonaganleh:rá, for instance, claim to be “absolutely different” and that the thinking of others cannot be applied to what they say.[234] They declare a lack of interest in Western rationality, asserting that a belief in their creation story means they do not need other explanations.[235] Gordon Christie provides support, arguing that “Emerging from a combination of wisdom gleaned from mythological time and thousands of years spent reflecting on the best ways to live are visions of ways of life which are considered completely adequate to the task at hand.”[236] To liberalize such a society, in the sense of opening it up to rational critique to provide members with a “context of choice” is inappropriate and threatening, given that Indigenous societies have a way of life “known to be good.”[237] These claims read to me as a strong assertion of a right for Indigenous people to govern themselves according to their own particular principles. This is not merely a claim of self-determination in terms of liberal autonomy, but the stronger claim that no justification of internal matters is owed to outsiders, and that such a justification, if offered in authentic terms, would not make sense to them anyway. A denial of the necessity of external justification also seems to be at play in Glen Coulthard's rejection of the politics of reconciliation in favour of the self-assertion of Indigenous people as

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[232] Dale A. Turner, *This Is Not a Peace Pipe: Towards a Critical Indigenous Philosophy* (Toronto: University of Toronto Press, 2006).

[233] Coulthard, *Red Skin, White Masks*, 45–46.

[234] Osennontion and Skonaganleh:RÁ, “Our World,” *Canadian Woman Studies* 10, no. 2 (September 1, 1989): 7, http://cws.journals.yorku.ca/index.php/cws/article/view/11160.

[235] Osennontion and Skonaganleh:RÁ, “Our World.”

[236] Christie, “Law, Theory and Aboriginal Peoples,” 91.

[237] Christie, 91–94.

Indigenous.[238] If justification is only owed internally, the imposition of external forms of criminal justice are necessarily illegitimate. Thus, the only people with authority to resolve conflicts in Indigenous communities would be internally respected individuals – an external, non-Aboriginal judge "is simply an outsider without authority."[239] If non-Indigenous judges are to have authority – say, as a device to prevent internal domination – that authority must be generated by the internal norms of the Indigenous community, that is, the judge must have earned respect in their terms and cannot simply rely on their authorization by the Canadian legal system.

Liberal democratic theories of legitimacy largely taken the society in which political power must be legitimated as a given. Although the boundaries of a particular political community may themselves be subject to a requirement for justification, theorists allow themselves fairly substantive presumptions about historically existing society. The Indigenous challenges to legitimacy canvassed so far directly challenge these starting assumptions. They argue that they do not implicitly share the values of Rawls's liberal democratic public political culture, challenging constitutionalism, the priority of free and equal individuals, and popular sovereignty.[240] We have also seen that Indigenous people challenge Habermas' rationalization of the lifeworld by rejecting the authority of Western religion to challenge their beliefs or knowledge structures. In resisting their erasure from public political culture, Indigenous people challenge the boundaries, necessity, and legitimacy of the historically existing political community that is Canada. While some Indigenous people are content to claim Canadian citizenship, others (notably many Haudenosaunee) reject the idea that they are subjects of Canadian governments at all, going so far as refusing to allow Canadian law enforcement to access their territory and issuing their own passports for international travel.[241] More generally, in asserting the legitimacy of their particular legal traditions and justice practices, Indigenous

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[238] Coulthard, *Red Skin, White Masks*, 154.

[239] Monture-Okanee and Turpel, "Aboriginal Peoples and Canadian Criminal Law," 246.

[240] Turpel, "Aboriginal Peoples and the Canadian Charter."

[241] Audra Simpson, *Mohawk Interruptus: Political Life across the Borders of Settler States* (Durham: Duke University Press, 2014).

people challenge the necessity (and hence legitimacy) of a unified Canadian approach to criminal justice. Finally, we have seen that Indigenous people challenge the legitimacy of Canada as a political community at all, given its unjustified assertion of Crown sovereignty and failure to legitimate itself in terms of pre-existing Indigenous legal traditions.[242]

3.7 Towards a Respectful Liberal Response: Freestanding Legitimation of Justice Institutions

Canadian liberal democrats are unlikely to be able to accept all the claims raised by Indigenous people, but we can and should do better than dismissing them out of hand as unreasonable. In shaping the principles of justification and deciding what sort of reasons will count, we need to retreat from specific, liberal-democratic conceptions of legitimacy and rely instead on the more capacious formulations of the general concept of legitimacy. The reality of Indigenous people and their worldviews falsifies the modernization narrative. This applies equally to Williams's crude formula (legitimacy + modernity = liberalism) and to more sophisticated accounts of the rationalization and disenchantment of society. For some reason, many liberals find it hard to let go of modernization theory. Habermas provides a cautionary example. Sometime after history failed to end, Francis Fukayama put to Habermas that East Asian religious ideas about the value of nonhuman nature might help counterbalance Western-rational environmental destructiveness. Habermas responded that however admirable the moral content of such ideas, we need to avoid a "dubious spiritual reenchantment of nature" and that East Asian societies needed to follow Western modernity in the transition to postmetaphysical thinking, "albeit in their own way."[243] By some bizarre alchemy, the failure of the descriptive story about progressive disenchantment turns it into a normative imperative. Liberal democrats cannot use historical facticity to rule out competing legitimacies because Indigenous people exist "now and around here": their challenges are live, local challenges to the legitimacy of the Canadian state. Theories of public reason have a tendency to do this by building liberal-democratic assumptions into their models of appropriate discourse. Other models remain on the

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[242] Borrows, *Canada's Indigenous Constitution*, 122–23.

[243] Quoted in Williams, "Reasons to Obey: 'Multiple Modernities' and Constructions of Political Legitimacy," 48.

table, and we must find a mode of dialogue that can make space for other ways of knowing and arguing.

Some observers look at the gulf between Indigenous and liberal democratic legitimations of justice and suggest more separation, in the form of independent Indigenous justice systems.[244] Complete separation is not a viable option in practice, nor does it present a theoretical solution to the legitimacy problem. Practically, the lives of Indigenous and non-Indigenous people in Canada are far too intertwined to be dealt with by entirely separate systems; criminal issues will inevitably arise between Indigenous and non-Indigenous people, or for each in the jurisdiction of the other. From the perspective of liberal democratic Canada, there is also a serious principled objection to separation. The respect owed by Canadians to Indigenous people is dual: we must respect Indigenous people as Indigenous (that is, respect their Indigenous worldviews and lifeways) and respect Indigenous people as equal co-citizens. These two forms of respect can find themselves in tension in the design of justice systems. I address these problems at greater length in the following chapter, arguing that some form of reconciliation of Indigenous and non-Indigenous principles of justice within shared institutions is inescapably necessary.

The idea of dual respect bears a superficial resemblance to the "citizens plus" model advocated by Alan Cairns. Under this approach, Indigenous people are viewed as citizens like any others, just with an additional package of rights.[245] This approach has been roundly criticized as assimilatory by Indigenous scholars, with Gordon Christie even calling it a "sly form of colonial apology" in his review.[246] As I understand it, a central critique is that the idea of citizens plus takes the citizen part as fundamental and treats Indigeneity as something that can be bolted on to the citizenship framework (hence the "plus"). The idea of dual respect attempts to capture the intuition that more is owed to Indigenous people than simply the respect as equal co-

[244] Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide*, 177.

[245] Alan C. Cairns, *Citizens plus: Aboriginal Peoples and the Canadian State*, Brenda and David McLean Canadian Studies Series (Vancouver ; Toronto: UBC Press, 2000).

[246] Gordon Christie, "Book Review: Citizens Plus: Aboriginal Peoples and the Canadian State, by Alan C. Cairns; First Nations? Second Thoughts, by Tom Flanagan; A People's Dream: Aboriginal Self-Government in Canada, by Dan Russell," *Osgoode Hall Law Journal* 40, no. 2 (April 1, 2002): 189–200.

citizens, but to do so in a way that does not prejudge the ethical relationship between the two forms of respect. Neither citizen respect nor respect for indigeneity is taken to be more fundamental; the relationship between the two must itself be negotiated in respectful cross-cultural dialogue.

As a precondition for a respectful dialogue, there needs to be some way of identifying who needs to be brought together in conversation. The basic principle of legitimacy suggests that justification is owed to all those over whom authority is claimed, but this is a prior question: among whom should claims of authority even be raised? Put another way, why is any given issue something that must be decided together, rather than apart? Melissa Williams offers a possible guiding principle with the concept of "communities of shared fate." This captures the fact that human beings are bound together in ethically significant relationships by forces not of our own making.[247] Whether we do find ourselves in a community of shared fate in any given situation or with regard to any given problem must be an open question in respectful dialogue, but the concept provides a helpful guiding principle in mapping the boundaries of dialogic inclusion. "We are all in the same boat, like it or not, so let us talk" is a more respectful starting point than, "I claim authority over you, here are my justifications."

Indigenous challenges to liberal democratic authority claims go all the way down the nested structure, challenging not just particular institutions – such as criminal justice – but also the political institutions that legitimate them and the underlying constitutional order that in turn legitimates political institutions. In the long term, any successful attempt to re-establish legitimacy will need to answer Indigenous challenges at the deepest level. In other words, the only long-term solution to the crisis of legitimacy is the negotiation of a decolonized constitutional order for Canada that can be accepted as legitimate by Indigenous people. This is a mammoth undertaking, and one that is likely to give full meaning to the idea of the "long term": although it is imperative that non-Indigenous Canadians engage in this effort, even with the best will in the world this will not be accomplished for many generations. That will seems currently lacking, with even the tepid efforts towards reconciliation of the current government considered

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[247] Williams, "Citizenship as Agency within Communities of Shared Fate," 43.

by more Canadians to be too much rather than too little.[248] The question of legitimacy of particular institutions, and especially of the criminal justice system, cannot wait for a resolution of the question of the overall legitimacy of the Canadian constitutional order: the problems in criminal justice are too severe to let further generations be broken on the "wheel of injustice."[249] This means that, until a decolonized constitutional order can be realized, institutions must take on some of the burden of legitimation that they would ordinarily delegate to political institutions. They must strive to establish a degree of freestanding legitimacy, that is, legitimacy in the eyes of those they claim authority over independent of their own political authorization. This does not mean that political authorization ceases to be important when it is contested by Indigenous people; the political authorization of criminal justice institutions is still a crucial element of their legitimacy for the broader public. However, institutions must also seek to legitimize themselves in terms acceptable to the Indigenous people over whom they claim authority.

In effect, the criminal justice system must seek to establish an overlapping consensus on its legitimacy (and thus authority) in the domain of criminal justice. Rawls deploys the idea of an overlapping consensus to enable a freestanding political conception of justice that can enjoy stability in a society characterized by a plurality of reasonable comprehensive doctrines.[250] The crucial element for our purposes is that in an overlapping, rather than strict, consensus, it is only necessary for parties to accept the central claim, not agree on their justifications for doing so.[251] In Rawls' case, people may endorse the political conception of justice for widely differing reasons, according to their various comprehensive doctrines.[252] The idea of an overlapping consensus thus creates the possible of more agreement on core areas of common concern precisely by accepting the continuation of ongoing and deep disagreement on non-public reasons. In the case of criminal justice institutions, however, we are seeking an overlapping

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[248] "Truths of Reconciliation."

[249] Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide* inspired by Art Solomon.

[250] Rawls, *Political Liberalism*, 133–72.

[251] Rawls, *A Theory of Justice*, 340.

[252] Rawls, *Political Liberalism*, 140.

consensus on the legitimacy, rather than the justice of these institutions. Legitimacy is a more capacious standard, because from any particular perspective, more institutional arrangements can be endorsed as legitimate than accepted as just. The acceptance of institutions as legitimate even if not fully just is in fact the norm for citizens in pluralist democracies. Few of us accept institutional arrangements such as the court system as fully just, but we can accept them as legitimately authorized and operated. This opens even more space for agreement amidst deep disagreement on theories of justice.

One practical example of this would be the use of sentencing circles within provincial courts, as has been an occasional practice in Canada. Typically, a sentencing circle involves the victim, offender, justice system professionals, and members of the community sitting in a circle to discuss the case and suggest possible dispositions. The process is advisory to the judge before the judge passes sentence.[253] Such a process can be endorsed as legitimate by the non-Indigenous justice system and Indigenous community alike, but for very different reasons. From the perspective of the non-Indigenous criminal justice system, sentencing circles are legitimate because they operate within the framework of Canadian law and are authorized by a judge who is in turn duly authorized by the legal system (which is in turn constitutionally authorized).[254] Indigenous communities, on the other hand, may have a variety of reasons for viewing sentencing circles as bolstering legitimacy: they may have a process for community authorization of sentencing circles, or such circles may include elements of traditional healing justice, or may be viewed as legitimate simply for enabling community participation in the justice system.[255] The crucial fact here is that an institutional innovation – the use of sentencing circles – enhances the legitimacy of a justice practice for Indigenous people, without losing legitimacy for non-Indigenous people and without requiring full agreement on theories of justice.[256]

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[253] Melanie Leigh Spiteri, “Sentencing Circles for Aboriginal Offenders in Canada: Furthering the Idea of Aboriginal Justice within a Western Justice Framework.” (University of Windsor, 2001), 11, https://scholar.uwindsor.ca/cgi/viewcontent.cgi?article=4429&context=etd.

[254] Spiteri, 11; on Indigenous procedures for authorization of judge-like authority in elders, see: Milward, *Aboriginal Justice and the Charter*, 81–86.

[255] Spiteri, “Sentencing Circles for Aboriginal Offenders in Canada: Furthering the Idea of Aboriginal Justice within a Western Justice Framework.,” 71.

256 I have used the examples of sentencing circles merely as illustrative of how an overlapping consensus on

It is worth noting that sentencing circles as they are found in provincial courts are not an institution that either Indigenous or non-Indigenous legal traditions would produce independently or would endorse as fully just. Each legal tradition will endorse a narrow range of institutions as just but will be able to accept a wider range as legitimate. Hybrid practices that neither tradition would choose are more likely to command an overlapping consensus on legitimacy in most cases. There may, however, be circumstances in which the Canadian criminal justice system can accept the legitimacy of practices drawn from Indigenous legal systems that it would not recognize as fully just. In practice, this is already the case through diversion projects whereby justice system officials (typically police or Crown prosecutors) divert individual cases to community justice programs operating outside the structure of the Canadian legal system. Such programs are typically operated by non-profit, community-based agencies receiving funding from the federal and provincial governments through the Aboriginal Justice Initiative. In focusing on the search for an overlapping consensus on legitimacy, much more space is opened up for potential agreement and for innovation to find mutually acceptable justice practices and institutions. It may require that the practices within each tradition that are found most objectionable by others be jettisoned, but it nevertheless allows mutual acceptance of a much broader range of practices.

I have emphasized the possibility of opening up broader space for agreement on procedures if the reasons for endorsing those procedures as legitimate do not have to be shared, but is important to remember than Indigenous and non-Indigenous people do share many reasons for accepting criminal justice institutions as legitimate. The conflict over criminal justice institutions is not primarily a matter of conflicting interests but is instead a disagreement about ideas of justice. Indigenous and non-Indigenous Canadians share an interest in reducing the incidence of crime, particularly violent crime, and in restoring harmony to communities after a crime has occurred. Indigenous people do however challenge some of the stated purposes of Canadian criminal justice, and many of the particular practices of the criminal justice system. As criminal justice institutions seek to legitimize themselves for Indigenous people, it is then prudent for them to emphasize the rationales and practices that are valued by both Indigenous and non-Indigenous Canadians. For example, the Criminal Code lays out the objectives of

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legitimacy can emerge for justice practices, and not as an exemplar of how the justice system should operate.

sentencing as: denunciation, deterrence, separation of offenders from society, rehabilitation, reparation of harm, and promotion of a sense of responsibility in offenders.[257] Many Indigenous legal systems share many of these objectives, including a particular emphasis on promoting responsibility, repairing harm, and restoring relationships.[258] A pragmatic criminal justice institution seeking legitimacy, then, would be wise to focus on the shared elements while de-emphasizing more contested rationales (such as denunciation) and avoiding the punitive rationales which, while absent from the Code, animate much of the political debate over criminal justice in Canada.

In Rawls' scheme, the overlapping consensus finds its formal, institutional expression in a package of constitutional essentials governing the basic structure of society.[259] In the case of a cross-cultural overlapping consensus on legitimate institutions for regulating co-existence, the appropriate institutional structure is a treaty. A treaty is, after all, a formalization of a particular type of overlapping consensus: each party to the treaty agrees to its contents, but they may do so for very different reasons.[260] There is a crucial difference between contracts and treaties that is worth noting here. A contract is activated by the consent of the parties but is given force by the existing framework of contract law.[261] A treaty, on the other hand, while also activated by the consent of the parties is given binding force through ratification within the independent legal systems of the parties. That is to say, the treaty is given legal weight by the overlapping legitimation of independent legal traditions, not by conforming to the structures of a single overarching legal framework. In this way, treaty-making provides the template for the formalization of cross-cultural overlapping consensus on legitimate institutions. The ideal

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[257] "Criminal Code, RSC 1985, c C-46," accessed August 24, 2018, https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-46/latest/rsc-1985-c-c-46.html.

[258] Spiteri, "Sentencing Circles for Aboriginal Offenders in Canada: Furthering the Idea of Aboriginal Justice within a Western Justice Framework.," 5–6.

[259] Rawls, *Political Liberalism*, 11.

[260] The reasons don't have to differ. Treaties may be, for example, a means of solving collective action problems to which everyone agrees for the same reason. But this is true of overlapping consensus in general: it may encompass a degree of strict consensus but can also be broader.

[261] That body of law may also set out further activation criteria, such as the exchange of consideration of material value to the parties.

resolution would be the establishment of institutions by treaty. As noted above, however, ideal resolutions in this area are a matter for the long term. A decolonized Canadian legal order may be eventually be the product of a form of treaty federalism, but in the interim, institutions do not have the legitimate authority (on the Canadian side) to enter into treaties to establish their freestanding legitimacy.[262] Nevertheless, treaties give a model of the type of agreement and ratification that may be necessary to establish such legitimacy. The relevant feature is that in order to enjoy mutual legitimacy, any institution will need to be the product of an agreement that is in some way ratified both by the Canadian justice system and by the Indigenous people it claims authority over.[263] That ratification must take place according norms that are internally acceptable to each party to the agreement: Canadian norms of justice (co-developed by Indigenous and non-Indigenous Canadians) to govern the Canadian justice system and Indigenous norms operant in the communities where the system is applied.

What might this look like in practice? Respectful cross-cultural dialogue between agents of the justice system and Indigenous people will need to take place in a variety of institutional settings. Political representatives may be best placed for abstract discussions of principles of reconciliation, but in sorting out the practical details of the functioning of the elements of the criminal justice system those involved in applying the system must be part of the conversation with those to whom the system is applied. The appropriate setting will vary, based on the particular element of the criminal justice system that is involved. For police, for example, the answer may be in restructuring civilian oversight bodies and police boards to require dual authorization by the Canadian legal system and the Indigenous communities served by that police force. Correctional institutions may need to seek greater authorization from the communities they are located in and the whose members they incarcerate. There are already steps in this direction, as representatives of such institutions do undertake consultation with

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[262] on treaty federalism see: James (Sakej) Youngblood Henderson, "Aboriginal Jurisprudence and Rights," in *Advancing Aboriginal Claims: Visions, Strategies, Directions*, ed. Kerry Wilkins, Purich's Aboriginal Issues Series (Saskatoon: Purich Pub, 2004), 97–90; Kiera L. Ladner, "Treaty Federalism: An Indigenous Vision of Canadian Federalisms," in *New Trends in Canadian Federalism*, ed. François Rocher and Miriam Catherine Smith, 2nd ed (Peterborough, Ont: Broadview Press, 2003), 167–94.

[263] There is an apparent asymmetry to a bargain between a system and people. However, Indigenous people should be included in the formulation of the rules of the Canadian justice system (as equal co-citizens) as separately, *as Indigenous people* subjected to Canadian justice.

Indigenous people. However, the real shift would be from a model that sees legitimacy as a product solely of the Canadian legal system and consultation as an optional extra to a model that sees legitimacy as having dual sources in Indigenous and non-Indigenous procedures of authorization. Much of the remainder of the dissertation is directed towards opening the conceptual space to enable such a shift, but the thrust of this chapter is to point out that such institutions will need to do some of the work of legitimation themselves.

The judiciary gives us some of the most advanced examples of adapting procedures in search of Indigenous legitimacy but is also the area where progress is most uneven. A number of provincial court initiatives attempt to involve Indigenous communities in redesigning the administration of justice. There are a small number of specialized courts placing an emphasis on Indigenous persons, with varying levels of incorporation of Indigenous practices and involvement of Indigenous communities: 13 in Ontario, five in BC, and one in Saskatchewan.[264] Such courts are typically constrained by the strictures of Canadian law and so often restrict community participation to the sentencing stage of proceedings. Incorporation of Indigenous traditions is often a matter of the use of ceremony, such as smudging, and a greater emphasis on rehabilitation rather than punishment in sentencing.[265] One notable example is the Saskatchewan Cree-speaking circuit court, which is unique in making the administration of justice available in an Indigenous language. The limitations of such initiative suggest two things. First, courts need a clearer mandate to seek legitimation from the communities they serve, so that it is not left to individual judges to decide whether or not to engage with communities. Second, the court system as a whole needs much more conceptual and legal leeway to alter its practices to be more legitimate in the eyes of Indigenous people.

In order to respond effectively and respectfully to the challenges Indigenous people raise to the legitimacy of criminal justice in Canada, it will thus be necessary for the institutions of criminal justice to take on the unfamiliar burden of legitimizing themselves through dialogue

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[264] Jonathan Rudin, "The (in)Justice System and Indigenous People," *Policy Options*, April 30, 2018, https://policyoptions.irpp.org/magazines/april-2018/the-injustice-system-and-indigenous-people/.

[265] "Specialized Courts | Provincial Court of British Columbia," accessed September 4, 2019, https://www.provincialcourt.bc.ca/about-the-court/specialized-courts#IndigenousCourts.

with Indigenous people and communities. This will be difficult, as such institutions are accustomed to being able to delegate that work to political institutions, and thus take their day-to-day legitimacy for granted. In order to operate effectively, however, there is no option but to establish some sort of freestanding legitimacy in the long interim between today and a future decolonized constitutional order. I have argued that institutions should seek an overlapping consensus on their own legitimacy between the Canadian legal system and Indigneous people. In order to do so, institutions will likely need a political mandate from Canada to seek legitimation from the people and communities they serve and will need greater legal space in which to make the necessary changes. Given the myriad difficulties associated with such an approach, it may seem like the creation of separate criminal justice institutions for Indigenous people is an easier path to legitimacy. In the next chapter, I argue that while separate justice institutions may form part of the solution (especially in the long term), they cannot solve the legitimacy problem. Some form of reconciliation of theories of justice within a single system will be necessary to enable overlapping consensus on the legitimacy of particular practices. In making this argument, I will give clearer expression to the institutional form of the cross-cultural dialogue needed to establish legitimacy.

Chapter 4
The Inescapability of Reconciliation

4 The Inescapability of Reconciliation

4.1 Introduction

So far, I have argued that the Canadian criminal justice system is in a state of chronic crisis in its dealings with Indigenous people and that this crisis is best understood as the system overall lacking legitimacy for Indigenous people. I have also argued that the legitimacy of the system cannot be redeemed according to the usual, abstracting procedures of liberal political thought. If the legitimacy failure is an inherent product of the coercive application of an alien, colonial legal order to Indigenous people, it may be necessary to accept that the system is irredeemably illegitimate. In such a case, it seems logical to suggest that solution to the legitimacy problem lies the in creation of a separate justice system for Indigenous people, to operate according to Indigenous norms, leaving the existing system to operate for non-Indigenous Canadians. This was the proposal of the Royal Commission on Aboriginal Peoples (RCAP), and such separate systems operate in the United States.[266] In this chapter, I resist the conclusion that the Canadian criminal justice system is *irredeemably* illegitimate. Instead, I argue that proposed alternatives, while presenting various advantages, do not solve the underlying legitimacy problem. Because the legitimacy crisis is the product of the imposition of colonial law, in the long term it can only be fully resolved by the decolonization of the legal order in Canada. This is a long-term project in the full sense of the term, however, and even with more mutual goodwill and commitment than has so far been demonstrated by Canada is likely to take several generations to accomplish. In the medium term, some attempt to reconcile Indigenous and non-Indigenous principles of justice within a single functioning system of justice is inescapable. Although this will not provide a full solution, it is the only path that offers some hope of an interim system of justice that could enjoy a reasonable measure of legitimacy for both Indigenous and non-Indigenous Canadians.

