

**RESTORATIVE JUSTICE IN COLONIAL SASKATCHEWAN:
AN ANALYSIS**

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ABSTRACT

This thesis is an examination of the place of restorative justice in the practice of criminal law in Canada generally and in Saskatchewan in particular. It takes as its focal point the fundamental tension between traditional Anglo-Canadian Law in this area, and the newly founded practices of restorative justice.

This project accepts that retribution, vengeance and proportional justice are important components of current practice. It argues that these imperatives find their place not only in practice, but also in justice system structure. This space is made both culturally and legislatively. Earlier societies are examined to develop a sense of the connection between societal norms and punitive paradigms, and an argument is made that Canada is no different from earlier societies in the way its legal values reflect the