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[266] Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide*, 224, 216–17; on an example of US courts see Justin B. Richland, *Arguing with Tradition: The Language of Law in Hopi Tribal Court*, The Chicago Series in Law and Society (Chicago: University of Chicago Press, 2008).

I begin this chapter with an examination of the idea of separate justice systems in Canada. Although the development of autonomous Indigenous systems of justice is a worthwhile goal, I argue that it faces substantial short- and medium-term obstacles that make its realization unlikely. Moreover, even fully realized separate systems would not solve and could even exacerbate the problem of legitimacy for the Canadian criminal justice system. Instead, I propose a medium-term model that works to create political and juridical space for Indigenous practices of justice while working to reconcile Indigenous and non-Indigenous conceptions of justice within the operations of the Canadian criminal justice system.[267] I argue that the existing *Gladue* approach and David Milward's proposed "Culturally Sensitive Interpretation of Legal Rights," will not change the existing system sufficiently to generate legitimacy.[268] This leaves us with the inescapable necessity of pursuing reconciliation within a single justice system, even while making space for the revitalization of Indigenous legal traditions and development of justice systems grounded in those traditions. This chapter is grounded in the idea that Canada constitutes – at least in the medium term – a community of shared fate, as articulated by Melissa Williams and discussed in chapter three.[269] As Val Napoleon and Hadley Friedland have argued, all societies confront the problems of violence and vulnerability that arise from human beings living together.[270] In Canada, Indigenous and non-Indigenous people share the need to deal with problems through a legitimate system of law.

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267 This proposal is structurally similar to the two-track solution proposed by RCAP. The key difference is that RCAP premised the development of Indigenous justice systems on a constitutional recognition of an Indigenous right to self-government in criminal justice, which has not and will not be forthcoming. Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide*, 177.I argue instead for ways that reconciliation of justice concepts can create juridical space even within the existing constitutional order for Indigenous practices of justice to operate autonomously. There is also a correspondingly greater emphasis on the degree of change needed within the Canadian justice system.

268 Milward, *Aboriginal Justice and the Charter*.

269 Williams, "Citizenship as Agency within Communities of Shared Fate."

270 Val Napoleon and Hadley Friedland, "Indigenous Legal Traditions: Roots to Renaissance," in *The Oxford Handbook of Criminal Law*, ed. Markus Dirk Dubber and Tatjana Hörnle, First edition (Oxford, United Kingdom ; New York, NY: Oxford University Press, 2014), 225–26, http://myaccess.library.utoronto.ca/login?url=https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199673599.001.0001/oxfordhb-9780199673599.

4.2 The Idea of a Separate Indigenous Justice System: On the Table but Out of the Question

The idea of separate Indigenous justice systems in Canada occupies a curious place in the public policy space in Canada. In some ways, it is very clearly and option that is on the table, and indeed looms large as the predominant alternative to the status quo. However, it has occupied this space for three decades without any signs that it is realistically likely to be adopted. In the next section, I examine how it has come to occupy this space, arguing that it has been established as an option by RCAP, by the existence of the American model, and by ongoing Indigenous demands. I also argue that, by occupying the policy space without any probability of realization, the idea of separate justice systems consumes political oxygen and smothers the emergence of alternative solutions.

The idea of separate justice systems was fixed in the possibility space of Canadian public policy through the recommendations of public inquiries and a Royal Commission in the 1990s. Most notably, the Aboriginal Justice Inquiry of Manitoba called for the Provincial and Federal governments to recognize the jurisdiction of Aboriginal people over criminal justice, and the maintenance of independent justice systems.[271] This recommendation was taken up by the Royal Commission on Aboriginal Peoples in its report, "Bridging the Cultural Divide."[272] Central to these recommendations is the proposal that other levels of government formally recognize Indigenous jurisdiction over criminal law and the development of criminal justice systems for their people. The determination of how much or little of this jurisdiction to take up would rest with Indigenous people, rather than other levels of government. This would represent a major shift from the status quo in Canada, under which criminal law is an exclusively federal jurisdiction, but the administration of justice is a provincial responsibility. Although governments did their best to ignore these recommendations, the stature of these recommendations gave a firm reference point for critics and ensured that the idea of separate justice systems will not disappear from public discussion. It has become standard practice for

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[271] Hamilton and Sinclair, *Report of the Aboriginal Justice Inquiry of Manitoba: The Justice System and Aboriginal People.*, 1:ch 17.

[272] Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide*, 177.

any new inquiries to refer to the recommendations of the Royal Commission and the Manitoba Justice Inquiry in their calls to action.[273]

The salience of separate Indigenous justice systems in the Canadian public policy space is also maintained by the continued presence of a viable model across the border in the United States. The legal status of Indigenous nations within the US as “domestic dependent nations” means that they retain jurisdiction over a broader range of self-government powers, including over criminal matters between “Indians in Indian territory.”[274] This has led to the development of traditional and tribal court systems by many American Indigenous nations. However, the jurisdiction of such court systems is circumscribed in many ways, chiefly by being limited to jurisdiction over tribal members on tribal land, to minor crimes and misdemeanours, and by being subject to the *Indian Civil Rights Act, 1968* which requires certain American-style procedural guarantees.[275] Taken together, these factors and the enabling American legislation have pushed tribal courts toward operating in ways that mimic non-Indigenous courts. Although this aspect has been criticized as an assimilationist departure from Indigenous practices, the ongoing development of tribal courts in the US provides inspiration to those calling for similar approaches in Canada.[276] Although the Navajo Nation system is often presented as the most developed example, the scale of the Navajo Nation itself (over 150,000 Navajos living on the Navajo nation’s lands) makes it a difficult model to emulate in Canada.[277] However, the tribal courts of smaller nations and the Northwest Intertribal Court System (a circuit court serving small nations in Washington state) have been cited as more applicable exemplars in the Canadian

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[273] See for example National Inquiry into Missing and Murdered Indigenous Women and Girls (Canada) and Canada, *Reclaiming Power and Place*, 2019.

[274] Hamilton and Sinclair, *Report of the Aboriginal Justice Inquiry of Manitoba: The Justice System and Aboriginal People.*, 1:ch 7.

[275] Hamilton and Sinclair, 1:ch 7.

[276] Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide*, 183–85; Hamilton and Sinclair, *Report of the Aboriginal Justice Inquiry of Manitoba: The Justice System and Aboriginal People.*, 1:ch 7.

[277] Navajo Epidemiology Center, “Navajo Population Profile 2010 US Census” (Window Rock, Navajo Nation: Navajo Epidemiology Center, December 2013), https://www.nec.navajo-nsn.gov/Portals/0/Reports/NN2010PopulationProfile.pdf.

context.[278] Despite the constitutional differences between the US and Canada and the limitations of tribal courts, the very existence of functioning tribal court systems in the US is a powerful riposte to those who would argue that they could not be established in Canada.

Finally, separate court systems remain on the agenda because of the demands of Indigenous people in Canada to escape the injustice they face in Canadian courts and prisons. The degree of support for such a shift is not always readily apparent. Criminal justice matters rarely rise to the top of the policy agenda for Indigenous organizations, who are often focused on the central issues of land and governance, pressing humanitarian concerns for their people such as clean drinking water and adequate housing, or major initiative such as reforming education and child welfare or pursuing restitution for residential schools. Criminal justice matters can occasionally rise to the forefront around flashpoint issues. The most sustained recent political pressure in the area of criminal justice was led by the Native Women's Association of Canada and directed toward the establishment of a national inquiry on Murdered and Missing Indigenous Women and Girls in Canada. While such pressure was eventually successful (after a change in federal government) in producing a national inquiry, it remains to be seen whether the report of the inquiry will elicit meaningful changes from Canadian institutions of criminal justice. Notably, the first call to action under the heading of justice is a call to implement the recommendations of RCAP and the Manitoba Justice inquiry relating to criminal justice.[279] Pragmatic Indigenous governments also often focus on more achievable goals in attempting to extend powers of self-government to areas of jurisdiction more likely to be recognized by other orders of government. This is true of self-government agreements, but even a newly created court at Akwesasne, which is being billed as the first court in Canada outside a federal framework, does not seek jurisdiction over criminal matters.[280] Nevertheless, there are persistent calls from Indigenous people from coast to coast to create separate Indigenous criminal justice

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[278] Hamilton and Sinclair, *Report of the Aboriginal Justice Inquiry of Manitoba: The Justice System and Aboriginal People.*, 1:ch 7.

[279] National Inquiry into Missing and Murdered Indigenous Women and Girls (Canada) and Canada, *Reclaiming Power and Place*, 2019, 1b:183.

[280] Giuseppe Valiante, "Akwesasne Creates First Court in Canada for and by Indigenous People," *CBC News*, October 2, 2016, https://www.cbc.ca/news/canada/montreal/akwesasne-indigenous-court-canada-1.3787969.

systems. For example, Shawna Davis, a student of Gitxsan law, argues that it is necessary to assert Indigenous law independent of the colonial system of justice.[281] On the other coast, Tuma Young, a Mi'kmaw lawyer and educator, proposes a separate justice system for Indigenous people to incorporate Mi'kmaq legal traditions and overcome the failures of Canadian justice.[282]

With the consistent recommendation by inquiries and commissions, the ongoing example of such systems operating in the US, and persistent demands from Indigenous people, the idea of a separate system of justice is firmly lodged in the Canadian public policy option space as the primary alternative to the status quo. Yet while separate justice systems are thus, "on the table" as a policy option, Canadian governments have never seriously moved to put them into practice. The Federal government's response to the recommendations of RCAP to recognize Indigenous jurisdiction over criminal justice and overhaul the existing criminal justice system largely dodged the key issues. In fact, the response on Aboriginal Justice was so brief it can be quoted in full:

> *The Government of Canada will continue to discuss future directions in the justice area with Aboriginal people. We will work in partnership with Aboriginal people to increase their capacity to design, implement and manage community-based justice programs that conform to the basic standards of justice and are culturally relevant. We will also work with Aboriginal people to develop alternative approaches to the mainstream justice system, as well as dispute resolution bodies. Programs will require the inclusion of Aboriginal women at all stages.*[283]

The tepid commitments to "continue to discuss," "work with," and "work in partnership with," were an accurate precis of the subsequent decades: the Federal (and Provincial) governments

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[281] Samantha Dawson, "Healing the Canadian Justice System," The Discourse, May 26, 2016, https://www.thediscourse.ca/urban-nation/healing-canadian-justice-system.

[282] Peggy MacDonald, "CBU Professor Proposes Separate Legal System for Indigenous People," *CBC News*, March 12, 2018, https://www.cbc.ca/news/canada/nova-scotia/wabanaki-inistitute-duma-young-indigenous-legal-lawyer-1.4568312.

[283] Public Services and Procurement Canada Government of Canada, "Gathering Strength: Canada's Aboriginal Action Plan. : R32-189/1997E-PDF - Government of Canada Publications - Canada.Ca," July 1, 2002, http://publications.gc.ca/site/eng/424401/publication.html.

have provided limited funding for pilot and small-scale diversion projects, made minor legislative amendments, and made some strides towards the "indigenization" of criminal justice institutions. Unsurprisingly, given the scale of the response, this hasn't meaningful addressed problems such as the overincarceration of Indigenous peoples, who have gone from slightly over 10 percent of those entering jail in the late 1990s to over a quarter today.[284] The anodyne language is still reflected in official statements today. For example, the press release from the 2018 Federal-Provincial-Territorial Meeting of Ministers Responsible for Justice and Public Safety noted that, "Ministers agreed the issue requires further collaboration," with a commitment to "establish a Pan-Canadian Strategy that accommodates jurisdictional and community differences" and lists areas of focus such a strategy may (or may not) include.[285] There is no suggestion that recognition of jurisdiction over criminal justice is even up for discussion. Indeed, under the inherent right policy that governs the Canadian approach to self-government negotiations, substantive criminal law is a "list three" power, that is, one of the "subject matters where there are no compelling reasons for Aboriginal governments or institutions to exercise law-making authority."[286] Provinces have proved no more likely to relinquish jurisdiction over the administration of justice in criminal matters, limiting the involvement of Indigenous people to the provision of community justice programs that receive case diverted at the discretion of officers of provincial justice institutions.

The refusal by Canadian governments to countenance the possibility of Indigenous jurisdiction over criminal justice leaves the idea of separate justice systems in an awkward state of limbo: it remains simultaneously an alternative that will not go away (indeed, the preeminent alternative policy) and an option that will never be adopted (barring a major and unforeseen political realignment). Remaining in this unrealizable but ineliminable limbo means that the idea of separate justice systems consumes political oxygen in a way that smothers the emergence of

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[284] Rudin, "The (in)Justice System and Indigenous People."

[285] "News Release – Federal-Provincial-Territorial Meeting of Ministers Responsible for Justice and Public Safety – Canadian Intergovernmental Conference Secretariat," accessed August 13, 2019, http://scics.ca/en/product-produit/news-release-federal-provincial-territorial-meeting-of-ministers-responsible-for-justice-and-public-safety/.

[286] Indian and Northern Affairs Canada, "The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government."

alternative proposals. Everyone knows that this is what must be done, but everyone also knows that it will not happen.[287] It thus crowds out more realizable, even if suboptimal, solutions that could enhance the legitimacy of the criminal justice system.

I am not arguing that separate Indigenous justice systems are a bad idea, or that Indigenous communities should not try to develop their own institutions of justice. As discussed earlier, this dissertation does not aim to advise Indigenous communities but is instead addressed toward the proper response of Canadian policy-makers to the needs and concerns of Indigenous people in Canada. Indeed, I believe the underlying normative case for independent Indigenous justice systems to be largely unanswerable by a colonial order, as it is a part of the broader case for Indigenous self-determination. Roughly stated, that case is that Indigenous peoples are pre-existing, self-governing peoples (in the international sense) with an unextinguished right to self-determination. Indigenous legal orders predate Canadian legal orders, and therefore Indigenous people have a normative right to govern themselves according to revitalized Indigenous legal orders. This includes the policy space that is known in the Canadian legal order as criminal justice but is variously configured in Indigenous legal orders. A great part of the challenge of legitimating Canadian practices of justice is in fact providing a convincing rationale for the applicability of Canadian legal orders on the territory of Canada, given the backdrop of pre-existing Indigenous legal orders.

On the other hand, my argument is not simply that the idea of a separate Indigenous justice system is utopian, in the sense of perfectly desirable but unrealistic. I do raise considerations of practicality (as I have already done in noting the firm resistance of Canadian governments to giving up jurisdiction and will again later in the chapter) in order to differentiate between short-, medium-, and long-term solutions. Practical barriers are not insurmountable, however, and the example of the US indicates that separate justice systems are practicable in a very similar context. Policy proposals must nevertheless adapt themselves to political constraints to be feasible in even the medium term, or instead accept that they will only be realized in the

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287 This is a common situation in the development of public policy. Memoranda to Cabinet typically contain three options: one that will solve the problem comprehensively but will never be chosen because it is too expensive, one that is cheap but will not accomplish anything, and a compromise option that civil servants hope will actually be adopted. Lamentably, the medium option on matters of criminal justice typically has been: "give us space to create alternative programs that work but are too small to make a meaningful impact on the overall problem."

long term (which may be many generations). On one level, I am arguing that, by focusing attention on a separate justice system that is no closer today than it was in 1991, at least two generations have already been trapped in a worsening, illegitimate system. While long-term solutions are pursued, it is crucial to find medium-term solutions that will produce a justice system that is at least tolerably legitimate. On another level, I argue that even a realized separate system of justice would have serious drawbacks, that is, it would not be a utopia. Even with these drawbacks, separate systems may be worth pursuing. However, the final and most significant level of the argument is that I do not believe that the creation of separate justice systems can ever solve the problem of the legitimacy of Canadian criminal justice. Indeed, the creation of separate systems under anything but the most idealized circumstances is instead likely to exacerbate the mutual perception of illegitimacy.

4.3 Problems of a Separate Justice System

To make this case, the next section will argue first that the underlying justification for separate systems means that operation of each system will serve to undermine the legitimacy of the other (in its own terms). Barring a perfect mechanism of sorting cases, this will exacerbate perceptions of illegitimacy for those caught up in the “other” system of justice. I will then examine the practical difficulties of creating separate justice systems in the Canadian context, attempting to differentiate between inherent and contingent practical concerns. Finally, I will present a principled objection to separate justice systems.

4.3.1 Undermining Reciprocal Legitimacy

The core argument for the creation of separate justice systems rests on the existence of competing conceptions of justice. At heart, this is an argument from cultural difference that holds that Indigenous people and non-Indigenous Canadians operate according to fundamentally different conceptions of justice. The strength of this claim varies: some argue that Indigenous and non-Indigenous worldviews are fundamentally incommensurable, while others argue that the very concept of justice is problematic from an Indigenous viewpoint.[288] Weaker versions of this

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[288] Manley-Casimir, “Incommensurable Legal Cultures: Indigenous Legal Traditions and the Colonial Narrative”; Christie, “Law, Theory and Aboriginal Peoples.”

claim suggest the gap is bridgeable, but that nevertheless conceptions of justice are sufficiently different that they need to be reflected in separate justice systems.[289] In either form, the justification for separate systems is as follows: people subscribe to sufficiently different conceptions of justice that they need separate institutions of justice in order to be subject only to systems of law that they can view as legitimate. The Canadian justice system lacks legitimacy for Indigenous people because it is incapable of embodying Indigenous ideas of justice sufficiently to be considered legitimate by Indigenous people. Similarly, the Canadian justice system will continue to exist because non-Indigenous Canadians will not accept the operations of an Indigenous justice system as legitimate for them. If separate systems are grounded on such a justification, however, they can only generate legitimacy if it is possible to perfectly separate Indigenous and non-Indigenous Canadians and their criminal justice issues and allocate them to the appropriate system. Although I will more fully explore practical challenges later, at this juncture it should suffice to point out that the lives of many Indigenous and non-Indigenous Canadians are intertwined (through ties of marriage, or as neighbours, or co-workers, etc.) in such a way that criminal cases could not be neatly divided between the two systems. Having endorsed the principle that each person should be treated by their own system of justice, any mismatches are rendered all the more illegitimate. Yet such mismatches are unavoidable if, for example, the perpetrator is non-Indigenous and the victim Indigenous (or vice versa). To resolve this dilemma, a third, overarching system of justice that can reconcile the competing legal orders is needed. Yet this is functionally identical to seeking reconciliation within a single system of justice that makes space for plural justice practices. Thus, in the pursuit of legitimacy, reconciliation of competing conceptions of justice is inescapable. Even if reconciliation is necessary for legitimacy, it should be noted that the strong argument from cultural difference would see reconciliation as impossible because the legal orders are incommensurable. If my argument is correct, this would lead to the pessimistic conclusion that mutual legitimacy is impossible. It thus seems better to me to work on the assumption that reconciliation is possible but difficult, rather than *a priori* impossible. If some kind of overarching reconciliation is achievable, it should also make alternative conceptions of justice more, rather than less, mutually legitimate: by recognizing them as ultimately reconcilable alternative formulations appropriate to

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[289] see for example: Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide*.

differing contexts, it should be more possible for individuals to recognize the legitimacy of being subject to the “other” system of law in the appropriate context.

4.3.2 Practical Challenges for Separate Justice Systems

I now turn to a more detailed examination of the practical challenges of establishing separate justice systems in Canada. The first practical problem is that of dividing jurisdiction. I argue that this is an inherent problem, as there is no single satisfactory delineation of jurisdictions between systems that does not trap many people in a system that, according to the underlying justification for separate justice systems, is illegitimate for them. The second practical problem is that of resources and scale. These are contingent problems which should be surmountable with appropriate institutional design, but which nevertheless may reduce the desirability of separate systems under realistic conditions and require compromises of principle. Third, I raise two entirely avoidable problems that are nevertheless likely perverse outcomes of a push for separate justice systems. The first, drawn from the American case, is the problem of legislative gaps and impunity. The second is a hypothetical argument about the potential perverse effects of the kinds of changes that would be necessary to realize separate justice systems in the Canadian constitutional context.

If there are to be separate Indigenous and non-Indigenous criminal justice systems, it is necessary for there to be some agreement on the delineation of jurisdiction. The most practicable solution is undoubtably a geographic division of jurisdiction. This is the mostly widely used method for delineating the jurisdiction over criminal justice: it is used to delineate jurisdiction between countries, and between states where criminal justice is federalized. Territorial jurisdiction has the advantage of being clearly delineable and, with either hard borders or agreements on the mutual recognition of arrest warrants and the transfer of arrested persons, of avoiding jurisdictional gaps. Territorial jurisdiction is also typically acceptable because it is congruent with the territorially defined jurisdiction of most systems of government. In the case of Indigenous people in Canada, however, this solution would be unsatisfactory because jurisdiction over Indigenous-controlled lands would be tremendously under-inclusive of Indigenous people. More than half of Aboriginal people in Canada live off-reserve, and thus would fall under the geographic jurisdiction of non-Indigenous governments. Most notably, despite crime rates being higher on reserve, most Aboriginal people incarcerated in Canada are

incarcerated for offences committed off-reserve, and thus would still be trapped in a non-Indigenous justice system.[290]

An alternative to geographical delineation is to base jurisdiction on the identity of the individuals caught up in the criminal justice system. Such identity-based jurisdiction, while less common than geographic jurisdiction, is certainly possible. Military and church courts operate on such a principle, for example. Certain practical difficulties could be overcome by careful institutional design. One such problem is the corollary of the under-inclusiveness of Indigenous geographic jurisdiction: most Indigenous people live far from Indigenous centres of government (and, presumably, justice systems). Two institutional approaches could enable identity-based jurisdiction to function under such circumstances. One option would be an inverted circuit court, whereby an Indigenous justice system based in an Indigenous community could travel to urban centres to administer justice to its members.[291] This could avoid the most objectionable feature of existing circuit courts, namely that they are external impositions of colonial injustice. If off-reserve members saw their home community's justice system as more legitimate than the Canadian system, such an inverted circuit court might be welcomed rather than resented. It would nevertheless suffer from some of the more prosaic challenges such courts face in dispensing timely and effective justice. The resource burden of doing so would be exacerbated in asking small communities to provide justice at a distance to large urban populations. A second option would be to develop urban-based Indigenous justice systems. This could mirror the successful efforts to create urban community justice projects, which reconceptualize community away from the reserve model to embrace the reality of urban Indigenous communities, as has been done successfully with Indigenous community justice diversion projects.[292] This approach could draw on successful community-based justice projects already in operation in many cities. Such an approach, while undoubtedly viable, has a tendency towards pan-Aboriginalism, due to the mix of Indigenous people found in many urban centres. This dilutes the emphasis on developing justice systems that flow organically from particular Indigenous legal traditions but

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[290] Carol La Prairie, "Aboriginal Over-Representation in the Criminal Justice System: A Tale of Nine Cities," *Canadian Journal of Criminology; Ottawa* 44, no. 2 (April 2002): 187–88.

291 I am indebted to my supervisor, Dr. Melissa Williams, for this suggestion.

[292] Craig. Proulx, *Reclaiming Aboriginal Justice, Identity, and Community* (Saskatoon: Purich Pub., 2003).

may still be viewed as more legitimate than the existing system by Indigenous people. A possible counterbalance to this tendency would be a hybrid approach: a court could have jurisdiction over all Indigenous people within a given territory but operate according the local Indigenous legal order(s). In either case, some reconciliation between Indigenous legal orders would be required to produce a system that is viable and legitimate for people from different Indigenous backgrounds, but this may be easier than reconciling Indigenous and non-Indigenous legal orders.

There are unfortunately other practical concerns that are less easy to resolve through institutional design. The question of Indigenous identity remains fraught in Canada, with no consensus on who gets to decide membership of Indigenous groups. Although the current tendency seems to be towards collective self-determination of membership for Indigenous nations, this presents several problems in the criminal context. Firstly, collective self-determination can be under-inclusive of those who self-identify as Indigenous, leaving many self-identified Indigenous people to be dealt with by a non-Indigenous system they find illegitimate. Second, self-definition of membership by various independent Indigenous legal systems threatens to create both overlaps and gaps in jurisdictions. Overlaps could be created when more than one system claims someone as a member, and hence jurisdiction over them. Gaps can be created if no system claims a member. Given the complex reality of Indigenous identity today, we could expect such overlaps and gaps to cover a substantial proportion of the Indigenous population. A further complication arises from the fact that most criminal justice matters involve at least two people (a perpetrator and a victim), if not more. The fraught determination of individual identity can thus be multiplied if those involved have different Indigenous identities, or if one is Indigenous and one is not, resulting in even more problems of overlapping jurisdiction. Many Indigenous legal traditions also give a more central role to victims and the community, which could again lead to competing claims to jurisdiction (on behalf of the victim and the perpetrator).

Many current Indigenous justice initiatives sidestep these problems by accepting self-identification and operating on an opt-in basis. This only works, however, because these initiatives are only an adjunct to the existing system, which scoops up all those who opt out. Self-identification does not seem a practicable basis for independent justice systems. There is little indication that self-identification would be acceptable in principle under many Indigenous

legal traditions. Furthermore, self-identification may not be considered sufficient grounds for an Indigenous justice system to be required to take on the burden of processing a given criminal case, but if jurisdictions can also refuse cases then many are likely to fall through the jurisdictional gaps. Most significantly, however, if truly independent Indigenous justice systems vary greatly from the Canadian justice system and from one another (which is, after all, the justification for separate systems in the first place) then a principle of self-identification would enable unjustifiable jurisdiction-shopping to find the most amenable justice system.

A final practical consideration around the determination of jurisdiction has to do with a pragmatic consideration of existing configurations of power. Because there is no perfect answer to the division of jurisdictions, practical solutions tend to err on one side or the other. In the existing Canadian constitutional order, conflicts of laws between federal and provincial governments are regulated by the doctrine of the paramountcy of federal law, which renders conflicting provincial laws inoperative. It would be theoretically possible for Indigenous legal orders to be paramount over the Canadian criminal justice system, but it seems impossible to imagine a circumstance in which this was a politically stable settlement; the first major case in which the Canadian public took objection to Indigenous laws would see the restoration of federal paramountcy. More realistically, federal paramountcy would be a minimum condition for relinquishing exclusive jurisdiction over substantive criminal law. The US case is illustrative of a likely Canadian outcome. There, the federal government excises major crimes from the jurisdiction of tribal courts and limits the available penalties to those appropriate for minor crimes and misdemeanours.[293] Identity-based jurisdiction is used as a restriction on the territorial jurisdiction of tribal courts, preventing them from exercising jurisdiction over offences committed by non-Indians on reserve.[294] There is no reason that jurisdiction should be configured in this way, but such a configuration is the likely outcome of a political process in the Canadian context that allocates jurisdiction based on identity, with Indigenous jurisdiction subordinated to federal (or provincial) jurisdiction. This is after all the effect of the current

[293] Hamilton and Sinclair, *Report of the Aboriginal Justice Inquiry of Manitoba: The Justice System and Aboriginal People.*, 1:ch 7.

[294] Hamilton and Sinclair, 1:ch 7.

system, with limited alternative Indigenous justice programs being available only through discretionary diversion from provincially-run justice systems. A realistic assessment of political power might suggest that geographic jurisdiction, for all that it is underinclusive, would be more likely to generate the conditions for truly independent Indigenous justice systems to develop.

Another category of practical difficulties has to do with the scale of Canadian Indigenous communities. Indigenous communities tend to have small populations; only ten reserves have a population of over five thousand, and most have a few hundred residents. The total population of larger Indigenous nations can be substantially larger (several tens of thousands), depending on how such nations are understood and organized politically. The Indigenous population of some urban centres is also larger, but faces the difficulties discussed above in terms of organizing justice systems. The remoteness of many communities, that is, their lack of proximity to major urban centres, and in some case lack of road access can also be considered a barrier to the development of effective justice systems. Issues of scale and remoteness are certainly problems for effective delivery of justice in the Canadian criminal justice system, leaving many to be served by circuit courts that are widely seen as unsatisfactory.[295] In a system that relies on highly trained, full-time professionals, it can be impossible for small communities to support a functioning court structure. In large measure, this is why the administration of justice is a provincial responsibility and our legal order does not require municipalities to operate their own criminal court systems. Although these problems of scale have been cited as a barrier to establishing Indigenous justice systems,[296] these problems can actually be alleviated by turning to Indigenous justice practices embedded in Indigenous legal traditions. Indigenous legal traditions contain a store of practices that are the product of accumulated institutional innovations to deal with precisely the challenge of delivering justice in small-scale communities. Many, for instance, do not rely on specialized professionals and thus can be supported in smaller communities. I will discuss this at greater length with regardless to conceptions of impartiality in chapter five, but the greater community involvement and reduced reliance on professionals is a

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[295] Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide*, 25, 68, 109.

[296] Royal Commission on Aboriginal Peoples, 77.

generalized example of such an adaptation.[297] Stepping outside the blinkered confines of modernization theory and the presumption that Indigenous justice systems must mirror existing common law justice systems helps to see past some of these barriers. RCAP presents another example of an adaptation to problems of scale from Big Trout Lake. Traditionally, people lived in smaller camps over the winter and lived together in a larger grouping during the summer (when more plentiful food made larger concentrations of population possible). Issues that could not be resolved in the smaller camps over the winter were dealt with by a circle process in the larger summer gathering.[298] This process was found to be more effective at dealing with problems than the new non-Indigenous circuit court.[299]

The more Indigenous institutions of justice are set up to structurally resemble non-Indigenous institutions, the more severe problems of scale become. The Navajo tribal court system is widely cited as the most developed and successful example of integrating Anglo-American law with traditional dispute resolution.[300] The scale of the Navajo nation sets it apart: it faces challenges more akin to a small state or province in running a justice system, not a small municipality. This enables features such as professional judges, advocates, and an appeals structure. On the assumption that such features are important for the external legitimacy of an Indigenous system of justice (i.e. for recognition as a justice system by non-Indigenous legal and political orders), the Manitoba justice inquiry recommended a regional model based on the Northwest Intertribal Court System in the state of Washington, which enables small communities to pool resources to develop such a system.[301] RCAP likewise recommended that jurisdiction over justice reside at the level of larger, reconstituted nations rather than individual

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297 The description of this may be backwards, in some ways. A reliance on an arms-length system of justice run exclusively be professionals is in fact a particular institutional adaptation to life in large-scale functionally specialized societies. Applying that model to a context in which it was never appropriate has produced predictably poor results.

298 Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide*, 23–24.

299 Royal Commission on Aboriginal Peoples, 25.

300 Royal Commission on Aboriginal Peoples, 74, 187; Hamilton and Sinclair, *Report of the Aboriginal Justice Inquiry of Manitoba: The Justice System and Aboriginal People.*, 1:ch 7.

301 Hamilton and Sinclair, *Report of the Aboriginal Justice Inquiry of Manitoba: The Justice System and Aboriginal People.*, 1:ch 7.

communities.[302] This creates a slight dilemma, whereby problems of scale push towards a more pan-Indigenous model: the Manitoba Justice Inquiry recommended joint First-Nation Métis Courts where possible, and RCAP suggested a pan-Canadian appeals mechanism.[303] The dilemma is that this then undermines the strongest argument for separate Indigenous justice system, which is to give expression to Indigenous legal traditions. As RCAP put it, the "legitimacy of a system of justice rests on its being and expression of a society's basic values."[304] The drive toward regional systems may work better in some areas than others, where legal traditions may cover broader cultural, linguistic, and national groupings. Large nations like the Anishinaabek may find they have sufficiently common legal traditions across communities to make regional justice systems appropriate. However, in areas with smaller nations and more differentiated legal traditions, such as the West Coast, this may be problematic. The argument from Indigenous legal traditions is certainly diluted when proposals move towards a more pan-Indigenous approach, as suggested above. It would be possible to shift the emphasis from Indigenous legal traditions to a more generalized argument for the devolution of criminal justice power, but as I will discuss below this poses its own difficulties.

To some degree, it is specifically the push to have a separate Indigenous justice *system* that is recognized as such by non-Indigenous legal and political orders that pushes towards professionalization, appeals systems, and the need for scale. If the emphasis is on the need to be recognized as a system of justice, there is pressure to make that system look recognizable as a system of justice to non-Indigenous eyes. Thus, Indigenous institutions of justice become shaped by non-Indigenous discourses of rights and their protection. As Glen Coulthard argues, recognition "that is ultimately 'granted' or 'accorded' a subaltern group…by a dominant group" fails to "significantly modify, let alone transcend, the breadth of power at play in colonial

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[302] Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide*, 77, 276. Note that the term "nations" can be confusing in this context. RCAP is using the term to refer to the largest definable political and cultural groupings. For instance, the Anishinaabek Nation comprises dozens of Anishinaabek communities, even though many of those individual communities also refer to themselves as nations.

[303] Hamilton and Sinclair, *Report of the Aboriginal Justice Inquiry of Manitoba: The Justice System and Aboriginal People.*, 1:ch 7; Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide*, 277–79.

[304] Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide*, 77.

relationships."[305] Legal forms of state recognition trap Indigenous people and institutions into a colonial discourses that defines them in relation to the colonial state, rather than according to Indigenous traditions.[306] This has been true of Indigenous legal systems in the US, where traditional courts have been increasingly supplanted by tribal courts, which more closely resemble non-Indigenous systems.[307] However, counter-discourses are possible, and established tribal courts have also developed more traditionally-inspired mechanisms within their Anglo-American legalistic format.[308] Unfortunately, there are good reasons to think that any push for the establishment of a formal, independent justice system will require the recognition of non-Indigenous governments. First, until Indigenous governments have realized self-determination with a viable land base, formal justice systems will need substantial material support from Canadian governments. Second, even if Indigenous justice practices can be revived without the support of Canadian governments, if they are not recognized by the Canadian justice system there is the risk that they will be undermined by the Canadian system arresting, trying, and imprisoning Indigenous people regardless of the outcome of Indigenous justice processes.

It is then possible that, in the medium term, *more* juridical space could be created for Indigenous justice practices, grounded in Indigenous legal traditions, without the establishment of formal jurisdiction over criminal justice or a separate Indigenous justice system as such (with its own jurisdiction, clearly delineated from the Canadian justice system). There are two major ways such space can be created without a formal, separate system. In the decades since RCAP, there has been little to no progress towards establishing a separate justice system. On the other hand, there have been impressive institutional innovations in in community-based justice programs. Many of these operate with federal and provincial support, but governments act largely as granting bodies, requiring minimal oversight. This to some extent frees such programs

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[305] Coulthard, *Red Skin, White Masks*, 30–31.

[306] Coulthard, 42.

[307] Hamilton and Sinclair, *Report of the Aboriginal Justice Inquiry of Manitoba: The Justice System and Aboriginal People.*, 1:ch 7.

[308] Hamilton and Sinclair, 1:ch 7; Justin B. Richland, "Hopi Tradition as Jurisdiction: On the Potentializing Limits of Hopi Sovereignty," *Law & Social Inquiry* 36, no. 1 (2011): 201–34.

from the constraints of colonial legal discourse. So long as they have a grant-proposal "word warrior"[309] who can speak the bureaucratic language of reducing recidivism and promoting community safety when it comes to apply for funding, actual community justice programs are free to draw on traditional practices. Although the funding for such programs has been limited, they could be greatly expanded to give greater space for community justice to develop. Ordinarily, such programs rely on discretionary diversion from the Canadian justice system: a major step forward would be to establish a presumption of diversion where the program and participant both agree. Such community justice projects obviate the problems of scale, as they develop from within communities according to the capacity of the community. Another area of progress has been the adoption of some Indigenous practices in certain provincial courts, such as the use of Indigenous languages, ceremonies, and the participation of elders.[310] Although these initiative have again been limited in number and scope, the outcome mirrors developments in US tribal courts: the incorporation of some degree of Indigenous legal tradition with a broadly Anglo-American legal structure.

Although the problems of scale can be reduced by a greater reliance on Indigenous justice practices and less mimicking of the Canadian justice system, some practical problems related to the small scale of communities are unavoidable. Most significantly, in small communities there is a serious danger of a concentration of political and judicial power in a few hands. Larger-scale societies permit the development of multiple, counterbalancing centres of power, but an independent judiciary is a crucial counterbalance the concentration of political power in a liberal democratic state like Canada. Traditionally, Indigenous societies developed a variety of mechanisms to guard against individual leaders accumulating or abusing power. For example, Martha Montour explains that traditionally, Iroquois matriarchs controlled longhouses, agricultural land, and inheritance in a way that counterbalanced the power of male leaders.[311] However, we must recognize that colonization has dramatically undermined many of these

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[309] Turner, *This Is Not a Peace Pipe*, 8.

[310] Rudin, "The (in)Justice System and Indigenous People."

[311] Martha Montour, "Iroquois Women's Rights with Respect to Matrimonial Property on Indian Reserves," in *Racism, Colonialism, and Indigeneity in Canada: A Reader*, ed. Martin J. Cannon and Lina Sunseri (Don Mills, Ont: Oxford University Press, 2011), 80–86.

traditional safeguards. In the case of the Iroquois, colonization diminished women's status and enforced patriarchal regimes of property and political power.[312] This is a common reality for Indigenous communities: the experience of colonization, and especially of patriarchal Indian Act rules, has undermined traditional structures of governance that could counterbalance the power of individual leaders. Caution is then required to ensure that traditionally-inspired justice processes do not simply reproduce the power of existing leaders. This is particularly of concern in ensuring the safety of women and children in communities suffering the intergenerational trauma of residential schools and ensuing struggles with substance abuse. As RCAP noted, communities have not always treated family violence seriously enough and in many communities elders need to undergo their own healing before they can be decision-makers in justice processes.[313] As Kuokkanen argues, even the use of the term "family violence" or "domestic violence" obscures the predominant pattern of male violence against women.[314] When relinquishing the counterbalancing force of an external, independent justice system, it is important to ensure that community justice does not reinforce colonially-created community pathologies. RCAP's suggestion that elected officials could be justice decision-makers is particularly worrying in this context.[315] Kuokkanen, citing the Manitoba Justice Inquiry, notes that chiefs and councils have historically been reluctant to confront violence against women and children by Indigenous men.[316] The answer does not, however, necessarily lie in the replication of the Canadian institutional answer of large-scale justice overseen by independent, impartial judges. Many community justice programs already operate as counterbalancing centres of power; most community justice programs are run by women, even in communities where the elected leadership is predominantly male. Instead, the thrust of this line of argument is that neither

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[312] Montour.

[313] Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide*, 269–73.

[314] Rauna Johanna Kuokkanen, *Restructuring Relations: Indigenous Self-Determination, Governance, and Gender* (New York, NY: Oxford University Press, 2019), 185, http://myaccess.library.utoronto.ca/login?url=https://www.oxfordscholarship.com/view/10.1093/oso/9780190913281.001.0001/oso-9780190913281.

[315] Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide*, 276.

[316] Kuokkanen, *Restructuring Relations*, 191.

replicating Canadian institutions nor replicating traditional justice processes will adequately address the problem of concentrated power in small communities *in the current context*. Instead, care and attention must be paid to how various institutions perform that function, and appropriate institutions must be designed that can perform the function of balancing power under current conditions. I discuss how this might be done in one area in chapter five, when I discuss models of impartiality.

Throughout this discussion of practical problems, I have tried to stress that only some such problems are inherent, while others are the product of (changeable) circumstance. I have tried to resist treating political constraints as structural when they are not. After all, governments, party systems, and even constitutions can change, given sufficient time and political will. However, the deeper and more extensive the change that is needed to background political conditions to enable a development, the more it is that such a development will need to be a long-term goal. Thus, the full realization of self-determination for Indigenous nations, under a decolonized political order and on a sustainable land base – a precondition for truly decolonized and independent Indigenous justice systems – is not impossible, but will need to be the work of many generations. Much of the thrust of this dissertation addresses what can be done in the medium term to promote legitimate practices of criminal justice for the intervening generations. It also important, however, to consider the likely consequences of changes to these background political conditions, as they may have perverse effects for the quest for legitimate practices of criminal justice for Indigenous people.

One perverse outcome of the configuration of jurisdiction in the US is impunity for non-Indigenous offenders on reserve. This is the result of the interaction of a number of factors. First, states do not have criminal jurisdiction on-reserve. Secondly, tribal courts do not have jurisdiction over non-Indigenous offenders, as identity-based jurisdiction is used to limit the geographic jurisdiction of tribal courts. Finally, because the on-reserve justice system is entirely Indigenous-run, the off-reserve federal justice enforcement personal are poorly equipped to handle offences committed on-reserve, and so federal prosecutors are reluctant to prosecute such

offences.[317] This should be an avoidable outcome: full territorial jurisdiction or a greater willingness by the federal justice system to pursue on-reserve offences could avoid generating such impunity. However, it is important to note that the factors producing this outcome are endogenous to the problem separate courts are meant to resolve. It is precisely the failure of the non-Indigenous justice system to adequately safeguard Indigenous peoples that motivates the drive for a separate justice system. It is reasonable, then, to expect the problematic attitudes of the general population to persist through the development of such systems and to produce second-best outcomes (such as identity-based restrictions on jurisdiction). We should also suspect that, if non-Indigenous police and prosecutors under-serve Indigenous populations when they are solely responsible for their protection, they would be even less likely to provide adequate justice for particular cases if a separate system were in place.

A major practical barrier to the development of independent Indigenous justice systems is the federal structure of criminal law in Canada. In the US, criminal law is more federalized, such that both states and the federal government have powers over substantive criminal law and the administration of justice. However, because Indigenous people on reserves fall solely under the federal power, they are not subject to state criminal jurisdiction. This makes the creation of Indigenous criminal justice systems much more straightforward. For those accustomed to a situation in which criminal law can change over state lines – even to the extent of the existence or absence of the death penalty for state crimes – it is easy to accept that there would then be different criminal law for minor offences on Indigenous lands. Furthermore, the exclusive authority of the federal government means that Indigenous justice systems can be established without the participation of recalcitrant state governments. In Canada, on the other hand, substantive criminal law is a matter of exclusively federal jurisdiction, whereas the administration of criminal justice is largely a provincial responsibility. This has the double effect of making people intuitively resistant to Indigenous law-making authority in the area of criminal justice and requiring provincial participation in attempts to establish Indigenous justice systems.

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[317] Hamilton and Sinclair, *Report of the Aboriginal Justice Inquiry of Manitoba: The Justice System and Aboriginal People.*, 1:ch 7.

It is important to note that there is nothing essential about exclusive federal jurisdiction over criminal justice in Canada. The current configuration can give that impression, especially as criminal justice is the exception to the general rule of legal pluralism by which Quebec operates according to civil law, rather than the common law that is the norm elsewhere. However, this is the product of historical accident rather than a principled position. When civil law was restored to Quebec in the *Quebec Act* of 1774, it was a response to the reasonable demands of the citizens of Quebec to continue to regulate their private affairs according to the laws to which they were accustomed, rather than those of their British colonial masters. The maintenance of British criminal law was not a matter of non-negotiable constitutional principle, but rather a product of the fact that the inhabitants of Quebec preferred it to the brutality of the contemporaneous French penal code.[318] Thus, it should be in principle possible to reconcile a more federalized criminal law, and even legal pluralism in criminal matters, with the Canadian constitutional order. It would, however, require a constitutional amendment. Setting aside the unwillingness of a generation of political leaders to reopen the constitution, there would seem to be two avenues to achieving such an amendment. The first would be to argue for a generalized devolution of substantive criminal justice powers on the American model, opening up space for both provincial and Indigenous substantive law-making power in criminal justice. This would have the advantage of getting provinces to back the change. Another approach would be to focus on the specific case for Indigenous jurisdiction stemming from Indigenous legal traditions.

If a generalized strategy were pursued, it could create perverse consequences for Indigenous people. Attitudes to criminal justice and particularly to the appropriate degree of punishment vary widely across Canada. Currently, such variation is dampened by the exclusive federal jurisdiction over criminal justice, and plays out through discretion, variability in sentencing between judges, and variations in the administration of justice. If, however, provinces had jurisdiction over substantive criminal law, we could expect substantially greater variation. This would perhaps not be of concern if it went hand in hand with exclusive Indigenous

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[318] Peter H. Russell, *Canada's Odyssey: A Country Based on Incomplete Conquests* (Toronto: University of Toronto Press, 2017), 36–37, http://myaccess.library.utoronto.ca/login?url=http://books.scholarsportal.info/uri/ebooks/ebooks3/utpress/2017-07-05/1/9781487514471.

jurisdiction over Indigenous people, but as discussed above many Indigenous people are still likely to be caught up in non-Indigenous justice systems. Canada's Indigenous population is concentrated in the West (and North), as are existing problems of overincarceration.[319] In Western Canada, particularly Alberta, Saskatchewan and Manitoba, incarceration rates are higher and people hold significantly more negative attitudes to Indigenous people.[320] This means that, for the bulk of the Indigenous population in contact with non-Indigenous justice today, they could find themselves caught up in an even more punitive and discriminatory system. To avoid such a perverse outcome, it would thus be crucial to emphasize a rationale for separate justice systems based in the distinctness of Indigenous legal traditions, rather than a general argument for devolution or subsidiarity in criminal justice matters.

4.3.3 A Principled Objection to Separate Justice Systems

After all these practical concerns, I wish to raise one principled objection to independent justice systems for Indigenous and non-Indigenous people. Any proposal that allocates Indigenous people to an Indigenous justice system based on their identity constitutes, in a crucial way, an abnegation of the promise of equal protection under Canadian law and thus of full membership in the Canadian community. In many cases, this will be a price advocates of separate justice systems are willing to pay. Given the failures of the Canadian justice system in protecting Indigenous people and the Canadian political order in making good the promise of full membership, many Indigenous people may gladly forego the dubious benefits of Canadian justice for an Indigenous system. Nevertheless, the promise of equal citizenship extended to Indigenous people has an important place in the Canadian psyche. If it were merely a matter of offending the sensibilities of a populace that wants to be structurally racist without having to think of itself as discriminating against Indigenous peoples, this would be of little concern. However, the guarantee of equal citizenship is also valued by many Indigenous people. Not all Indigenous claims are made in the name of Indigenous difference; many are made in the name of

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[319] Prairie, "Aboriginal Over-Representation in the Criminal Justice System."

[320] "Truths of Reconciliation."

equal citizenship.[321] For example, claims for adequate shelter and clean drinking water on reserves are often framed as claims for equal access to the basic necessities of life enjoyed by other Canadians. If Indigenous Canadians are not satisfied with protections afforded to them by an Indigenous justice system, and instead claim the protections of the Canadian legal system, there is no away around the fact that denying them such protections is tantamount to denying them equal citizenship. In the terminology of dual respect, the concern is that attempts to fully respect Indigenous people as Indigenous by developing a separate criminal justice system would fail to offer appropriate respect to Indigenous people as equal co-citizens.

The idea of dual respect provides important guidance to state policy development, as I have argued elsewhere with Melissa Williams.[322] Respect is a normative idea with strong roots in both Western and Indigenous ethical traditions, unlike concepts such as rights and sovereignty.[323] The Truth and Reconciliation Commission of Canada also recently advocated that mutual respect be the basis of a renewed relationship between Canada and Indigenous people.[324] In this case, I am talking largely about how the Canadian state can uphold its end of a mutually respectful relationship. I argue that the Canadian state owes at least two distinct forms of respect to Indigenous people: respect as bearers of the status of free and equal persons under law, that is, as free and equal co-citizens and respect *as indigenous* people. Ordinarily, the state has a much better idea of how to do the former than the latter (even if, in practice, Indigenous people have frequently been denied full equality as co-citizens). However, in the case of the development of separate justice systems, there is a real risk that efforts to respect the rights of Indigenous people as Indigenous by respecting criminal justice practices that flow from

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[321] see an example on education: Tanya Talaga, *Seven Fallen Feathers: Racism, Death, and Hard Truths in a Northern City* (Toronto, Ontario: House of Anansi Press Inc, 2017), 20; on Child Welfare: Marc-André Cossette, “Fix First Nations Child Welfare System Now, Says Cindy Blackstock,” *CBC News*, December 2, 2017, https://www.cbc.ca/news/politics/blackstock-philpott-children-welfare-1.4420658; and on clean water: Geoffrey York, “In the Neskantaga First Nation, Undrinkable Water Is a Crisis of Health and Faith,” *The Globe and Mail*, September 17, 2019, https://www.theglobeandmail.com/canada/article-in-this-ontario-first-nation-undrinkable-water-is-a-crisis-of-health/.

[322] Teddy Harrison and Melissa S. Williams, “The Ethics of Indigenous Rights,” in *The Routledge Handbook of Ethics and Public Policy* (Routledge Handbooks Online, 2018), https://doi.org/10.4324/9781315461731-26.

[323] Turpel, “Aboriginal Peoples and the Canadian Charter,” 9–10; Turner, *This Is Not a Peace Pipe*, 13.

[324] Truth and Reconciliation Commission of Canada., *Honouring the Truth, Reconciling for the Future*, vi.

Indigenous legal traditions will result in denying some Indigenous people the protection of Canadian law and thus deny them respect as equal citizens.

This is not an abstract or purely theoretical concern. Guarantees of personal safety and equal protection of the law are among the most concrete and practically meaningful elements of equal citizenship. In other words, these are provisions of equal citizenship that are directly valued by ordinary citizens. How likely is it that the situation described above, wherein an Indigenous Canadian claims the protection of Canadian law as against an Indigenous justice system, would arise? I contend that such a scenario would be highly likely. However jurisdiction is defined, some people are bound to be caught up in an Indigenous justice system they do not endorse. This is a clear problem with identity-based jurisdiction, given the difficulties with defining Indigenous identity. It can also be of concern with geographic jurisdiction, however, as people may live in and identify with an Indigenous community without embracing the associated Indigenous legal tradition. This is especially likely given the weakening of traditional identities through colonization and the likely imperfect institutional realization of traditional justice practices. Furthermore, the more diverse and smaller Indigenous justice systems are – that is, the truer to the underlying justification of reflecting Indigenous legal traditions – the more likely it is that someone will be caught up in a system they do not endorse. Members of vulnerable groups, including women and children, are of particular concern. RCAP pointed out that Indigenous communities have not always treated family violence with appropriate seriousness, and Jane Dickson-Gilmore and Carol La Prairie note that in some communities a local jury has never convicted a man accused of domestic violence because such abuse is not seen as a crime.[325] This is not true of all, or even most Indigenous communities, many of which have made great strides in tackling domestic violence through the revitalization of traditional mechanisms of dispute resolution.[326] The failings of the Canadian justice system to afford equal protection to Indigenous women and children are also now well documented by the Truth and Reconciliation Commission and the National Inquiry into Missing and Murdered Aboriginal Women and

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325 Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide*, 269; Dickson-Gilmore and LaPrairie, *Will the Circle Be Unbroken?*, 152.

326 see for example the Hollow Water community holistic healing circle program described in Rupert. Ross, *Returning to the Teachings: Exploring Aboriginal Justice* (Toronto: Penguin, 2006), 29–43.

Girls.[327] Nevertheless, there are likely to be situations in which vulnerable Indigenous people feel that they are not well served by an Indigenous justice system and appeal to the Canadian justice system for equal protection. Emma LaRocque raises the concern, arguing that many Indigenous women are upset with some purportedly traditional Indigenous justice models, but are afraid to publicly challenge them. She argues that Indigenous women should not have to fight in every community for the protections that are taken for granted by other Canadian women.[328] Rauna Kuokkanen echoes this concern in arguing that any decolonial deconstruction of relations of domination must include relations of gender domination beyond the state.[329] We have already seen this dynamic play out in disputes between male-dominated Indigenous organizations (such as the Assembly of First Nations) and Indigenous women's organizations (such as the Native Women's Association of Canada) over whether the *Canadian Charter of Rights and Freedoms* should apply to Indigenous governments, with Indigenous women arguing that such external safeguards are necessary to counterbalance colonially-created misogyny in Indigenous communities.[330] This is not an argument against Indigenous justice systems in general. Instead, it has two implications. The first is that protection of vulnerable people must be a central concern in the design and implementation of Indigenous justice institutions – as it is in many communities and Indigenous legal traditions. Second, it suggests that, if it is possible to create space for such practices within an overarching system that does not entirely renounce the equal protection of Canadian law, this may be preferable to a more independent system that does sacrifice such protections.

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[327] Truth and Reconciliation Commission of Canada., *Honouring the Truth, Reconciling for the Future*; National Inquiry into Missing and Murdered Indigenous Women and Girls (Canada) and Canada, *Reclaiming Power and Place*, 2019; National Inquiry into Missing and Murdered Indigenous Women and Girls (Canada) and Canada, *Reclaiming Power and Place*, 2019.

[328] Emma LaRocque, "Re-Examining Culturally Appropriate Models in Criminal Justice Applications," in *Aboriginal and Treaty Rights in Canada: Essays on Law, Equity, and Respect for Difference*, ed. Michael Asch (Vancouver: UBC Press, 1997), 93–95.

[329] Kuokkanen, *Restructuring Relations*, 218.

[330] Jo-Anne Fiske, "Constitutionalizing the Space to Be Aboriginal Women," in *Aboriginal Self-Government in Canada: Current Trends and Issues*, ed. Yale Deron. Belanger (Saskatoon: Purich Pub., 2008), 317.

4.4 Two Models of Gradual Change

4.4.1 The *Gladue* Approach

The most significant change that has been made to the Canadian court process in response to concerns about the overrepresentation of Indigenous people in Canadian jails has been the development of the *Gladue* approach to sentencing. In this section, I will describe the *Gladue* approach and explore the ambiguities it has created in the operation of criminal justice. I argue that the development of the *Gladue* approach does not offer an effective model for criminal justice reform, and that important lessons can be learned in designing future reforms that will be more likely to generate legitimacy.

Named after the leading Supreme Court case, *R. v. Gladue*, the approach actually stems from a change made to section 718.2(e) of the *Criminal Code* in 1996.[331] This was part of a set of reforms, including the introduction of conditional sentences and restorative purposes of sentencing, which the government of the time hoped would help to reduce the Indigenous overincarceration.[332] The provision, a subclause of the purpose and principles of sentencings, now reads as follows (the section in square brackets was added in 2015)[333]:

> *718.2 (e) all available sanctions, other than imprisonment, that are reasonable in the circumstances [and consistent with the harm done to victims or to the community] should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.*

The Supreme Court has interpreted this provision in three landmark cases: *R v Gladue* in 1999, *R v Wells* in 2000, and *R v Ipeelee* in 2012. In *R v Gladue*, the court laid out the fundamentals of

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[331] Alexandra Hebert, “Change in Paradigm or Change in Paradox? Gladue Report Practices and Access to Justice,” *Queen’s Law Journal* 43, no. 1 (September 22, 2017): 150.

[332] Kent Roach, “One Step Forward, Two Steps Back: Gladue at Ten and in the Courts of Appeal,” *Criminal Law Quarterly* 54, no. 4 (May 2009): 470.

[333] Gerry Ferguson, “A Review of the Principles and Purposes of Sentencing in Sections 718-718.21 of the Criminal Code” (Department of Justice Canada, August 10, 2016), 17, https://www.justice.gc.ca/eng/rp-pr/jr/rppss-eodpa/RSD_2016-eng.pdf.

what has become the *Gladue* approach. The court ruled that sentencing for all offenders must be holistic and take into account the circumstances of the offence and social factors that bear on the responsibility of the offender. In particular, judges must take into account the "unique systemic or background factors which may have played a part in bringing the particular offender before the courts."[334] The court interpreted the provision broadly, noting that it was remedial provision designed to reduce overincarceration (in general, but especially for Indigenous people).[335] In *R v Wells*, the court seemed to undermine the reasoning of *Gladue* by ruling that sentencing objectives of deterrence and denunciation should not be trumped by restorative principles in serious crimes.[336] However, the ruling in *R v Ipeelee* reaffirmed the broad approach taken in *Gladue*, holding that systemic and background factors were relevant to sentencing even in serious cases.[337] The court reiterated the systemic factors from *Gladue* and emphasized that the provisions were meant to respond to the history of colonialism and the trauma of residential schools, and in particular to how that history translates to the ongoing disadvantage of Indigenous people. However, the court also emphasized that the provision should not be understood as an automatic sentencing discount, but merely as a direction that such background factors must be considered in sentencing decisions.[338]

The application of the *Gladue* approach by courts across Canada has been inconsistent. In the first ten years after *R v Gladue*, Crown appeals of sentences following the *Gladue* approach were rare and largely unsuccessful in Ontario.[339] Courts of appeal in other provinces, on the other hand, were much restrictive in their approach to *Gladue*, especially in British Columbia and Saskatchewan.[340] Kent Roach has argued that, while some sentencing disparity is an

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[334] R. v. Gladue, 1 SCR.

[335] Roach, "One Step Forward, Two Steps Back: Gladue at Ten and in the Courts of Appeal," 475.

[336] Hebert, "Change in Paradigm or Change in Paradox?," 153.

[337] Hebert, 154.

[338] Hebert, 155.

[339] Roach, "One Step Forward, Two Steps Back: Gladue at Ten and in the Courts of Appeal," 479.

[340] Roach, 473–81.

accepted part of sentencing practice in Canada, this particular disparity is "troubling given that the provision's role as a remedial law designed to address Aboriginal overrepresentation in prison in all parts of Canada."[341] The problem is not only inconsistency. Patterns of overincarceration also vary in Canada, with the problem most severe in the West (especially in Manitoba and Saskatchewan, but also Alberta and BC) and the North. To the extent that courts in the areas where overincarceration is the biggest problem are the most resistant to *Gladue* reasoning, it should be unsurprising that the *Gladue* approach is failing to meet its remedial objectives. That failure is clear: although the general reliance on incarceration has been reduced since 1996, the rate of overrepresentation of Indigenous people in prison has only increased.

In addition to differences between provincial courts of appeal in how much weight to give the restorative considerations stemming from *Gladue* against more punitive purposes of sentencing (especially denunciation and deterrence), there have been major differences in how the *Gladue* approach has been implemented by various provincial courts. In order to follow the approach outlined in *Gladue*, judges need a good deal of information that is not readily available in the ordinary course of criminal proceedings. Usually, that information is provided in a pre-sentencing report.[342] The quality of such information can vary widely, depending on the approach of the jurisdiction and the resources available for producing the report. In some cases, the information is not provided at all or given merely cursory attention in an ordinary pre-sentence report, the author of which may not have any familiarity with the particular circumstances of Indigenous offenders.[343] In other jurisdictions, the pre-sentence report may cover those particular circumstances in more detail. In some cases, however, a specialized "*Gladue* report" is prepared, by a *Gladue* report writer who has detailed knowledge of the circumstances of Indigenous offenders in general and the particular circumstances of the offender in the particular case.[344] Such reports require a greater investment of time and

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[341] Roach, 487.

[342] Hebert, "Change in Paradigm or Change in Paradox?," 153–54.

[343] Hebert, 159–60.

[344] Hebert, 157.

resources, and are only available in some jurisdictions. They are robustly provided in Ontario and Alberta, somewhat available in Nova Scotia, Prince Edward Island, Quebec, and British Columbia but not in Saskatchewan and Manitoba, where the need is greatest.[345] Only Alberta has mandated that a *Gladue* report be provided; other provinces have ruled that coverage in a pre-sentence report is sufficient.[346] The most developed *Gladue* approach is in Ontario, where 13 specialized *Gladue* (Indigenous Persons) Courts not only provide *Gladue* reports but are staffed entirely with officials with the necessary knowledge and inclination to put the *Gladue* approach into practice.[347]

Although there is an extensive legal literature on *Gladue* and related jurisprudence, I would like to examine the *Gladue* approach as a piece of public policy directed towards a particular remedial end, that is, to repairing the operation of Criminal justice in Canada for Indigenous people. I argue that the *Gladue* approach constitutes a form of evolved public policy, developing through jurisprudence and court practice out of the impetus of a legislative change. As such, it is a policy that is riddled with ambiguities that undermine its effectiveness. These ambiguities include whether it constitutes special treatment for Indigenous people and whether reducing penalties for Indigenous offenders is desirable. I therefore argue that it is not an appropriate model for future policy reforms.

The first ambiguity arises from the curious construction of s.718.2(e), which is both a principle of general application (alternatives to incarceration are to be considered for *all* offenders) and a remedial principle targeted at the particular disadvantaged position of a defined group (Aboriginal offenders). The Supreme Court has made it clear in *R v Gladue* that it places a good deal of weight on this particular, remedial purpose in order to justify specialized processes for taking into account the particular circumstances of Indigenous offenders.[348] Nevertheless, the Court also stated that background and systemic factors should be considered for non-Aboriginal

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[345] Rudin, "The (in)Justice System and Indigenous People."

[346] Hebert, "Change in Paradigm or Change in Paradox?," 164–65.

[347] Rudin, "The (in)Justice System and Indigenous People."

[348] Roach, "One Step Forward, Two Steps Back: Gladue at Ten and in the Courts of Appeal," 475.

offenders.[349] There has been an inconsistent application of this principle by lower courts, however, with ongoing disagreement over the degree to which *Gladue*-like consideration needs to be extended to other disadvantaged persons.[350] This ambiguity has limited the effectiveness of the *Gladue* approach on two fronts. By (correctly) emphasizing the distinctiveness of the Indigenous experience of colonialism, the *Gladue* approach is in some ways relegated to an extra measure for specialized courts or specialized personnel. In the absence of explicit Supreme Court guidance to the contrary, this makes it easy to consider fully developed *Gladue* reports as an optional extra that can be foregone where budgets are tight. At the same time, the very emphasis on the particular circumstances of Indigenous offenders highlights the generalized failure to sufficiently consider background and systemic factors for all offenders. To illustrate this point, we can look at the need for specialized *Gladue* reports. If all pre-sentencing reports were actually sufficiently implementing the general principle, then specialized *Gladue* reports might not be necessary at all. This would, of course, require the authors of pre-sentencing reports to have the cultural competence of *Gladue* report writers and, as a practical matter, busy courts might have writers who specialized in working with Indigenous offenders. Nevertheless, the ambiguity remains: the policy has been unwilling to wholeheartedly commit to a mandated special measure for Indigenous people, while simultaneously failing to implement general reforms that would make special measures unnecessary.

The second ambiguity is over the desirability of less punitive sentences for Indigenous offenders. A good deal of this ambiguity arises from the overlapping identities of Indigenous people as victims and offenders in Criminal justice. The fact that many offenders have themselves been victims of crime and abuse is a major part of the motivation for the *Gladue* approach and taking into account this dual status is an important part of *Gladue* analysis. Yet many Indigenous offenders also target Indigenous victims in their crimes. Thus, from the start, there has been a concern that if s.718.2(e) resulted in a generalized sentencing discount for Indigenous offenders it could discount the importance of Indigenous people as victims and

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[349] Ferguson, “A Review of the Principles and Purposes of Sentencing in Sections 718-718.21 of the Criminal Code,” 19–20.

[350] Ferguson, 19–20.

jeopardize the safety of vulnerable Indigenous people, especially women.[351] Although Roach noted that, after ten years, much of that initial controversy had died down, it has re-emerged with the publication of the final report of the National Inquiry into Missing and Murdered Indigenous Women and Girls.[352] The inquiry's stance encapsulates this ambiguity. On the one hand, it calls for *Gladue* reports to be considered a right and to be universally provided.[353] On the other hand, it also calls for a thorough evaluation of the impact of *Gladue* principles on sentencing equity for violence against Indigenous women, girls, and 2SLGBTQQIA people (which the inquiry would like to be considered an aggravating factor at sentencing).[354] The court has clearly interpreted s.718.2(e) as a remedial measure designed to address over-incarceration, but the national inquiry's approach highlights the fact that merely reducing over-incarceration is not necessarily a desirable public policy goal if it jeopardizes the safety of Indigenous people along the way. Recent legislative changes have increased the ambiguity of the provision, rather than providing clarity. In 2015, the words "and consistent with the harm done to victims or to the community" were inserted in s.718.2(e), which has the effect of undermining the rest of the provision. Similarly, recent amendments in response to the National Inquiry's recommendations that will push for more punitive sentences in cases of violence against Indigenous women and girls push against the stated remedial objective of *Gladue*.[355]

The *Gladue* approach is an evolved rather than designed public policy. It began with the introduction of a small and ambiguous legislative change in the form of s.718.2(e) of the *Criminal Code.* This was substantially flushed out by the Supreme Court in the decision in *R v Gladue*, and subsequently fine-tuned in *R v Wells* and *R v Ipeelee*. Nevertheless, considerable

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[351] Kent Roach, "Ending Peremptory Challenges in Jury Selection Is a Good First Step," *Ottawa Citizen*, April 2, 2018, sec. Opinion, 470–71, https://ottawacitizen.com/opinion/columnists/roach-ending-peremptory-challenges-in-jury-selection-is-a-good-first-step.

[352] Roach, "One Step Forward, Two Steps Back: Gladue at Ten and in the Courts of Appeal," 471.

[353] National Inquiry into Missing and Murdered Indigenous Women and Girls (Canada) and Canada, *Reclaiming Power and Place*, 2019, 1b:185.

[354] National Inquiry into Missing and Murdered Indigenous Women and Girls (Canada) and Canada, 1b:185.

[355] Forrest and Platt, "Government to Accept Criminal Code Changes Pushing for Harsher Sentences in Crimes against Indigenous Women | National Post."

variation in the *Gladue* approach has been allowed to develop, both in the interpretations of provincial courts of appeal and in the availability of resources for putting the approach into practice in Provincial courts. This has all contributed to the acknowledged failure of *Gladue* in meeting its stated remedial objectives.[356] It also constitutes a failure to respect Indigenous people as equal co-citizens. Given that both Parliament and the Supreme Court have stated that the particular circumstances of Indigenous people require consideration in sentencing, the inconsistent application of *Gladue* principles renders the administration of justice to some degree arbitrary. An Indigenous person in Saskatchewan or Manitoba will not receive the same consideration as one in Toronto, as a result of these disparities. Moreover, the ambiguities of *Gladue* contribute to undermining the legitimacy of the practice of criminal justice in Canada, rather than bolstering it. For some critics, *Gladue* is seen as special treatment that undermines equality before the law. The approach adopted in *Gladue* is often viewed – however unfairly – as a race-based sentencing discount.[357] This perception is likely to be reinforced by the combined effect of *Gladue* principles and the new treatment of victimization of Indigenous women as an aggravating factor, which could be reduced sentences for Indigenous offenders only if the victim is not an Indigenous woman. Although this critique lacks a nuanced understanding of the social context or legal conditions, it is rhetorically powerful for the general public. From the other direction, the half-measure that is *Gladue* provision merely serves to highlight the inadequacy of the general practice of Canadian criminal justice in providing justice to Indigenous people.

The lesson from the struggles of the *Gladue* approach to gain traction should be that future policy changes need significantly more legislative direction. Although it is fairly normal practice for Parliament to leave much of the detail of criminal justice policy to be worked out in jurisprudence, if there is a genuine desire for system-wide change it will need a clearer legislative mandate. In the case of *Gladue*, for instance, a clear mandate that requires *Gladue* reports in all cases for Indigenous defendants would radically hasten the uptake of the practice. Naturally, this sort of clear legislative direction would be difficult to achieve, both in political

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[356] Roach, "One Step Forward, Two Steps Back: Gladue at Ten and in the Courts of Appeal," 471.

[357] See for example National Post Editorial Board, "One-Tier Justice," *National Post*, November 23, 2004, sec. Editorials.

and practical terms. In political terms, the ambiguities of s.718.2(e) have allowed it to survive successive changes of government largely intact. Achieving and maintaining a clear political consensus on stronger action will of course be difficult. Practically, clear direction would likely require cooperation between the federal and provincial governments and a good deal of sensitivity not to raise objections from the judiciary. Nevertheless, the approach taken in *Gladue* of simply setting the ball rolling and seeing where it ends up has not been successful and so more forceful direction will clearly be required in the future.

4.4.2 A Culturally Sensitive Interpretation of Legal Rights

In his immensely helpful book, *Aboriginal Justice and the Charter: Realizing a Culturally Sensitive Interpretation of Legal Rights*, David Milward attempts to chart one way forward. Milward analyzes conflicts between various *Charter* rights and concepts of justice drawn from Indigenous legal traditions.[358] He argues that, if s.35(1) of the *Constitution* includes an Indigenous right to criminal jurisdiction, then principles of constitutional balancing demand that Indigenous perspectives on justice would need be given serious weight where they conflict with *Charter* rights.[359] He argues that *Charter* rights should then be interpreted in a culturally sensitive manner when applied to Indigenous justice processes.[360] To support this claim, he analyzes a serious of conflicts between *Charter* rights and perspectives drawn from Indigenous legal traditions, arguing for culturally-sensitive compromise positions to be reached between Canadian jurisprudence and Indigenous communities. For example, he discusses the conflict between the Canadian right to silence and truth-speaking traditions in some Indigenous communities that punish lying to the community more severely than an initial offence. He presents a modified case-to-meet rule, under which would if the prosecution presents a prima facie case the accused must then respond and cannot remain silent.[361] He also argues that the right to counsel should be modified to be a guarantee of some kind of support or advocate for

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[358] Milward, *Aboriginal Justice and the Charter*.

[359] Milward, 62, 71–72.

[360] Milward, 74.

[361] Milward, 169–71.

participants in justice processes, but not necessarily to require attorneys. This would enable community justice processes to operate without the need for specialized, full-time professionals with Canadian credentials.[362]

Although Milward's method generates many helpful proposals for the contours of Indigenous justice institutions, I am concerned that he simultaneously assumes too much autonomy for Indigenous justice systems and defers too much to existing Canadian jurisprudence. His approach blends arguments of principle about basic ideas of justice with pragmatic concerns about what will be acceptable to the dominant society. There is nothing wrong with this approach in general – I adopt a similar understanding throughout this dissertation. However, I am concerned that Milward is too theoretically cautious while being unrealistic about the constraints of practical politics. On the theoretical end, he works within the framework of existing jurisprudence and legal argument, and in particular the framework of the *Charter*. This prevents him from exploring theoretically bolder avenues that might nevertheless yield plausible policy proposals (as I attempt to do in chapter five). On the practical end, even the theoretically moderate approach he engages in produces proposals that are likely to meet very serious resistance from practical Canadian politics. For example, he argues that a full revival of truth-speaking traditions will be impossible because of civil libertarian objections, but that a revival of corporal punishment should prove acceptable.[363] This seems unlikely. Overall, however, there is an underlying assumption of a model roughly along American lines: a recognition of Indigenous jurisdiction over criminal justice (in this case, recognition under s.35(1) taking the place of the American doctrine of the internal autonomy of domestic dependent nations) but a limitation of that jurisdiction by the sensibilities of the federal legal order. As discussed above, I think that this is overly optimistic about the prospects of a constitutional recognition of an Indigenous right to self-determination in criminal justice. At the same time, it is overly deferential to the Canadian rights framework. I would like to argue the inverse: even in making space for Indigenous justice practices *within* the Canadian justice system, we must be more willing to revise our existing legal concepts and reconcile them with

[362] Milward, 174–81.

[363] Milward, 173, 190.

Indigenous perspectives. Thus, we should be theoretically radical while remaining realistic about the constraints of practical politics in making policy suggestions.

The model of a culturally sensitive application of legal rights grants the underlying legitimacy of those rights – it grants the claim that these are genuine legal expressions of underlying basic rights. Those genuine rights merely require culturally-sensitive interpretation to apply them in different cultural contexts. This is the excessive deference to the existing legal order: the *Charter* is manifestly a specific cultural expression, rather than an articulation of underlying basic rights. This is particularly clear when we examine s.16-23 covering language rights: this is not the expression of an underlying human right to culture as expressed in language, but is instead the articulation of a particular political compromise between English and French in Canada. This is also true of the legal rights in s.7-14. Some of these may be basic, underlying human rights, but others are clearly remedial rights created to maintain the functioning of a particular approach to criminal justice (such as the right to counsel, to reasonable bail, and trial by jury for serious offences). These rights only make sense in a specific legal context (i.e. one that operates with professional lawyers, operates a system of pre-trial detention, and has adversarial courts with the option of jury trials). Rather than taking for granted the existing articulation of rights and attempting to modify them for application in another cultural context, we need to first recognize that Canadian jurisprudence is itself a culturally specific articulation of underlying legal rights and human interests. Attempting a culturally-sensitive application of those already culturally-specific articulations risks trapping us into Canadian legal discourses in the way that has rightly been criticized. This unduly circumscribes the horizons of possibility and pushes towards Indigenous justice practices that mimic Canadian law with only minor modifications and incorporations of Indigenous thought.

The alternative requires a cross-cultural dialogue that seeks to establish common ground on the underlying human interests that legal rights are designed to protect. Ideally, such a dialogue could elucidate which rights protect genuinely shared interests, which can then be given culturally-specific expressions for the appropriate context (Indigenous- and non-Indigenous alike). It would also clarify which rights are only necessary in specific cultural contexts, such as the ameliorative rights required to prevent abuses in an adversarial system of justice. Such rights could be given force only in the appropriate cultural or institutional contexts.

4.5 A Model for the Medium Term: Reconciliation to Create Space for Indigenous Justice

I have argued that the legitimacy problem in Canadian justice cannot be solved by the institution of separate justice systems. Even with the most optimistic assumptions, separate systems would leave large numbers of people trapped in the "other" system, with no justification available of the legitimacy of the system for them. The existence of separate systems also provides no answers for criminal cases that involve both Indigenous and non-Indigenous people. All this suggests that the imperative to reconcile Indigenous and non-Indigenous principles of justice is inescapable: either it must occur within the Canadian justice system, or it must occur between separated justice systems to produce joint institutions capable of dealing with cases that cross systemic and cultural divides. This is but one instance of the general inescapability of reconciliation in Canada. As Chief Justice Antonio Lamar put it in *Delgamuukw*, "Let's face it, we are all here to stay."[364] Indigenous and non-Indigenous Canadians need to find ways of living together harmoniously, and they will necessarily mean some form of reconciliation between Indigenous and non-Indigenous practices and worldviews. In this domain, there must be a reconciliation of Indigenous and non-Indigenous approaches to criminal justice. Criminal justice is how society regulates the limit cases of how we live together, and so is necessarily a part of the broader reconciliation project.

Canadian practices of reconciliation have come under justified criticism for reinforcing rather than challenging colonial structures of power. Coulthard critiques Canadian practices of reconciliation for reproducing colonial power through the normalization of asymmetrical and nonreciprocal forms of recognition.[365] Too often, state discourses of reconciliation are used to "ideologically manufacture" a transition to support transitional justice mechanisms, which temporally locate wrongs in the past and focus on "overcoming the subsequent *legacy* of past abuse, not the abusive colonial structure itself."[366] Legal discourses of reconciliation, he argues,

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[364] Delgamuukw v. British Columbia, 3 SCR 1010, accessed August 14, 2019.

[365] Coulthard, *Red Skin, White Masks*, 25.

[366] Coulthard, 108–9.

attempt to "reconcile" the assertion of state sovereignty with Indigenous nationhood by subordinating the latter.[367] These are legitimate criticisms of some of the existing state and legal discourses of reconciliation, and in particular of the deployment of reconciliation language by successive Canadian governments to avoid tackling ongoing colonial structures. Yet this is not the only discourse of reconciliation in Canada today. The Truth and Reconciliation Commission of Canada set out a forward-looking model of reconciliation, arguing that it is "about establishing and maintaining a mutually respectful relationship between Aboriginal and non-Aboriginal peoples in this country." This cannot be the return to a previous harmonious state, since such a relationship had not existed. Developing a mutually respectful relationship will require "awareness of the past, acknowledgement of the harm that has been inflicted, atonement for the causes, and action to change behaviour."[368] It is this model of reconciliation that I have in mind when I speak of the inescapability of reconciliation: a discourse that does not historicize wrongs but instead confronts the ongoing effects of unjust structures and develops respectful responses. In terms of the legal discourse of reconciliation, it is broadly speaking accurate to say that it has been used to subordinate Indigenous legal concepts and claims to Canadian sovereignty. More specifically, Canadian jurisprudence has redescribed Indigenous claims in order to make them legible to the Canadian legal system, and in so doing has often distorted the claims into a form that is more palatable to Canadian political sensibilities. As James Tully argues, this is the *modus operandi* of modern constitutionalism: to redescribe demands for recognition in the prevailing language of constitutionalism, even where this distorts and misdescribes the claim.[369] In short, most of the compromise to achieve this form of reconciliation comes from the Indigenous side, with only minor alterations made to Canadian legal orders. Instead, the legal discourse around reconciliation needs to take seriously the

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[367] Coulthard, 124.

[368] Truth and Reconciliation Commission of Canada., *Honouring the Truth, Reconciling for the Future*, 6–7.

[369] James. Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (New York: Cambridge University Press, 1995), 38.

responsibility on the part of Canada to work for reconciliation – to atone for the causes of wrongs and take action to change wrong behaviour.[370]

The challenge, then, is develop a model of reconciliation that does not paper over problems, but instead draws on Indigenous and non-Indigenous traditions of thought to produce mutually acceptable outcomes, that is, to produce a way of living together in mutual respect. To do this will require embracing the "strange multiplicity" Tully describes as the reality of constitutionalism in an age of diversity.[371] If we recognize that a tidy delineation of jurisdictions for separated justice systems is an impossibility, we can give up on the attempt to create legal pluralism as a plurality of "empires of uniformity," or purely expressed legal traditions. In practice, this means privileging practical dialogue between participants over abstraction, in order to find common ground as a multiplicity, rather than a uniformity.[372] Tully's discussion of constitutionalism as an activity governed by the three conventions of mutual recognition, consent, and a presumption of cultural continuity would seem to provide a starting point for intercultural dialogue over the shape of a justice system that could be viewed as legitimate by both Indigenous and non-Indigenous people.[373] Such a dialogue would certainly preclude assimilative discourses of recognition, given the emphasis on consent and the presumption in favour of cultural continuity. Practically, this would likely mean accepting a blend of institutional reforms in the medium term. This could include the recognition by Canada of Indigenous institutions of justice, at least to the extent of making space for the development of such institutions by Indigenous communities. But it could also include the incorporation of Indigenous principles and practices of justice into existing Canadian legal structures, or the development of community justice practices in the grey area permitted by diversion from the mainstream justice system. It would require a tolerance of a degree of untidiness and multiplicity

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[370] Truth and Reconciliation Commission of Canada., *Honouring the Truth, Reconciling for the Future*, 6–8.

[371] Tully, *Strange Multiplicity*.

[372] Tully, 183.

[373] Tully, 30.

in institutions of justice to mirror the multiplicity of overlapping identities for Indigenous Canadians.

This is an exercise in the reconciliation of Indigenous and non-Indigenous conceptions of justice. For such a dialogue to be effective, it would need to be a real, ongoing, and concrete dialogue between participants in the justice system across cultural divides, governed by Tully's three norms of mutual recognition, consent, and cultural continuity.[374] Such dialogue should also properly be understood as a series of dialogues in a variety of sites within society and the criminal justice system. As I noted in chapter three, in the second-best circumstances of the medium term, institutions of criminal justice will have to seek a degree of freestanding legitimation rather than relying on top-down legitimation by political institutions and the underlying constitutional order. This would suggest that each institution will have to be supported by its own forms of cross-cultural dialogue aimed at securing dual legitimation from Indigenous and non-Indigenous perspectives. Some criminal justice institutions already have associated venues for deliberation and dialogue. For example, many police bodies have some form of oversight board. These could be prime sites for cross-cultural dialogue about the operation of police in Indigenous communities. However, making this viable would require significant restructuring in terms of membership and procedures around the model of cross-cultural dialogue based on mutual recognition, consent, and cultural continuity. Similarly, correctional facilities already engage communities in discussion and seek advice. Such discussions could be expanded and developed into a venue for dialogue aimed at legitimation. However, this would require placing substantially greater emphasis on the importance of such discussions. They cannot be treated as merely consultative or public relations exercises, but rather as an opportunity to draw on the knowledge and perspectives of Indigenous and non-Indigenous stakeholders in the justice system in order to design more legitimate practices.

The precise nature of such dialogues would, of course, need to be worked out in practice in live discussion between real participants. No theoretical discussion can pre-empt the actual give and take that would be required to work out a model that can generate mutual legitimacy. As such, any dialogue would likely need to be recursive, in the sense that whatever model was

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[374] Tully, 30.

adopted to govern the dialogue would itself need to be subject to deliberative revision over time. Melissa William's model of three normative spaces can help to understand this recursive process.[375] Williams argues that we can identify three distinct normative spaces in a colonial context like Canada. The first normative space will be "governed *exclusively* by the norms and commitments affirmed by [indigenous] peoples themselves."[376] In this normative space, Indigenous people can design and implement their own institutions of criminal justice, and work to revitalize Indigenous legal traditions. The second normative space is not a non-Indigenous mirror image, but is instead "governed by the norms expressed within Canadian institutions and practices of constitutional democracy, in all their pluralism and complexity."[377] For criminal justice, this will include the tradition of the Common law but also any principles from Indigenous legal traditions that have been adopted into Canadian practice. Indigenous people are included in this normative space as Canadians, that is, as full equal co-citizens. The third normative space, however, is the terrain of cross-cultural dialogue. This includes all Canadians understood as Indigenous and non-Indigenous people, rather than preconceived as co-citizens. As Williams puts it, "In order to avoid relations of domination, the terms of living together must be agreed to by both parties on a basis of equality."[378] A crucial feature of the third normative space is that it is where we can most appropriately delineate the scope of the other two normative spaces. In other words, it is only through cross-cultural dialogue between equals that we can determine the appropriate role for Indigenous justice practices and reformed practices of Canadian criminal justice to deal with the common problems that arise from living together.

The basic problem is that, historically, the second normative space has been taken as the authority on delineating the scope of the first. Thus, it has been Canadian institutions operating according to Canadian norms that have determined the limited scope that has been permitted for the development of Indigenous practices of justice in Canada. In order to properly show respect

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[375] Melissa S. Williams, "Sharing the River: Aboriginal Representation in Canadian Political Institutions," in *Representation and Democratic Theory*, ed. David Laycock (University of British Columbia Press, 2004), 93–118.

[376] Williams, 108.

[377] Williams, 108.

[378] Williams, 108.

to Indigenous people as both equal co-citizens and as Indigenous people, it must be dialogue in the third normative space that sets these boundaries. Thus, the kinds of consultation that already occur in criminal justice institutions need to undergo two major changes. First, they need to move from post-hoc consultation and advisory bodies to deliberations with the power to make real changes to justice practices. It may be that, in order to maintain legitimacy for non-Indigenous Canadians, any changes would need to be ratified by the Canadian political process. However, the point is that the cross-cultural dialogue could generate meaningful changes. In legitimacy terms, this would be equivalent to changes generated by the civil service being endorsed by Parliament. Second, discussions need to move from the second normative space to the third, where they can be guided by norms generated by Indigenous and non-Indigenous peoples situated as equals.

Chapter 5
Impartiality

5 Impartiality, Indigeneity, and Criminal Justice

5.1 Introduction

Indigenous people in Canada challenge the legitimacy of the criminal justice system, arguing that it is an ineffective, alien approach imposed on them without their consent.[379] Although specific failures of justice may grab the headlines, the critique is systemic: the application of Canadian justice norms to Indigenous communities is itself considered illegitimate and unjust. The practice of circuit courts best embodies this concern. Circuit courts operate where communities are too small and widespread to make permanent courts practicable: rather than having the people come to the court, the court travels to the people. Where the legitimacy of the system is not in question, this is an eminently practical solution to the challenge of providing justice to far-flung communities. In the case of Indigenous communities, Canadian judges, lawyers, and jailers are already viewed as outsiders lacking in legitimate authority.[380] When the only interaction is the dispensing of "justice", that is, the court professionals literally come from outside only to try and punish community members, their status as "outsider[s] without authority" is underlined.[381] In the most extreme (but common) case, the members of the court will fly in to a community every few months, deal with the cases on the docket, then leave. Proceedings are usually in English, which many community members may not speak. It would be hard to design a more baldly colonial procedure: representatives of a distant authority arrive, claim authority over a community, dispense punishment, and leave – perhaps taking some community members away to distant prisons.

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[379] Borrows, "Creating an Indigenous Legal Community," 168; Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide*, 77; Turpel, "Aboriginal Peoples and the Canadian Charter," 4, 41; Napoleon and Friedland, "Indigenous Legal Traditions: Roots to Renaissance," 234–35.

[380] Monture-Okanee and Turpel, "Aboriginal Peoples and Canadian Criminal Law," 246.

[381] Monture-Okanee and Turpel, 246.

There is a growing recognition that circuit courts are an unsatisfactory solution for Indigenous communities. Court officials often understand that Indigenous people are reluctant to call upon Canadian justice to intervene in their disputes, preferring to solve problems within the community.[382] Even where matters do come to trial, victims and witnesses are often reluctant to testify where doing so would involve directly accusing the perpetrator and exposing them to punishment.[383] Canadian courts also systematically misinterpret the behaviour of Indigenous people. For instance, in many Indigenous cultures, prolonged eye contact is disrespectful, so Indigenous witnesses politely look aside while testifying, which Canadian courts regularly interpret as a sign of untrustworthiness.[384] The end result is a court process that is ineffective and frequently viewed by communities as harmful interference: courts impose fines and jail sentences but leave without solving any problems.[385]

Some circuit courts make efforts to ameliorate these concerns. Some judges in Northern Ontario, for instance, set up their court in a rough circle form and try to make the process less formal and adversarial.[386] There is a provincial circuit court in Saskatchewan that conducts proceedings at least partially in Cree (although lawyers may argue in English). These initiatives, while laudable, are limited and exist largely at the discretion of individual judges. Given the problems with circuit courts, the question remains: why operate in this manner at all? Why continue to impose Canadian courts on Indigenous communities? Why insist that justice be overseen by professional judges and lawyers who communities view as "outsiders without authority?"[387] The answer is, at least in part, that what Indigenous people view as a legitimacy-threatening deficit of Canadian justice, the justice system sees as its greatest virtue. That system

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[382] McMillan, "Colonial Traditions, Co-Optations, and Mi'kmaq Legal Consciousness," 190; Ross, *Returning to the Teachings*, 202.

[383] Ross, *Dancing with a Ghost*, 7–9.

[384] Ross, 4.

[385] Ross, 53.

[386] Ross, *Returning to the Teachings*, 7–8.

[387] Monture-Okanee and Turpel, "Aboriginal Peoples and Canadian Criminal Law," 246.

requires that judges "come as a stranger" to the case, that is, that each case be presided over by and impartial judge who has no connection to the disputants.[388] Because Indigenous communities are small and people are tightly interconnected, it is not possible to find such an impartial person within the community. Hence, our system essentially demands that judges come from outside. Whether there is a permanent satellite court or a roving circuit court does not change the essential fact that justice is dispensed to Indigenous communities by outsiders *by design*.

In this chapter, I argue that the conception of impartiality that demands outsiders judge Indigenous people is limited and in need of revision. In doing so, I adopt an approach advocated by Patricia Monture and Mary Ellen Turpel. They argued that it was necessary to strip the existing system down to its conceptual building blocks and compare those to their Indigenous equivalents.[389] Impartiality is certainly one such conceptual foundation. I proceed by reconstructing the model of impartiality implicit in Canadian criminal trials, which I then subject to criticism. I then attempt a philosophical reconstruction of a conception of impartiality implicit in contemporary Indigenous circle justice practices. I argue that this is a fuller conception of impartiality which could enhance the practice of justice in Canada. Justice practices that embody this richer conception have the potential to be viewed as legitimate by Indigenous and non-Indigenous Canadians alike. I argue that a practice with ancient roots in the common law, that of the mixed jury, has the potential to embody the fuller conception of impartiality within the Canadian criminal justice system. Notably, adopting this wider conception of impartiality would also open up political and juridical space to replace circuit courts with legitimate community-based justice practices.

5.2 The Canadian Model of Impartiality in Criminal Justice

In this section, I reconstruct the implicit model of impartiality behind the practice of Canadian criminal trials. To do so, I engage in some analysis of the structure of criminal trials, but also rely on policy documents that give guidance to criminal justice system officials and

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[388] Ross, *Returning to the Teachings*, 206–7.

[389] Monture-Okanee and Turpel, "Aboriginal Peoples and Canadian Criminal Law," 267.

court cases that provide judicial interpretation of the principles underlying the system. The model I construct construes impartiality in two central ways. First, impartiality is taken to be a property of certain judging agents (judges and juries) stemming from their disinterestedness in the relevant case. Secondly, impartiality is offered as a procedural guarantee based on a method of avoidance of bias. This procedural guarantee is overseen by impartial judges who are meant to regulate an adversarial process to ensure procedural impartiality.

Although impartiality is central to the practice of Canadian criminal justice, not all participants must strive to be impartial at all times. Canada's justice system is adversarial, rather than inquisitorial, which licenses some participants to pursue only particular interests. The right of the accused to act to avoid punishment is strongly protected, as is the ability of their lawyers to act in their interests.[390] The situation is less clear with Crown prosecutors, who fulfil many functions in the criminal justice system. Crowns are expected to act impartially in the exercise of prosecutorial discretion, much in the same way that impartiality is considered a general value of the public service.[391] Within the court setting, however, part of the Crown role is still to “act as a strong advocate” and “vigorously pursue a legitimate result to the best of its ability.”[392] In fact, the Court has cautioned that presenting the advocate role as being performed impartially may in fact mislead juries into thinking an impartial determination of guilt had already been made.[393] Within the trial context, the responsibility of ensuring that an adversarial process produces an impartial result rests squarely with the judging agents: primarily with judges, but also, where appropriate, with juries.

Judges oversee the trial process, and are the deciding authority on matters of procedure, law, and (except in jury trials), fact. It is thus crucial that judges themselves act impartially, or, as

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390Section 11(c) of the Charter of Rights and Freedoms, which protects against self-incrimination, is one clear example. The simple fact that those eventually found guilty of crimes are not also charged with perjury is another. Similarly, attorney-client privilege is only the clearest of the many ways the criminal justice system protects the ability of lawyers to act in the particular interests of their client (rather than impartially to serve justice).

[391] Public Prosecution Service of Canada, “Public Prosecution Service of Canada Deskbook” (Attorney General of Canada, 2014), 46, J79-2/2014E-PDF.

[392] R. v. Cook, 1 SCR 1113 (C 1997).

[393] Boucher v. The Queen (C December 9, 1954).

construed by the Canadian Judicial Council, "Judges must be and should appear to be impartial with respect to their decisions and decision making."[394] The judiciary considers impartiality not merely to be the product of a procedure or a quality of actions, but also to be a property of judges themselves. The Supreme Court has located judicial impartiality as "a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case."[395] I would like to note two peculiar features of this formulation. First, the tribunal as a whole is assimilated to the person of the judge, making the constitutional guarantee of trial by an impartial tribunal rest on the properties of the judge.[396] Second, the crucial property is rather extraordinarily considered to be an internal state of mind. In order to make the requirement of impartiality effective, the judiciary thus also places importance on the public perception of impartiality: although impartiality "in fact" is a matter of an internal state of mind, public confidence in an impartial judiciary is also necessary.[397] The general proposition that justice must not only be done but also be seen to be done is to be tested "from the point of view a reasonable, fair minded, and informed person."[398] But what is the reasonable observer looking for in determining the impartiality of a judge? Impartiality is given a negative definition as the *absence* of bias, actual or perceived.[399] Judges are thus advised to avoid actions or associations that could give rise to a reasonable perception of bias.[400]

Judicial reasoning accounts for the conceptual possibility that an impartial state of mind could be achieved despite the presence of biasing factors: a judge could be truly impartial

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[394] Canadian Judicial Council, "Ethical Principles for Judges" (Canadian Judicial Council, 1998), 27, JU11-4/2004E-PDF, https://www.cjc-ccm.gc.ca/english/news_en.asp?selMenu=news_pub_judicialconduct_en.asp.

[395] Valente v. The Queen, 2 SCR 673 (C 1985); affirmed in Ruffo v. Conseil de la magistrature, 4 SCR 267 (C 1995).

396 This is an element of s 11(d) of the Charter of Rights and Freedoms, which reads in full "11. Any person charged with an offence has the right (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal."

[397] Canadian Judicial Council, "Ethical Principles for Judges," 8, 31.

[398] Canadian Judicial Council, 25, 27, 31.

[399] Valente v. The Queen, 2 SCR.

[400] Canadian Judicial Council, "Ethical Principles for Judges," 32.

provided their own opinions leave them “free to entertain and act upon different points of view with an open mind.”[401] Nevertheless, by locating impartiality in an unobservable state of mind, giving it a negative definition as the avoidance of bias, and requiring a reasonable *perception* of impartiality, the judicial construal of the value of impartiality lends itself to a method of avoidance. In order to maintain the public perception of impartiality, judges are advised to avoid or refrain from public activity that could be perceived as biasing and to avoid conflicts of interest.[402] Yet this presumes a judge is already in place: what is the quality by which impartial judges can initially be identified? Given the negative definition of impartiality, the only possible positive corollary is disinterestedness: the judicial system should be providing judges who have no interest in the outcome of cases (and thus, no connection to the parties to a dispute). The disinterestedness of judges thus sets up a (rebuttable) presumption of impartiality: so long as a judge is disinterested, they can reasonably be presumed to be impartial unless there is clear evidence to the contrary.[403]

The basic model of judicial impartiality has emerged: disinterested judges are presumed to be free from bias, unless their conduct would lead a reasonable person to perceive bias. Impartiality is thus a (presumed) quality of judges, but a fragile one: it must be protected by the judge's own conduct and by institutional arrangements. Judicial independence – another key constitutional guarantee – is thus construed as merely instrumentally valuable to the provision of impartial justice. Were judicial independence not required for impartiality, it would be unnecessary.[404] Nevertheless, judicial independence requires a series of institutional arrangements (such as security of tenure and remuneration) that protect judicial decision-making from outside interference.[405] There remains, however, a strong onus on judges to ensure that their conduct upholds the public perception of impartiality: judicial independence protects

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[401] endorsed in R. v. S. (R.D.), 3 SCR 484 (C 1997).

[402] Canadian Judicial Council, “Ethical Principles for Judges.”

[403] see R. v. S. (R.D.), 3 SCR the presumption of the impartiality of the judiciary.

[404] R. v. Lippé, 2 SCR 114 (C 1990).

[405] Canadian Judicial Council, “Ethical Principles for Judges,” 8.

against biasing interference, but judges themselves are also responsible for avoiding potentially biasing entanglements.

In Canada, the model of juror impartiality essentially mirrors the basic model of judicial impartiality but shifts the onus of maintaining a perception of impartiality from the ongoing conduct of judges to the process of juror selection. This shift of emphasis is a result of judges needing to be impartial relative to many trials, while jurors must only be impartial relative to the single trial for which they are selected. In the Canadian system, assembling an impartial jury has two stages: creating a jury roll and selecting the petit jury (i.e. those jurors who actually serve in a given case). These two phases correspond to two distinct ideas of impartiality. First, there is cross-sectional, or jury impartiality, which suggests that the jury should be a random cross-section of society as a whole.[406] In Canadian jurisprudence, this can also be referred to as the representativeness of the jury.[407] This type of impartiality is ensured through the random selection of jurors for the jury roll. The second idea of impartiality concerns the individual or psychological impartiality of jurors, understood as the disinterestedness of individual jurors.[408] As with judges, there is a rebuttable presumption of impartiality for randomly selected jurors. Jurors can be disqualified for perceived bias during the selection of the petit jury from the jury role. Jurors can be rejected if either the defence or prosecution reasonably apprehends a source of bias in a challenge for cause. Until 2019, jurors could also be rejected through a limited number of peremptory challenges, that is, with no reason given. Legislation to eliminate peremptory challenges was recently struck down by an Ontario judge, making the future of the practice unclear.[409]

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[406] Marianne Constable, *The Law of the Other: The Mixed Jury and Changing Conceptions of Citizenship, Law, and Knowledge*, New Practices of Inquiry (Chicago ; London: University of Chicago Press, 1994), 36.

[407] R. v. Kokopenace, 2 SCR 398, accessed September 16, 2019.

[408] Constable, *The Law of the Other*, 36–37.

[409] Sean Fine, “Jury Trials at Risk as Judge Strikes down Federal Ban on Peremptory Challenges Enacted after Boushie Case,” *The Globe and Mail*, November 6, 2019, https://www.theglobeandmail.com/canada/article-ontario-judge-strikes-down-federal-ban-on-peremptory-jury-selection/.

The use of peremptory challenges has long been controversial, in Canada and other common law jurisdictions, because of the potential for systematic bias against jurors from minority groups.[410] Although the number of challenges is generally limited, because members of minority groups are often a small part of the pool, they can be excluded entirely from petit juries through the use of peremptory challenges. This has been the case for Indigenous people on juries in Canada, which is why the Manitoba Justice Inquiry recommended the elimination of peremptory challenges in 1991.[411] In 2018, Gerald Stanley was acquitted in the shooting death of Coulten Boushie by an all-white jury. In response to the public outcry, a measure to eliminate peremptory challenges was included in an omnibus criminal justice reform, coming into effect in 2019. While some have welcomed this change, others are sceptical, arguing that the strategic use of peremptory challenges against white jurors can be the only way for defense counsel to ensure that there is any minority representation on a jury at all.[412]

Although the practical implications of the elimination of peremptory challenges will only become clear with time, the Supreme Court of Canada has unequivocally ruled that accused do not have a right to the inclusion of jurors from their minority group.[413] In *R. v. Kokopenace*, the Court ruled that the guarantee of representativeness of juries is severely circumscribed, and will be met so long as the state does not deliberately exclude any subset of the population and makes reasonable efforts to compile an inclusive jury roll. According to the court, "impartiality is guaranteed through the process used to compile the jury roll, not through the ultimate composition of the jury roll or the petit jury itself."[414] Thus, so long as the procedure is reasonably fair – defined as selecting the jury randomly for lists that draw from a broad cross-

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[410] for a discussion of American jurisprudence, see Constable, *The Law of the Other*, ch 2.

[411] Hamilton and Sinclair, *Report of the Aboriginal Justice Inquiry of Manitoba: The Justice System and Aboriginal People.*, 1:ch 17.

[412] Roach, "Ending Peremptory Challenges in Jury Selection Is a Good First Step"; Scott Reid, "Peremptory Challenges Are Necessary for Fair Jury Trials," *Toronto Star*, January 28, 2019, sec. Opinion, https://www.thestar.com/opinion/contributors/2019/01/28/peremptory-challenges-are-necessary-for-fair-jury-trials.html.

[413] R. v. Kokopenace, 2 SCR.

[414] R. v. Kokopenace, 2 SCR.

section of society and delivering notices to those selected – then it does not matter whether the eventual jury roll, much less the petit jury, is in fact representative of society. Furthermore, the unintentional exclusion of small groups from the jury roll is acceptable so long as there is still "fair opportunity for participation by a broad cross-section of society."[415] By defining jury impartiality in this way, the Court makes it possible to have jury rolls with minimal inclusion of members of minorities, and even with no inclusion of members of the specific minority group a defendant belongs to. They also make it possible for a jury like that in the case of Gerald Stanley – i.e. an all-white jury in case where a white man is on trial for the murder of an Indigenous man – to be considered legally impartial.

The process of juror selection illustrates the method of avoidance that constitutes impartiality as a procedural guarantee in Canadian criminal justice. Overseen by the figure of the impartial judge, the procedures of criminal justice are meant to exclude any factors that could potentially bias the outcome of the case. This is most notable in the rules of evidence, which operate principally by excluding evidence deemed to be irrelevant or unreliable. The basic principle is that impartiality can be achieved by purifying the process of any biasing factors; an impartial decision can result from the condensate left behind after this process of purification.

Critiques of Impartiality as Disinterestedness

It is important to recognize that the model of impartiality embodied in the Canadian criminal justice system is not the only way to understand the value of impartiality. Despite the rhetoric deployed in its defence, it is not "true impartiality", nor is it even necessarily an obvious or natural model of impartiality.[416] As Melissa Williams has argued, the juridical model of justice does not "exhaust the available ways of thinking about impartiality."[417] Instead, it is a particular institutional expression of a more general value, which comes to seem natural to those

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[415] R. v. Kokopenace, 2 SCR.

[416] see for instance R. v. S. (R.D.), 3 SCR.

[417] Melissa S. Williams, "The Uneasy Alliance of Group Representation and Deliberative Democracy," in *Citizenship in Diverse Societies*, ed. Will Kymlicka and Wayne Norman (Oxford: Oxford University Press, 2000), 128.

socialized to it. By itself, this fact is not a critique: the concept of impartiality is sufficiently general that it will always require further specification in any institutional formulation. The more general concept of impartiality has positive and negative formulations. In the positive formulation, impartiality denotes fair or equitable treatment. In the negative formulation, it denotes a freedom from bias or prejudice, shown through not favouring one side over another. In the case of criminal justice, impartiality through neutrality is not available: judges must judge, and in so doing, cannot avoid "taking sides" altogether. To judge impartially, the formal requirements of impartiality must be given substantive content. As John Stuart Mill put it, "Impartiality...as an obligation of justice, may be said to mean, being exclusively influenced by the considerations which it is supposed ought to influence the particular case in hand; and resisting the solicitation of any motives which prompt to conduct different from what those considerations would dictate."[418] Determining which considerations are relevant or irrelevant is left to the institutionalized norms of the decision-making procedure.

In Canadian criminal justice, the emphasis is on the negative formulation: impartiality is a matter of avoiding bias. Thus, the rules of evidence exclude potentially biasing factors, juror selection excludes potentially biased jurors, and judicial conduct must be such as excludes even the reasonable perception of bias. The Criminal Law and the Law of Evidence also set out more positively the types of considerations that are relevant to determining a case. Legal concepts such as *mens rea, actus reus*, defences, and levels of liability all function to regulate the types of reasons that can be considered in deciding a case. Although such specification are a functional necessity for institutionalizing impartiality, they leave the model of impartiality open to a critique of its scope. These specifications may be insufficiently inclusive and exclude considerations that are actually relevant to the just resolution of a case. Conversely, they may be overly inclusive, and include factors that bias the decision. I will return to this form of critique while examining an Indigenous model of impartiality.

This model of impartiality resolves around the central importance of the disinterestedness of the judging agents. It is the fact that judges (and jurors) have no particular interest in the cases over which they preside that sets up the rebuttable presumption of their impartiality. Thus,

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[418] John Stuart. Mill, *On Liberty, and Other Essays* (New York: Oxford University Press, 1991), 180.

disconnection is given a positive value in supporting impartial justice. For some Indigenous critics, it is precisely this formulation of impartiality that is the most objectionable: the disinterstedness and disconnectedness that recommends a judge as impartial in the Canadian criminal justice system means they are "simply an outsider without authority" in Indigenous communities.[419] As Monture and Turpel argue, authority to resolve conflict in tight-knit Indigenous communities belongs those who know the parties and can consider all the relevant information. Although this could be understood as an outright rejection of the value of impartiality, I believe it points to a subtler conceptual critique: disinterestedness is not identical to impartiality. Specifically, the disconnection required by this model of impartiality is viewed as inappropriate and even harmful in healing approaches to justice, which view disconnection (from oneself and all one's relations) as the underlying source of the problems addressed in the criminal justice system.[420]

In relying on the disinterestedness of judges, the Canadian criminal justice system does not directly institutionalize impartiality. Disinterestedness is instead a kludge necessitated by the awkward formulation of impartiality as an unobservable internal mental state with a negative content, coupled with the requirement of a perception of impartiality. In other words, having set up a model of impartiality that ensures a judge cannot directly demonstrate their impartiality (but only their partiality), the system institutionalizes disinterestedness (which is more clearly demonstrable) as a heuristic for impartiality. Because having an interest in a case (i.e. some connection to the participants) can be a real or perceived source of bias, we exclude such judges in the hopes that the remainder will be impartial. Although this institutionalized heuristic has been relatively successful at excluding certain kinds of bias (such as conflicts of interest and nepotism), it does not provide any actual guarantee of substantive impartial treatment. As a stand-in for the "impartiality in fact" of a judge's internal state of mind, it leaves much to be desired.

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[419] Monture-Okanee and Turpel, "Aboriginal Peoples and Canadian Criminal Law," 246.

[420] Ross, *Returning to the Teachings*, 135.

By relying on a heuristic of disinterestedness, this model opens itself to the critiques levelled against the "view from nowhere" conception of impartiality in political theory. Iris Young argues that the ideal of impartiality in moral reasoning strives towards a universal point of view that transcends the particularity of subjectivity.[421] This, she maintains, is an "idealist fiction", as we can see from the unrealistic thought experiments – ranging from Rawls' original position to Nagel's brain in a vat – required to generate such a view from nowhere.[422] Moral reasoning can only ever occur from a situated point of view which gives the reasoner an interest in the outcome. Young argues, with Bernard Williams, that it is the situated, first-person nature of moral and practical reasoning that distinguishes it from factual or scientific reflection.[423] The pursuit of this impossible idealist fiction, for Young, erases difference and enables dominant groups to portray their particular perspectives as universal.[424] In the case of Canadian criminal justice, the presumption of the impartiality of disinterested judges can take the form criticized by Young. Empirically, most judges are white men; if their perspective is, absent clear evidence to the contrary, considered to be impartial, there is a real risk of universalizing the particular perspective they share. The emphasis on eliminating sources of bias also makes difference suspect in precisely the way that concerns Young. This is illustrated in the case of *R.D.S. v. Her Majesty the Queen*. The verdict in this case was challenged on the grounds that Justice Sparks (a black woman) caused a reasonable apprehension of bias by remarking in her judgement on certain contextual elements of the case: specifically, that police officers sometimes mislead the court and that they are particular prone to overreact when dealing with racial minorities.[425] Although the Supreme Court ultimately decided that the judge's conduct did not overturn the presumption of impartiality, both lower courts initially agreed with the Crown in finding that Justice Sparks showed bias. On the Supreme Court, three judges agreed, with two more arguing

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[421] Iris Marion Young, *Justice and the Politics of Difference*, Paperback reissue / (Princeton, N.J: Princeton University Press, 2011), 100.

[422] Young, 103–4.

[423] Young, 104.

[424] Young, 97.

[425] R. v. S. (R.D.), 3 SCR.

that the comments were "worrisome and came very close to the line." The barest plurality found the comments to be an "entirely appropriate recognition" of the relevant context of the case, and an aid to impartial judgement.[426] Sherene Razack argues that this case illustrates the operation of a colour blindness in the law that acts to posit the innocence of white subjects by asserting the irrelevance of racial identity unless its specific relevance can be demonstrated.[427] This is another way of describing the false universality of a particular perspective: assertions of the relevance of difference are rendered suspect against the putative universality of the view from nowhere. To put it another way, judges who themselves exhibit difference (from the normalized white male) seem to thereby lose some of their presumption of impartiality.

Advocates of contextualized judging (including Justices L'Heureux-Dubé and McLachlin in *R.D.S*) could argue that impartiality is better captured by a view from everywhere than a view from nowhere. Such an approach is advocated by Susan Okin, who argues that impartiality is better conceived as taking into account every particular position, rather than transcending them. For Young, this too is unsatisfying, because it retains a monologic structure that assumes that a single impartial reasoner can somehow adopt the point of view of everyone.[428] Judicial impartiality – even conceived contextually – is particularly vulnerable to this critique, as the inclusion of perspectives is still filtered through the monologic perspective of the impartial judge. There are immanent counter-currents to the monologic focus of judicial impartiality, however. The use of juries suggests that a multiplication of perspectives may be important to achieve impartiality. Similarly, the use of panels of judges in appellate courts suggests that there are limits on the ability of any individual – however impartial – to assimilate all relevant perspectives. Nevertheless, the specific operation of these processes reaffirms the dominant approach as emphasizing disinterestedness. Rather than striving to balance various perspectives and interests in the composition of juries, each juror is selected for their disinterestedness. In practice, this can mean that the composition of juries repeats the assertion of particularity as

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[426] R. v. S. (R.D.), 3 SCR.

[427] Sherene Razack, "R.D.S. v. Her Majesty the Queen: A Case about Home," *Constitutional Forum* 9 (1998 1997): 59–60.

[428] Young, *Justice and the Politics of Difference*, 105.

universality by excluding individuals for differing from the perceived universal norm – as when Indigenous jurors are systematically excluded through the use of peremptory challenges.

5.3 Reconstructing a Model of Impartiality from Contemporary Indigenous Circle Justice

Unlike criminal trials, Indigenous justice practices do not operate under a single, unifying system of justice, nor are there authoritative policy documents that lay out Indigenous approaches to impartiality. Instead, there is a multitude of Indigenous justice practices, rooted in varied Indigenous legal traditions and responding to the diverse contemporary realities of Indigenous communities.[429] Many Indigenous scholars address this diversity by speaking from the tradition they know best.[430] Because I am not embedded within an Indigenous legal tradition, and thus lack the deep knowledge of such traditions Indigenous scholars bring to the table, I am focusing instead on the models of impartiality implicit in practice. This also allows me to symmetrically situate my discussion of models of impartiality, by examining the models drawn from practice on even terms. Rather than the single implicit model of impartiality that is hegemonic within the Canadian criminal justice system, it is more accurate then to think of a multiplicity of Indigenous models of impartiality implicit in the diverse justice practices of Indigenous communities. In this section, I will attempt a philosophical reconstruction of one such model that I believe to be implicit in one set of contemporary Indigenous justice practices, loosely termed circle justice. I focus on circle justice for three main reasons. First, the use of circle justice practices is widespread in contemporary Indigenous communities in Canada. Although not a pan-Indigenous practice, circle justice is widely used in community justice practices funded by the pan-Canadian Aboriginal Justice Initiative. Second, circle justice practices enjoy a greater degree of legitimacy in Indigenous communities than the Canadian court system.[431] Third, circle justice practices, although varied, have common structural features

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[429] Napoleon and Friedland, "Indigenous Legal Traditions: Roots to Renaissance," 228–29.

[430] for a clear discussion, see: Napoleon and Friedland, "Indigenous Legal Traditions: Roots to Renaissance"; John. Borrows, *Drawing out Law : A Spirit's Guide* (Toronto: University of Toronto Press, 2010) provides another illustration of this approach.

[431] As evidenced by the selection of circle justice practices by many communities when given some measure of control over criminal justice practices. Evidence that such practices are more culturally relevant is presented in

from which a model of impartiality can be derived. It is important to note at this juncture that this is the limit of my claims about circle justice. I am not claiming that circle justice represents an authentic or traditional Indigenous justice practice, nor am I claiming that it is grounded in any particular Indigenous legal tradition. I am merely claiming that circle justice practices have been widely adopted by Indigenous communities as a more legitimate alternative (or, in some cases, complement) to the Canadian court system.

Practices of circle justice vary widely across Indigenous communities. Circles are used for purposes as diverse as sentencing, healing, training, support, and discipline. Who is included in the circle will vary accordingly, as might the protocols for the operation of the circle. Circles may also be associated with traditional teachings from the legal tradition under which they operate. Nevertheless, it is possible to discern a common structure to most circle practices. The shape of the circle provides both the format and the procedure for the justice practice. In a typical justice circle, those most affected by the problem at hand are invited to participate in the circle. This will include the victim, offender, support workers for each, the families of each, and members of the broader community.[432] Where the Canadian justice system is involved, the judge, Crown and defence attorneys, and police may also be included.[433] Circles begin with ceremony, typically in the form of a cleansing ceremony (smudging is perhaps the most familiar) and prayer. Once everyone understands the process, there are a series of “go-arounds” in which each participant has a chance to speak in turn, uninterrupted, until they pass to the next in the circle.[434] Each go-around may have a specific purpose (such as addressing the victim, victimizer, or suggestions for a way forward) or they may simply continue until everyone has had their full say. Finally, the circle closes with ceremony. Ordinarily, the circle is part of a larger process, which will include preparatory work with the participants (which may itself take the form of

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Department of Justice Evaluation Division, “Evaluation of the Aboriginal Justice Strategy December 2016,” 30.

[432] Ross, *Returning to the Teachings*, 194–95.

[433] Ross, 195.

[434] Ross, 196.

circle work).[435] This general structure may be modified for specific purposes, but the structure itself can be used to identify defining features of circle justice.

Firstly, practices of circle justice do not rely on the figure of the disinterested judge to guarantee procedural impartiality or fairness. Circles can be run without a single presiding figure at all, or, where a judge is included, their role in the process is greatly reduced. This should not be surprising when we consider that, as Rupert Ross puts it, "in traditional times decision-making processes seldom involved disinterested strangers coming in from the outside to render impartial justice."[436] There may be individuals who play an important role in conflict resolution, but their qualification for such a role is understood differently from judges in the Canadian justice system. As Monture and Turpel argue, in closely-knit kinship communities a "person with authority to resolve conflicts…must be someone know to them who can look at all aspects of a problem."[437] The separation that characterizes the disinterested, impartial judge of Canadian criminal justice simply marks them as out as "outsiders without authority." It is also worth noting that, in contrast to the solitary, Olympian figure of the impartial judge, there may be multiple people in a community needed to play such a role. Monture and Turpel argue that there may be some analogy between Elders in Indigenous justice practices and judges in the Canadian criminal justice system, but they emphasize that Elders do not play the role of a judge.[438] Elders play a role in guiding a process to a satisfactory conclusion, gathering consensus from the participants, and carrying and disseminating traditional knowledge, rather than pronouncing authoritative conclusions or sentences. The respect accorded to the impartiality of a disconnected judge in Canadian courts is replaced by a respect for accumulated life experiences of Elders and the holding of community wisdom in their hearts and minds. For a given problem, it may be precisely the connection of a particular Elder to the parties that recommends them as best able to facilitate a solution.

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[435] Ross, 194, 197.

[436] Ross, 207.

[437] Monture-Okanee and Turpel, "Aboriginal Peoples and Canadian Criminal Law," 246.

[438] Monture-Okanee and Turpel, 246.

Although Monture and Turpel present their arguments as an outright rejection of the value of impartiality in Indigenous communities, I would like to argue that contemporary Indigenous justice practices in fact present an alternative conception of impartiality. Clearly, any formulation of impartiality as disconnectedness (including impartiality as disinterestedness) is rejected by Indigenous communities. However, impartiality as fair treatment, that is, as not favouring either party in a conflict does seem to be valued in the construction of Indigenous justice practices. I contend that this is closer to the conceptual core of impartiality. Thus, if a justice process requires an even-handed mediator, it would be fair to call such a person impartial. The difference is merely in the understanding of how a mediator can come to be qualified as impartial: impartiality is not understood to be established by disconnection or disinterestedness. Individuals (often Elders) can instead come to be known in the community as impartial by demonstrating impartiality in their actions over time. The impartial mediator is characterized by a lifetime of good community membership, helping others, and treating others fairly all while taking into account connection and a deep knowledge of context.

Such an alternative model of impartiality makes good sense for Indigenous communities. It is no surprise that traditional justice does not call on the disinterested outsider, because such a figure was not available in traditional Indigenous communities. The kludge of the disinterested judge deployed by Canadian criminal justice is available only in large societies with regular interaction between strangers, not in small communities where everyone is deeply connected to everyone else. In such communities, it will be impossible to find a judge who has no connection to the parties to a dispute. Thus, to the extent that function dispute resolution and justice could be delivered in traditional Indigenous communities, people had to find a way to be fair and even-handed (that is, impartial) while operating within webs of interconnection. This points us to one very good pragmatic reason that the Canadian criminal justice system should pay careful attention to Indigenous practices of justice: such practices constitute a repository of institutional innovation adapted to the situation of small communities. Given that the Canadian justice system struggles to provide effective justice in such situations, such a repository is the obvious place to look for alternative practices that could be more effective and legitimate.

In some Indigenous justice practices, notably practices of mediation, such impartial-but-connected individuals play crucial roles. Circle justice, however, relies less on the impartiality of any individuals and more on procedural guarantees of impartiality. In an adversarial court, the

procedural guarantees of impartiality require constant, active oversight by the impartial judge. In circle justice, the constraints of the circle procedure are designed to produce impartial outcomes without the necessity of such a figure; although the norms guaranteeing impartiality may require oversight this oversight can be achieved collectively by the participants. To see how this is the case, I will examine three structural features of circle justice: the impartial situation of participants, consensus decision-making, and the impartiality of inclusiveness.

Circle justice situates participants equally. Canadian courts have a decidedly hierarchical structure. This is built into physical layout of the courtroom, which situates participants in a complex hierarchy of participation, oversight, and spectatorship. It is also built into the procedural norms that govern who can speak and what they can say. Most significantly, the hierarchy is topped by the judge who controls the proceedings. In circle justice, participants are situated equally as members of the circle. The equal situation of participants is an inherent, structural feature of circle justice. If it is not a feature, the circle must literally be broken, and the process commensurately distorted. Thus, even circles that include judges situate them as equal participants (at least for the duration of the circle). This equal situation is a strong guarantee of a certain kind of impartiality, because everyone involved is guaranteed equal participation regardless of their role, level of involvement, professional expertise, or social situation. The impartial situation of participants can be reinforced by additional procedural norms. The typical norm governing participation in the circle gives each participant an equal opportunity to speak, uninterrupted, until they have had their full say.[439] The perspective of each participant is thus given equal value a priori and can be weighed by each other participant. By contrast, courts strictly limit both who can speak and what kinds of evidence can be presented.

Secondly, circle justice lends itself to a requirement for consensus in decision-making. This is not a structural necessity of circle justice in the way that the equal situation of participants is. Circle justice can be practiced without consensus. Sentencing circles in Canadian courts operate in such a way, where the decision is taken monologically by the judge after the circle concludes. Nevertheless, the circle process itself suggests a particular form of consensus is required. Recall that in a typical circle process, equally situated participants present their

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[439] Ross, *Returning to the Teachings*, 197.

perspectives in turn, without interruption. The only opportunity for responses come in the iterative go-arounds through the circle. Ross describes this as a communal process of joint decision-making: the participants in the circle all contribute to taking a decision together.[440] The consensus reach through such a process is a genuine collective product, and thus can be achieved without some feeling that they have won or lost the argument. This type of consensus-formation can also be considered to be a form of impartiality, in that it treats each as an equal participant in the formation of the decision. Whether or not this particular procedure is adopted, the equal situation of participants in the process suggests that some form of impartial decision-making procedure is required; to keep with the other features of circle justice, decisions must be symmetrically or universally acceptable. It is thus reasonable to think that sentencing circles in which the judge overrules the circle consensus are a derogation from the model of circle justice.

Thirdly, when considered relative to Canadian criminal courts, circle justice offers the impartiality of inclusiveness. Both the hierarchical structuring of Canadian courts and the method of avoidance practiced in pursuit of impartiality exclude many potential participants and viewpoints. Viewpoints can be excluded as irrelevant to the matter at hand or as sources of bias. As noted above, the Canadian model of impartiality means courts must constantly walk the tightrope between under- and over-inclusivity, opening them to critiques from both directions. Circle justice takes a different approach. Rather than practicing a method of avoidance, circle justice opts to be widely inclusive of both participants and perspectives. Although this is again not a necessary feature – circles could be substantially less inclusive – the typical circle is much more inclusive than the typical court case, including all those affected by a justice problem, those connected to those affected, and even members of the wider community (often considered to themselves be affected). Participants are also able to share whatever perspectives they consider relevant or helpful. Furthermore, once a perspective is included in the circle, it is equally situated with other perspectives, making it more difficult to structurally marginalize perspectives, participants, or forms of knowledge. It is then up to the other participants to weight those perspectives according to their total understanding of the situation, which will include their preconceptions about other participants and knowledge of their interconnection.

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[440] Ross, *Dancing with a Ghost*, 27.

This inclusivity of circle justice suggests a dimension of impartiality that is absent in Canadian criminal justice: impartiality as non-partiality or completeness. This is in fact an older meaning of the English term that has generally fallen out of common usage, but there is good reason to consider it a relevant part of the concept of impartiality for the purposes of justice.[441] Formulations of impartiality as freedom from bias have a tendency to beg the question: impartiality excludes all those considerations that ought to be excluded.[442] Impartiality as completeness avoids this problem, by starting from the gathering of all potentially relevant factors, rather than the exclusion of all potential sources of bias. This would align more closely with a model of impartiality as the view from everywhere, rather than the view from nowhere. Impartiality, then, would not be the condensate left behind after biasing factors had been refined away, but would instead be the product of including all considerations and weighing them appropriately to form a decision. Melissa Williams has argued that deliberative democratic conceptualizations of impartiality supplement various understandings of impartiality as freedom from bias with an understanding that impartiality requires inclusiveness of persons and issues.[443]

Circle justice is a particularly promising instantiation of a view from everywhere model of impartiality because it insists on the unmediated inclusion of difference in the justice process; diverse participants are physically present to present their different perspectives themselves. This means that the process of building up the view from everywhere is necessarily dialogic, not monologic. Recall that Young objected to the view from everywhere model of impartiality on the grounds that it retained a monologic structure that unrealistically suggested a single reasoner could adopt the point of view of all.[444] Circle justice accepts such a critique, and preserves the difference of the participants while working dialogically towards the construction of an impartial outcome that takes all perspectives equally into account. As such, it seems to escape the drive for totality that Young sees as problematically characterising the ideal of impartiality.

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[441] J. A. H. Murray, ed., *The Compact Edition of the Oxford English Dictionary* (Oxford: Oxford University Press, 1971), 1382.

[442] for a clear example: Mill, *On Liberty, and Other Essays*, 180.

[443] Williams, “The Uneasy Alliance of Group Representation and Deliberative Democracy,” 129–30.

[444] Young, *Justice and the Politics of Difference*, 105.

The model of impartiality that emerges from practices of circle justice thus differs substantially from the model operative in Canadian criminal courts. It rejects the identification of impartiality with disinterestedness. To the extent that impartiality is a quality of individuals, it is demonstrated by a record of treating others fairly in a condition of interconnectedness. Moreover, the putative impartiality of individuals is of secondary importance, with greater emphasis placed on structural guarantees of impartiality built into justice procedures. Eschewing the method of avoidance practiced in Canadian courts, impartiality is instead understood to require broad inclusion of people and perspectives.

5.4 The Mixed Jury as a Site for Impartiality as Inclusiveness

I am not trying to suggest that the Canadian criminal justice system should shift to a model of circle justice. Instead, I am arguing that the institutions of Canadian criminal justice embody only a limited conception of impartiality. By drawing on the conceptual insights that come from examining circle justice, we can develop new practices that embody a fuller conception of impartiality within the Canadian criminal justice system, in the hopes that those practices can enjoy greater legitimacy. One practice that could do so is the mixed jury. As Marianne Constable unearths, the mixed jury, although abolished in the 19th Century, has deep roots in British (and hence Canadian) common law.[445] Mixed juries were originally a device for dealing with legal disputes involving members of distinct communities that operated according to distinct customs and laws. In such cases, a jury would be composed of twelve individuals with understanding of the events and the law, six from each community.[446] In the earliest forms, such juries would be highly deliberative, and would be charged with producing a verdict (literally truth-saying) that “encapsulates a knowledge of the practices of two communities” by reconciling the customs of two communities in a statement of practical reason, i.e. a statement of what is to be done.[447] This is immediately suggestive of a possible role in mediating between Indigenous customs and legal traditions and the Canadian criminal justice system. In considering

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[445] Constable, *The Law of the Other*, 143–44.

[446] Constable, 2.

[447] Constable, 2.

how a modern mixed jury could be developed, I will address three major issues: the context of use for mixed juries, the embodiment of impartiality-as-inclusiveness, and potential pitfalls. I argue that the model of mixed juries could be one way for the Canadian criminal justice system to embrace a fuller understanding of impartiality.

It is striking to me that mixed juries developed in contexts that we would now describe as settler colonialism. Marianne Constable describes the use of mixed juries between Saxons and the Welsh and between Normans and Saxons – both cases of a later settler reconciling with pre-existing legal traditions.[448] This is similar to the context for the development of personal law in continental civil law traditions, which was the coexistence of Roman law with the law of invading gothic peoples. However, the existence of this colonial context for the development of the mixed jury is obscured by its later extension to cover certain groups of resident alien or metic populations, notably Jews and foreign merchants (such as the Hanse) who were granted royal privileges to use some of their own laws in settling disputes.[449] This latter usage long outlived the settler-colonial context and gradually distorted the use of mixed juries to focus on language (rather than distinct legal practices), until the institution was deemed to be obsolete and abolished. However, the context in modern Canada in fact most closely resembles the context of the early mixed jury. There are two crucial factors. The first is the existence of communities sufficiently distinct in terms of their customs and legal traditions. For the early mixed jury, this could mean neighbouring English and French towns after the Norman conquest, but in Canada we have the distinct legal traditions of Indigenous communities alongside the rest of Canadian society and the Canadian criminal justice system. Second, although distinct customs are maintained, boundaries between communities are sufficiently permeable to give rise to extensive interaction and occasional legal disputes.[450] Finally, there is an imbalance of power that ensures that legal disputes will come before the courts of one of those traditions (Norman courts after the conquest, say, or Canadian courts today). In such contexts, the mixed jury provides a site for the deliberative reconciliation of the customs and laws of the two communities. By doing so, it can

[448] Constable, ch 1.

[449] Constable, 21.

[450] Constable, 11.

help to enhance the legitimacy of the practice of justice in the eyes of members of both communities.

The composition of the mixed jury embodies a very different conception of impartiality from the modern Canadian jury as it stands. In fact, the mixed jury embodies essentially the opposite interpretation of impartiality from the supreme court in *Kokopenace*. The Supreme Court argued that impartiality was guaranteed by a reasonably fair and random selection, such that the composition of actual jury does not matter. For the mixed jury, on the other hand, impartiality is established precisely by designing the jury to substantively represent different communities. In the early mixed jury, this meant that jurors were selected because of their specific knowledge, perhaps of the case but certainly of the customs and laws of the two communities.[451] In the development of the common law, this came to be viewed as an impediment to the impartiality of jurors, such that by the 19th century courts had adopted the view that jurors should not bring their own knowledge of law or facts to bear on cases.[452] This is the method of avoidance that I have criticized as giving rise to a limited conception of impartiality. As Constable argues, juror impartiality was always relevant, in the form of a concern for the character of those selected as jurors who could not be biased towards one or the other party.[453] However, jury impartiality in a mixed jury is guaranteed not by a process of avoidance and exclusion, but by the guaranteed *inclusion* of diverse perspectives and local knowledge of practices. In the case of Indigenous people in Canada, this would mean the mandated inclusion of Indigenous inclusion of Indigenous people with a knowledge of the customs and legal traditions of the Indigenous people involved in the trial (accused or victims). This would also involve a reconceptualization of the role of the jury that readmits their specific knowledge, rather than excluding it as potentially biasing. This is in turn only possible if the criminal justice system embraces the model of impartiality-as-inclusion outlined above.

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[451] Constable, ch 1.

[452] Constable, 133.

[453] Constable, 145–46.

There are some major pitfalls to be aware of in trying to design a modern mixed jury to operate in the Canadian criminal justice system. The first is to avoid the process that led to the eventual irrelevance and abolition of the mixed jury under the common law. The second is to resist the tendency to view a mixed jury solely as a device for counterbalancing racial bias. Finally, there are the practical difficulties with developing a model of a mixed jury with the existing legal framework.

Marianne Constable explains the gradual obsolescence and eventual abolition of the mixed jury as a process by which a deliberative system of law as practical reason was eventually colonized and replaced by positive law, that is law as enforceable propositions.[454] There were two major tracks to this long evolution. Firstly, the practice of mixed juries moved gradually away from an emphasis on distinct communities and legal traditions. Once established in statute, the mixed jury began to lose its special role in reconciling distinct bodies of law and began instead to be an institution for processing a particular kind of fact, i.e. the anthropological fact of the customs of particular groups (stripped of authority as law).[455] This was further diluted with the shift to a focus on different languages, rather than distinct customs. Although language is bound up with the distinct customs of various communities, it is not the language per se but the existence of the distinct way of life, customs, and legal traditions that justifies the mixed jury. As jurisprudence focused increasingly on language, the mixed jury lost much of its justification – and eventually seemed irrelevant with the availability of interpreters.[456] Secondly, with the 19th century adoption of a model of impartiality-as-indifference, or disinterestedness, the particular knowledge provided by the mixed jury comes to be seen as a source of bias, rather than a contribution to the construction of impartiality as inclusiveness.[457] These are particular problems when trying to design a modern mixed jury, because the practice would have to be inserted into a legal system that already has the features that destroyed the old mixed juries. A new practice of a

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[454] Constable, 90, 96, 125–26, 129, 133.

[455] Constable, 97.

[456] Constable, 125–26, 133.

[457] Constable, 129.

mixed jury would likely need special legal protection against challenge, precisely because it operates according to a conception of impartiality that goes against existing jurisprudence.

Most discussion of the representativeness of juries frames the issue in terms of racial bias, but it is important to note that it was this precise framing that led to the abolition of the mixed jury. By the mid-1700s, the predominant understanding of the justification of the mixed jury for resident aliens was to protect against the prejudice of Englishmen toward aliens. Thus, Blackstone was able to write that in cases involving two aliens, an all-English jury would suffice as the prejudice would be balanced.[458] In the extensive American jurisprudence on peremptory challenges and the composition of juries, Blackstone's crude logic seems to remain: the assumption is that the presence of members of a particular race on a jury will help to mitigate racial bias against the defendant. This proposition does have empirical support, and so should not be dismissed lightly.[459] It is itself a strong argument against the purely procedural reasoning in *R. v. Kokopenace*.[460] It was also the driving force behind the public outcry that led to the elimination of peremptory challenges in Canada (as well as some of the concerns about the wisdom of such an elimination). However, the logic of the mixed jury goes further: the inclusion of Indigenous jurors is not merely in order to counterbalance racial prejudice, but Indigenous jurors would be meant to bring with them a knowledge of Indigenous understandings of justice. This would mean that jurors would need to be selected for such knowledge, not merely because they are Indigenous (with a presumption that this would reduce their prejudice against Indigenous defendants). There is a risk that viewing jury selection as a matter of countering racial bias will perpetuate a racialized construction of Indigenous identity, rather than confronting the colonial reality of the suppression of distinct Indigenous legal traditions.[461]

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[458] Constable, 129.

[459] Constable, 43.

[460] R. v. Kokopenace, 2 SCR.

[461] for more on this risk, see: Bonita Lawrence and Enkashi Dua, "Decolonizing Antiracism," in *Racism, Colonialism, and Indigeneity in Canada: A Reader*, ed. Martin J. Cannon and Lina Sunseri (Don Mills, Ont: Oxford University Press, 2011), 19–28; Martin J. Cannon, "Revisiting Histories of Legal Assimilation, Racialized Injustice, and the Future of Indian Status in Canada," in *Racism, Colonialism, and Indigeneity in Canada: A Reader*, ed. Martin J. Cannon and Lina Sunseri (Don Mills, Ont: Oxford University Press, 2011), 19–28.

Furthermore, to the extent that the challenge is avoiding racial bias, the justice system has shown itself to be satisfied that procedural guarantees of neutrality can substitute for the substantive inclusion of diverse perspectives. This logic would negate the need for a mixed jury, as it did in the 19th century. If, on the other hand, the purpose of the mixed jury is to incorporate substantive knowledge of Indigenous views of justice into Canadian trials, there can be no such substitution of procedural neutrality.

In practice, it will be difficult to develop the space for a mixed jury in existing trials. Early mixed juries operated at a time when trials were substantially more deliberative and less formalized, being largely undifferentiated from political assemblies.[462] In such a context, they were largely accepted as a practice of reconciliation that could command legitimacy. Developing a modern mixed jury, on the other hand, involves contending with all the forces that eliminated the mixed jury from the common law and the degree to which a principle of avoidance and impartiality-as-disinterestedness has become entrenched in the common law. Nevertheless, I believe the effort to develop such a practice is worthwhile. The method I would propose would be to begin with pilot projects that operate under a specific legal mandate that gives them a protect legal space to operate in. This should be possible. Although existing jurisprudence may be seen as hostile to impartiality as inclusiveness, the reasoning in *Kokopenace* merely argues that the *Charter* does not *require* the state to provide substantive representation on juries, not that it prohibits the state from attempting to do so.[463] Even so, serving on the initial mixed juries is likely to be an exercise in frustration. Essentially, without other changes, jurors will be invited to bring a particular kind of knowledge (knowledge of Indigenous customs and laws) into a system that is largely hostile to such knowledge. However, the practical attempt to incorporate such knowledge will illuminate precisely the barriers that need to be addressed before the practice of mixed juries can become more widespread. It will also raise those in a deliberative context that is oriented toward providing solutions through practical reason. For that reason, it would make most sense to operate such pilot projects alongside existing court initiatives, so that the juries can be sure of a sympathetic hearing from judges committed to reforming the operations of criminal

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[462] Constable, *The Law of the Other*, 14.

[463] R. v. Kokopenace, 2 SCR.

justice. In the second phase, the knowledge gained from these pilots can be used to design a model of mixed juries that can be used more widely in cases involving Indigenous people.

In the longer term, an adapted mixed jury may provide an institutional setting for reconciling Indigenous and non-Indigenous justice practices within the Canadian criminal justice system. Various models of modernized mixed juries may be needed for different circumstances. In cases in urban centres, for instance, that include a mix of Indigenous and non-Indigenous perpetrators and victims (or Indigenous people from multiple legal traditions), the model is most likely to resemble the old mixed jury by incorporating a balance of Indigenous and non-Indigenous people. In remote Indigenous communities, however, the jury may be all Indigenous. Here, mixed jury becomes a misnomer. However, the broader conceptualization of impartiality that derives from the examination of the mixed jury is crucially important. The institutional innovation would to be to readmit as relevant the particular knowledge of jurors concerning Indigenous customs and legal traditions and even their knowledge of the participants. Juror impartiality in such cases would be provided through a requirement for consensus on the inclusion of individual jurors, in other words, jurors could still be challenged for cause by either side. The change would be that merely having knowledge of the people and events involved would not be a disqualification (as in small communities this would disqualify everyone). Instead, a substantive judgement on the impartial character of potential jurors would be required. Fortunately, precisely the factor that makes disinterested judges and jurors unavailable – the small and interconnected nature of the community – also makes it possible to render more substantive judgements about impartiality than in a standard jury selection in large-scale communities

To make a real difference in small communities, and especially in the context of fly-in circuit courts, these reformed juries would need to see much wider use than is currently the case. Relatively few cases make it to trial in Canada (most are settled through plea-bargaining), and few trials involve juries. One model that would make sense would be to convene a jury for the entire sitting of a fly-in court, rather than for an individual trial.[464] This would allow a jury to

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[464] There could be practical challenges with this – one option would be to convene a slightly oversized jury, with members recusing themselves for particular cases where necessary.

deal with a series of minor cases, rather than only being convened for the most serious offences. This should be feasible, as fly-in court sessions are typically short. To the extent that this would lengthen such sessions slightly, it corresponds to long-standing recommendations for reform.[465] The inclusion of relevant local knowledge, however, could also speed up the process of justice in such communities, where the ignorance of the court party is often a barrier to prompt access to justice. Such a model might also bridge the gap between community justice practices and the dispensations of the provincial court. However, it should not be considered a substitute for the continued development of community justice practices. Happily, as provincial courts gain a greater understanding of local justice practices and traditions through the practice of incorporating such knowledge through juries, they should become more open to diverting cases to community justice initiatives.

5.5 Conclusion

It is not the purpose of this chapter to comprehensively weigh the merits of these competing models of impartiality. Instead, I have attempted to simply suggest that there are limits to and justified critiques of the model of impartiality implicit in Canadian criminal courts. This is particularly the case for Indigenous communities who reject some of the premises of such a model. As noted in the introduction, it is the limited view necessitated by such a model that dictates that criminal justice be delivered to remote Indigenous communities in the form of circuit courts. On the other hand, the model of impartiality reconstructed from circle justice practices opens up two possibilities for reforming the delivery of criminal justice in Canada to better serve Indigenous communities. Firstly, it suggests that impartiality can be achieved without the involvement of a disinterested judge. To the extent that this is the case, reconceptualizing impartiality along these lines would open up the political and juridical space for more problems to be resolved by Indigenous justice practices within Indigenous communities, obviating the need for a circuit court in the first place. Secondly, it suggests that there is room for the Canadian court system to enrich its conception of impartiality. In doing so, the court system could draw upon the stock of justice practices developed by Indigenous

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[465] Hamilton and Sinclair, *Report of the Aboriginal Justice Inquiry of Manitoba: The Justice System and Aboriginal People.*, 1:chapter 8.

communities to provide impartial justice in circumstances where the institutional heuristic of oversight by disinterested judges is unavailable. This could help to develop improved justice practices within the Canadian court system. Such practices could meet some of the conceptual challenges to the current model of impartiality that are encountered within Western political thought. They could also be practices that would enjoy greater legitimacy from Indigenous people swept up in the Canadian courts.

Chapter 6
Conclusion

6 Conclusion

6.1 Summary

In the dissertation, I argued that the various problems faced by Indigenous people in the Canadian criminal justice system should be understood as constituting a crisis of legitimacy for the practice of criminal justice in Canada. Systemic problems, including high rates of violence against Indigenous people and the overincarceration of Indigenous people cannot be given narrow and technical interpretations. Understanding the crisis as merely a problem of overrepresentation within the criminal justice system has generated an approach that sees the solution in minor tinkering with the mechanisms of Canadian justice. Predictably, this has not even solved the problem narrowly conceived (i.e. rates of overrepresentation have only continued to climb). This can be most clearly seen with the *Gladue* approach analyzed in chapter four. More significantly, however, such approaches could never address the underlying issue: a system that radically fails to offer equal protection from violence to Indigenous people while simultaneously punishing them out of all proportion lacks the legitimacy that is necessary for a functioning system of justice. This is particularly true in the colonial context, where that system is the forceful imposition of alien norms derived from the common law legal tradition upon Indigenous peoples with their own distinct, pre-existing legal traditions. The illegitimacy of the system also means that instances of outright police abuse of Indigenous people cannot be dismissed as the actions of bad apples, but are instead the most egregious instances of systemic bias and racism against Indigenous people.

Because Indigenous challenges to legitimacy reach all the way down to challenge the fundamental assertion of Crown sovereignty and the underlying legal order in Canada, the ordinary liberal democratic response of legitimizing challenged institutions by appealing to their authorization by political institutions and the underlying constitutional order is unavailable. Instead, institutions must themselves engage in cross-cultural dialogue in order to establish a degree of freestanding legitimacy that will allow them to function effectively when dealing with Indigenous people. I have argued that this is necessary in order to show dual respect to

Indigenous people, that is, to respect Indigenous people *as Indigenous* and as equal co-citizens. Although I have endeavoured to give some sense of the nature of that cross-cultural dialogue, it is not a matter of creating some new deliberative institution that conforms to the precepts of a particular theory of communication. Instead, following James Tully, we must embrace polyphonic dialogue across a multitude of sites associated with the various institutions of criminal justice. This "strange multiplicity" is a difficult model for the modern state, which is always reluctant to give up its hard-won empire of uniformity, but it is a necessary step towards decolonization.[466] Although the exact form of such dialogue must itself be worked out practically between live participants, theory can make an important contribution in guiding the manner of engagement by the state and its agents in such dialogue. The central insight is that such dialogue must take place in the third normative space, that is, the space of cross-cultural dialogue. This means that all norms, including the norms governing the dialogue itself, must be negotiated between equally situated parties.[467] This will, of course, necessitate an iterative process that permits revising the terms of the relationship itself as dialogue continues. It is a strong contrast to existing practices of consultation, which too often take the form of inviting Indigenous participants into the second normative space, that is, into a space governed by Canadian norms. In such a space, Indigenous participants' attempts to bring forth their perspectives are regularly frustrated by the fact that the very rules of acceptable discourse are structured by alien norms.[468]

The challenge of establishing legitimacy is unavoidable, as the creation of a separate system of criminal justice for Indigenous people cannot create mutual legitimacy. The lives of Indigenous and non-Indigenous people are simply too intertwined for any sort of clean separation to be possible. In such second-best circumstances, trying for maximal separation is unlikely to be the best solution for all concerned. In fact, separate institutions could simply worsen the mutual perception of illegitimacy, particularly for those caught up in the "wrong" system. Considering that most Indigenous people are incarcerated for offences off-reserve, and

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[466] Tully, *Strange Multiplicity*.

[467] Williams, "Sharing the River: Aboriginal Representation in Canadian Political Institutions," 108.

[468] Tomm, "Public Reason and the Disempowerment of Aboriginal People in Canada," 293–94.

the political realities of power in Canada, it is likely that *most* Indigenous offenders would remain trapped in a system they view as illegitimate. Instead, a spectrum of institutions and practices – some Indigenous-controlled, some under the purview of the Canadian legal system, and some hybrid – must be created in order to address the very real challenge of providing legitimate criminal justice in Canada. Creating the conceptual space for doing so requires reconciliation of contrasting Indigenous and non-Indigenous theories of justice.

In the fifth chapter, I attempted some the philosophical work that would clear the space for real dialogue towards reconciliation of contrasting understandings of impartiality. The idea of impartiality has a central role in criminal justice, but the overly narrow conception embedded in Canadian judicial practice precludes the institutional flexibility that would be necessary to design institutions that can meet the challenge of providing legitimate practices of criminal justice in remote Indigenous communities. Reconceptualizing impartiality to incorporate insights drawn from Indigenous theories and practices of justice not only gives a fuller conception of impartiality but helps open space to enable more mutually legitimate practices of justice to develop. This includes making more conceptual space for the development of independent Indigenous practices of justice to be accepted as legitimate by the Canadian criminal justice system, but also for the Canadian criminal justice system to see a space for possibility of reform of its own practices. Drawing on the medieval tradition of the mixed jury, I outlined a program of reform of the role of the jury grounded in a broader conception of appropriate impartiality.

6.2 Further Conceptual Reconciliation

Impartiality is not the only such contested concept that calls for the reconciliation of Indigenous and non-Indigenous approaches. The adversarial nature of criminal justice proceedings conflicts with many Indigenous approaches, along with the resultant protections of the right to remain silent, the presumption of innocence, and the right to cross-examine witnesses.[469] The presumption of innocence, while a crucial safeguard in an adversarial system, undermines strong norms in some Indigenous legal traditions that emphasize the

[469] Milward, *Aboriginal Justice and the Charter*, 130–54, 166–73.

acknowledgement of misdeeds and the taking of responsibility.[470] In the Canadian criminal justice system, it is acceptable for a guilty party to remain silent or deny responsibility, forcing others to come forward with accusations and proof of their guilt. In many Indigenous traditions, this is unacceptable because it forces others to violate deeply held norms of respect. For the Anishinaabek, for example it is ethically wrong to directly and publicly contradict others.[471] An adversarial justice system that requires precisely that therefore directly challenges Anishinaabek ethics. Similarly, Milward argues that the Iroquois would punish deception more seriously than involvement with an offence, because lying to the community was seen as deeply wrong within their truth-speaking tradition.[472] Although Milward has put forward some interesting proposals for compromises in these areas under the rubric of a culturally sensitive application of *Charter* rights, much more work is needed to actually reconcile Indigenous and non-Indigenous perspectives in these areas. Institutional innovations that could replace adversarial trials as much as possible would obviate the conflict, but the Canadian justice system will need to either make greater space for the direct operation of Indigenous legal traditions or look to Indigenous justice practices for inspiration in designing procedures that can do so.

A major difference between the Canadian legal system and many Indigenous legal traditions is the Canadian insistence on secularizing law. Many Indigenous legal traditions are avowedly spiritual, incorporating spiritual elements to their justice practices and drawing on explicitly sacred sources of law.[473] This sacred character of law is qualitatively different from the incomplete secularization of Canadian law. A comparison of constitutions can be instructive here. The preamble to the *Charter of Rights and Freedoms* states, “Whereas Canada is founded principles that recognize the supremacy of God and the rule of law.” While this constitutes a stark reminder of the limits of Canadian secularism, the reference to God has not been given legal force by the courts; it is more often understood as a rhetorical gesture resulting from

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[470] Milward, 132.

[471] Johnston, “Aboriginal Traditions of Tolerance and Reparation,” 4.

[472] Milward, *Aboriginal Justice and the Charter*, 168–69.

[473] Borrows, *Canada’s Indigenous Constitution*, 24.

political compromise. The Anishinaabe Chi-Naaknigewin, the constitution of the Anishinaabek Nation, also has a preamble that references the Creator. This Ngo Dwe Waangizid Anishinaabe (One Anishinaabe Family) translates as: "Creator placed the Anishinaabe on the earth along with gift of spirituality. Here on mother earth, there were gifts given to the Anishinaabe to look after: fire, water, earth, and wind. The creator also gave the Anishinaabe seven sacred gifts to guide them. They are: Love, Truth, Respect, Wisdom, Humility, Honest, and Bravery. Creator gave us sovereignty to govern ourselves. We respect and honour the past, present, and future."[474] This much more substantial preamble is far from the "dead letter" of the preamble to the *Charter*.[475] The applicability of sacred law to criminal justice is a profound challenge to existing practices of justice, ranging from potential violations of religious freedom to the admissibility of dreams as evidence.

The legal authority of spirituality is just one of the deep challenges Indigenous worldviews pose to the Western metaphysical and ontological assumptions taken for granted by the settler colonial normative order. Another, equally profound, is a radically different view of agency. For some Indigenous people legal personality is not limited to humans. Animals, spirits, and even rocks are considered to have mntu (souls) by the Mi'kmaq, and the Anishinaabek conceive of political relationships between people and rocks.[476] This involves mutual obligations and entitlements based in the sentience of the land as a fundamental principle of law; the agency and liberty of animals and rocks can be oppressed.[477] These are difficult for someone embedded in a Western, rationalistic worldview to comprehend; indeed I would venture that they are unintelligible within that worldview. Finding a way to reconcile competing ontologies and views of the appropriate place of spirituality in criminal law is a particularly difficult challenge for reconciling Indigenous and non-Indigenous legal orders. The easiest path to a reconciliation here

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[474] Anishinabek Nation, "Anishinabek Nation Access to Justice Guide" (North Bay, Ontario: Union of Ontario Indians, 2018), http://www.anishinabek.ca/wp-content/uploads/2018/08/Access-to-Justice-Guide-WEB-VERSION.pdf.

[475] R. v. Sharpe, No. CA025488 (Court of Appeal for British Columbia June 30, 1999).

[476] Borrows, *Canada's Indigenous Constitution*, 64, 243.

[477] Borrows, 242–45.

is to lean heavily on the search for an overlapping consensus on the legitimacy of particular justice practices that can be endorsed (for different reasons) from within either worldview. However, this too-easy answer will not resolve the dilemma when it comes to particular questions and conflicts, such as the admissibility of dreams as evidence or whether violating the agency of non-human animals or the land is to be considered a crime.

The role of punishment in criminal justice is also contested by many Indigenous people. Punishment is, of course, central to the operation of the Canadian criminal justice system, much of which is a matter of calibrating the degree of punishment warranted by certain offences. A great deal of the law of criminal procedure is taken up with the safeguards which are necessitated by the threat of punishment, and which are proportionate to the penalty and stigma to be applied in a given case. Indigenous legal traditions, on the other hand, are frequently cast as non-punitive or restorative in approach.[478] The dichotomization of Indigenous justice as restorative and Canadian justice as punitive is a gross oversimplification. Many Indigenous legal traditions included punitive elements, including corporal and even capital punishment.[479] Val Napoleon and Hadley Friedland note that the conflation of Indigenous justice approaches with restorative justice is itself a function of the place allotted to Indigenous justice within the Canadian legal system. Because the Canadian state outlaws Indigenous practices that involve coercion, it has come to ignore the coercive elements of Indigenous legal traditions.[480] Indigenous people today are also not universally opposed to punitive measures. Senator Lillian Dyck, a member of the Gordon First Nation, recently moved amendments to the criminal code designed to increase punishment in cases of violence against Indigenous women and girls by considering their increased vulnerability at the time of sentencing and by prioritizing denunciation and deterrence over rehabilitation in cases of domestic violence.[481] Although the specific amendments differed,

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[478] Spiteri, "Sentencing Circles for Aboriginal Offenders in Canada: Furthering the Idea of Aboriginal Justice within a Western Justice Framework.," 6; Sawatsky, "Self-Determination and the Criminal Justice System," 92–94.

[479] Milward, *Aboriginal Justice and the Charter*, 21–23; Borrows, *Canada's Indigenous Constitution*, 81.

[480] Napoleon and Friedland, "Indigenous Legal Traditions: Roots to Renaissance," 237–38.

[481] Forrest and Platt, "Government to Accept Criminal Code Changes Pushing for Harsher Sentences in Crimes against Indigenous Women | National Post."

the push for stiffer penalties to protect Indigenous women and girls was driven in part by the recommendations of the national inquiry into missing and murdered Indigenous women and girls.[482] Even with a more nuanced perspective, however, there remains a general tendency for Indigenous legal traditions and contemporary Indigenous justice practices to place a greater emphasis on restorative principles than the Canadian criminal justice system does currently.[483] As Napoleon and Friedland argue, "the predominant narrative of 'justice as healing' is not false, but it is dangerously incomplete."[484] The danger comes from denying Indigenous communities coercive tools to respond to violent behaviour, even where their response would be less punitive than Canadian criminal justice. The Canadian justice system is likewise generally considered to be overly punitive, especially in its overuse of incarceration – an institution that was clearly alien to Indigenous legal traditions.[485]

Opinion polls in Canada consistently find that most Canadians believe punishments in the criminal justice system to be too lenient.[486] There can clearly be an outrage dynamic at work that ratchets up the punitiveness of criminal justice over time. Politicians, working with a background understanding of the punitive attitudes of citizens, respond to the outrage generated by particular sensationalized cases by making ever-harsher punishments.[487] However, Anthony Doob's work

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[482] Maura Forrest, "Federal Minister Casts Doubt on MMIW Commissioner's Push for Stiffer Sentences for Crimes against Indigenous Women | National Post," *National Post*, June 1, 2019, sec. Canadian Politics, https://nationalpost.com/news/politics/federal-minister-casts-doubt-on-mmiw-inquirys-push-for-stiffer-sentences-for-crimes-against-indigenous-women; National Inquiry into Missing and Murdered Indigenous Women and Girls (Canada) and Canada, *Reclaiming Power and Place*, 2019, 1b:185.

483 Larry Chartrand and Kanatase Horn, "A Report on the Relationship between Restorative Justice and Indigenous Legal Traditions in Canada" (Department of Justice Canada, October 2016), http://publications.gc.ca/collections/collection_2018/jus/J4-51-2016-eng.pdf; Milward, *Aboriginal Justice and the Charter*, 7–10.

[484] Napoleon and Friedland, "Indigenous Legal Traditions: Roots to Renaissance," 238.

[485] Milward, *Aboriginal Justice and the Charter*, 11–14; Monture-Okanee and Turpel, "Aboriginal Peoples and Canadian Criminal Law," 248.

[486] Julian V. Roberts, Nicole Crutcher, and Paul Verbrugge, "Public Attitudes to Sentencing in Canada: Exploring Recent Findings," *Canadian Journal of Criminology and Criminal Justice* 49, no. 1 (2007): 83; Kimberly N. Varma and Voula Marinos, "Three Decades of Public Attitudes Research on Crime and Punishment in Canada," *Canadian Journal of Criminology and Criminal Justice/Revue Canadienne de Criminologie et de Justice Penale* 55, no. 4 (2013): 551.

[487] Philip Pettit, "Is Criminal Justice Politically Feasible," *Buffalo Criminal Law Review* 5 (2002 2001): 433–36.

has shown that the Canadian public may be substantially less punitive than is commonly assumed: in opinion research that provided members of the public with information about the costs and effects of punishment people displayed much more moderate attitudes.[488] Significantly, punitive attitudes to punishment decrease if people are given more contextual information about the crime and the offender.[489] This extends to support for s.718.2(e) of the Criminal Code, which mandates that particular attention be paid to the circumstances of Aboriginal offenders in seeking alternatives to incarceration. People are more likely to support "special consideration" when they are offered contextual information about the circumstances faced by Aboriginal peoples.[490] Such research suggests that it is not inevitable that the outrage dynamic drive criminal justice policy in Canada to ever-harsher sentences, and that latent support for non-punitive solutions in criminal justice can be activated by making salient the relevant contextual considerations. This could be a matter of political leaders appropriately framing public debates over criminal justice reform to emphasize contextual factors and alternatives to incarceration. It could also suggest that involving citizens through more deliberative processes in guiding the reform of criminal justice institutions would be likely to elicit more moderate and less punitive views, because the more information people are provided with the less punitive they seem to be. Thus, there is more space for dialling back the degree of punitiveness in Canadian criminal justice than a naïve reading of the news would suggest.

Why is reducing punitiveness desirable in the quest for legitimate criminal justice? Firstly, the punitive practices of Canadian criminal justice – particularly the over-incarceration of Indigenous people – provoke one of the chief objections raised by Indigenous people against the system.[491] Reducing the reliance of such measures thus directly addresses one concern raised by Indigenous people. Secondly, reducing the punitiveness of Canadian criminal justice opens up

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[488] Varma and Marinos, "Three Decades of Public Attitudes Research on Crime and Punishment in Canada," 551–52.

[489] Varma and Marinos, 551–52.

[490] Varma and Marinos, 556.

[491] Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide*, xi, 1; Monture-Okanee and Turpel, "Aboriginal Peoples and Canadian Criminal Law," 248; Milward, *Aboriginal Justice and the Charter*, 12–14.

space for other approaches to criminal justice to flourish. The system is structured so that more discretion is available for offences that are considered less serious, that is, that warrant lesser punishment. Many of the ways punishment has been ratcheted up, such as mandatory minimum sentences, eliminate discretion entirely. This reduces or eliminates the space in which Indigenous justice initiatives can develop, whether through diversion or sentences that offer alternatives to incarceration. It also opens up space by reducing the need for the type of procedural protections that, as outlined above, can conflict with Indigenous legal traditions or cultural norms. Such protections are necessitated by the threat of punishment, and thus are less necessary (or at least can be replaced by other safeguards more easily) when harsh punishments are not on the table.[492] Although the degree to which less punitive approaches reduce the need for safeguards is contested, it is clear that there would be greater flexibility about the nature of such safeguards with less punitive approaches.[493]

Although special measures for Indigenous offenders, such as those resulting from s.718.2(e) and the *Gladue* decision, may be required to redress existing discrimination in the criminal justice system, generalized reductions in punitiveness would be more beneficial and more stable. First, the evidence from criminology suggests that Canadian criminal justice is overly punitive from a consequentialist perspective: harsher sentences do not seem to improve general deterrence, and prison may in fact make offenders more, not less, likely to reoffend (when compared to alternative sentences).[494] Incarceration is also a tremendously expensive intervention. A less punitive system would therefore be likely to be as or more effective at achieving its stated goals while costing less, which should bolster its general legitimacy. Second, there is tremendous resistance to any perceptions of two-tier or race-based justice in Canada.[495] Although people may support special measures when given enough contextual information, there is still a widespread view that people should receive the same treatment regardless of

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[492] Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide*, 62, 205; Milward, *Aboriginal Justice and the Charter*, 18; Ross, *Returning to the Teachings*, 206.

[493] see critique of Rupert Ross in Milward, *Aboriginal Justice and the Charter*, 117.

[494] Milward, 11–13.

[495] see an example in a national newspaper editorial: National Post Editorial Board, “One-Tier Justice.”

background, with a majority of Canadians supporting the statement that “In modern Canada, Indigenous people should have no special status that other Canadians don’t’ have.”[496] General reductions in punitiveness are thus more likely to be widely accepted than specific measures for Indigenous offenders. Even s.718.2(e) is in fact a general provision, which merely emphasizes the particular circumstances of Aboriginal offenders. Particular measures for Indigenous offenders will be more acceptable if they are seen as broadly equivalent to (if different in character from) measures for non-Indigenous offenders. A perception of equivalence is likely to make provisions for Indigenous justice more stable and less subject to rollback by the outrage dynamic. This last is a real threat. For example, when Terri-Lynne McClintic, serving a life sentence for the murder of a child, was transferred to an Indigenous healing lodge in 2018, it elicited substantial outrage in the media, debates and votes in the house of commons, a review of the policy on healing lodges and a reversal of the transfer.[497] Any treatment perceive as special is particular vulnerable to reversal through outrage.

Finally, I should append a note of caution about revisions to punitiveness. As noted above, not all Indigenous approaches eschew punishment and, in some cases, particularly where Indigenous women are victims of violence, there may be a need for more punishment rather than less. There is a need not only to reconcile Indigenous and non-Indigenous attitudes to punishment, but also to find a balance between effective rehabilitative and restorative measures and protection of the public and vulnerable persons. Incarceration may not be the only effect protective measure, but to the extent that it removes perpetrators from victims and the public it does play a strongly protective function. Future investigations into reconciling approaches to punishment should strongly thematize the need to find alternative methods of effective protection if the use of incarceration is to be reduced.

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[496] “Truths of Reconciliation.”

[497] Kathleen Harris, “Goodale Orders Review of Child Killer’s Transfer to Healing Lodge | CBC News,” *CBC*, September 26, 2018, https://www.cbc.ca/news/politics/mcclintic-murder-stafford-healing-lodge-1.4839527.

6.3 International Comparison

Another fruitful avenue for future research is international comparison. Although I have discussed some comparisons with the United States, I have barely scratched the surface. The Canadian case shares many features with the United States, Australia, and New Zealand. All are European settler states on Indigenous land with sizeable Indigenous populations. All four face similar problems with high rates of crime in Indigenous communities and overrepresentation of Indigenous people in the criminal justice system. There are also, however, significant differences between the countries that make comparison particularly interesting. New Zealand is in many ways the outlier, having a unitary system of government (and criminal justice), and having a single Indigenous group (the Maori) making up 15% of the population (proportionally, the largest Indigenous population among the four countries). The United States, Australia, and Canada area all federations, but while Australia and the US both have substantial state-level criminal justice, substantive criminal law is purely federal in Canada. In all three, there are many distinct Indigenous groups and legal traditions. The United States is unique in having legally recognized independent Indigenous justice systems.

International comparisons can also be made with other overincarcerated populations. On avenue I intend to explore is a comparative study of theoretical issues arising from the mass incarceration of black people in the United States and the overrepresentation of Indigenous people in the Canadian criminal justice system. The first research question for comparison would be, what is the nature of the injustice in the treatment of racialized minorities by the criminal justice system? Do Indigenous Canadians and black Americans face similar types of injustice, or are there meaningful differences? Once I have diagnosed and analyzed the nature of the injustices suffered, my second research question will be, how can a legitimate criminal justice system operate under such circumstances? Should separate justice systems be part of the solution? If not, what are the requirements of legitimacy for criminal justice within a broader, unjust social structure? In part, this is an inquiry into what Tommie Shelby terms the "political ethics of the oppressed," that is, the "duties of individuals living under unjust conditions" and the

"virtues of political resistance."[498] It is also an inquiry into the political ethics of the complicit, that is, the duties of participants in an unjust system to reform and even resist that system.

This research would be relevant and timely. In both countries, racial disparities are currently the subject of substantial popular attention. Criminal justice is also the site of polarized activism, with some calling for radical reform and others pushing for the continued extension of so-called "tough on crime" policies. The durability of racial injustices, however, suggests that effective policy innovation is necessary if this conflict is not to escalate. Why, then, is a theoretical study needed? In the United States, there has been extensive study of mass incarceration by criminologists, empirical political scientists, and legal scholars. While overrepresentation in Canada is less studied, there has been some good recent work to complement the extensive documentation produced by justice system inquiries in the 1990s. While this research is of immense value, it cannot answer the pressing questions of political ethics that arise from racialized injustice and give urgency to the need for new policies. Political theory is well suited to provide a rigorous examination of these questions to help guide policy makers.

The first novel aspect of such a project is to approach racialized injustice in the criminal justice system through the lens of political philosophy. Although criminal justice was central to much of the political philosophy canon, it is sadly neglected by contemporary Anglo-American political philosophy. In many ways, political philosophy has ceded the ground of criminal justice to other disciplines, especially criminology and legal theory. This project is part of a broader attempt to restore the centrality of criminal justice to political philosophy by highlighting the connections between criminal justice and wider political processes and examining the questions of political ethics posed by contemporary criminal justice practices. In this way, political philosophy can contribute to the interdisciplinary conversation about racialized injustice in criminal justice, and can refine its own concepts by immersion in the rich details of practical problems.

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[498] Tommie Shelby, *Dark Ghettos: Injustice, Dissent, and Reform* (Cambridge, Massachusetts: The Belknap Press of Harvard University Press, 2016), 5.

The second novel contribution of such a project is the substance of the comparison. National and disciplinary boundaries have meant that black mass incarceration and Indigenous overrepresentation are often studied in isolation. Existing international comparisons either focus on one group alone (e.g. comparing Indigenous justice in Canada and the US) or subsume both into a single, larger phenomenon, such as treatment of racialized minorities. I propose to treat each as a distinct but comparable phenomenon. The question then becomes: why is the mass incarceration of black people such a dominant problem in the United States, while the overrepresentation of Indigenous people dominates Canadian criminal justice? After all, Indigenous Americans and black Canadians face injustice in the criminal justice system too. Indigenous Americans are dramatically overrepresented in federal prison – despite having limited autonomy over criminal justice – and are subjected to similar levels of police violence as black Americans. Is this merely a symptom of the relative marginalization of Indigenous concerns from the national public sphere, or is there an underlying logic that explains the disparate interest? One candidate would be a logic of colonialism, that requires focusing attention on black crime (and incarceration) in order to control the labour of black bodies, while simultaneously erasing Indigenous bodies in order to expropriate Indigenous lands. Does understanding overrepresentation solely in terms of racial discrimination miss something crucial about the distinctive injustice of the operation of settler colonialism? The prevalence of Indigenous overrepresentation in Canada despite a lack of private prisons, felony disenfranchisement, and racial disparity in sentencing laws suggests causes of disparity may run deeper than the obviously racist policies that dominate the American political discussion.

Indigenous people in Canada have been clear about the nature of the injustice they face: they are subject to the coercive application of an alien system of justice.[499] This justice has failed to provide Indigenous people with protection from violence and crime, or to provide anything they recognize as meaningful justice for criminal wrongs. The justice system has repeatedly been complicit with horrendous injustice, including police enforcement of the apartheid-like pass system, the residential school system, and judicial execution of leaders of political resistance to the Canadian state. The justice system continues to be a primary venue for state violence,

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[499] Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide*; Monture-Okanee and Turpel, "Aboriginal Peoples and Canadian Criminal Law."

whether official (disproportionate incarceration and the use of force by justice system officials) or unofficial (e.g. the extrajudicial killings of Indigenous men in Saskatoon known as "starlight tours"). A distinctive feature of this injustice is that Indigenous people see themselves as subjected to a non-functioning Canadian criminal justice system which has forcibly displaced preexisting Indigenous legal traditions and ways of providing justice. Taken together, this leaves Canadian criminal justice without legitimacy in the eyes of Indigenous people.

As a preliminary diagnosis of the injustice faced by black Americans, we can look to Michelle Alexander's convincing argument that mass incarceration is a third system of racial control (after slavery and Jim Crow).[500] In this diagnosis, the criminal justice system does not merely reflect the racial disparities of broader society, but actively and coercively produces a racial hierarchy. Mass incarceration is used to politically and economically marginalize black Americans. While Alexander's thesis is controversial, it is clear that the practice of criminal justice in the United States does have these effects: with nearly one in three black men expected to go to jail in their lifetime, the operation of felony disenfranchisement and the exclusion of ex-felons from legal labour markets and public benefits massively marginalize black Americans. According to Tommie Shelby, the complicity of the American state in this level of injustice threatens its legitimate authority to condemn and punish crime.[501] Although the state may retain the ability to enforce laws against violations of basic moral rights (because it is the agent best placed to do so), it lacks the legitimacy to impose or enforce obligations beyond natural duties.[502]

There are clear similarities between the threats to legitimacy in Canadian and American criminal justice. Yet there are also instructive differences. In the American case, a solution internal to the existing paradigm of justice seems to be available. That is, if the American criminal justice system lived up to its own ideals of impartiality and fairness, it could restore its legitimacy. In Canada, no such solution is available, because the problem is that those very ideals

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[500] Alexander, *The New Jim Crow*.

[501] Shelby, *Dark Ghettos*, 228.

[502] Shelby, 229.

are alien standards imposed upon Indigenous people. Thus, the justice system must radically alter itself if it hopes to meet Indigenous standards of legitimacy. Part of the explanation for this difference may lie in the different histories of the two countries. In the United States, the injustices of slavery and Jim Crow provided a template of racial control that is enacted by the criminal justice system. Black people were excluded from full participation in order to be included in an economic racial hierarchy that exploited their labour. In Canada, the history instead follows a logic of elimination, with Indigenous people marginalized or destroyed by an economic system that exploited their land.[503] Criminal justice then follows in a line of totalizing institutions (most notably residential schools) that seek to remake "deviant" Indigenous people as Canadians, that is, as pliant participants in a capitalist system of production.

In both countries, criminal justice inequities have a pronounced spatial dimension. Crime and violence are spatially concentrated in ghettoes – deprived urban areas housing concentrations of racialized minorities, both black and Indigenous – and in remote Indigenous reservations. In both cases, the physical separateness of racialized minority communities reproduces the lack of a common social world with the dominant society. Without a common social world, criminal justice interventions originating outside these separated communities take on an imperial character; they become something done by the powerful to the oppressed. Shelby advocates a new movement for the abolition of ghettos: predominantly black communities can of course continue to exist, but they should not be defined by disadvantage.[504] Historically, attempts to abolish reserves have been part of government attempts to assimilate Indigenous peoples and have met with fierce resistance. Could abolitionism, similarly understood, be a valid goal with regard to reserves? That is, could action be mobilized around ensuring that Indigenous communities are not ghettoized and defined by disadvantage, but instead defined solely by political self-determination? The second spatial dimension is that of spatial dislocation: criminal justice institutions such as courts and especially jails are often remote from the communities they "serve." To what extent does the logic of colonial justice – embodied by fly-in circuit courts and

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[503] Patrick Wolfe, "Settler Colonialism and the Elimination of the Native" 8, no. 4 (December 1, 2006): 387–409.

[504] Shelby, *Dark Ghettos*, 275.

remote jails – help to explain the experience of black Americans systematically removed from urban communities and warehoused in jails in (predominantly white) rural communities?

It will only be possible to properly address my second research question after I have thoroughly researched the nature of existing injustices. Nevertheless, I can suggest two avenues I will explore: the relation to black and Indigenous nationalisms and the implications of a political ethics of complicity for justice system reform. A variety of forms of black nationalism – understood as a movement for black solidarity and self-determination – have a long history in American political thought. However, these nationalisms have not generated any kind of political momentum toward the idea of a separate criminal justice system as a solution to racial injustice in the existing system. At the same time, American Indigenous nationalism has produced the legal status of "domestic dependent nations" and long-standing separate tribal justice systems. Although the subordination of such systems to federal law creates its own problems, the very existence of separate courts is a marked contrast to Canada. In Canada, Indigenous nationalisms drive a strong push for self-determination, but usually focus on control over land, resources, membership, and culture. While there are calls for control over criminal justice, they take a back seat to other priorities. In exploring these realities, I will ask whether separate justice systems provide the answer to legitimacy problems. To the extent that they do not, what are the conditions of legitimate justice practices that can reconcile aspirations for self-determination with other criteria of legitimacy?

In both Canada and the United states, the problems of legitimacy for criminal justice are deep-rooted and longstanding. Legitimacy problems also go beyond the field of criminal justice, to racialized disparities in influence over the political and constitutional structure as a whole. If we accept that some level of systemic injustice is the background condition for the operation of the criminal justice system, what does that do to the obligations of participants in the justice system? Ordinarily, we are required to refrain from complicity with injustice. Yet participation in a flawed justice system is a functional necessity of keeping society running; maintaining that system is in fact required to prevent the much greater injustices that occur in the absence of any system of criminal justice. My exploration of the political ethics of the complicit, a complement to Shelby's political ethics of the oppressed, will go beyond the familiar "problem of dirty hands" to systematically explore the obligations of well-meaning actors to work within, reform, and even resist the existing criminal justice system. This is an urgent inquiry, as I argue that

complicity with injustice is not a special case, but rather the ordinary condition of contemporary citizens. We all inhabit systems that fall far short of perfect justice and enforce racial, sex, and class injustice in various ways. Having a clearer idea of our obligations under such conditions can help us push towards a more just situation.

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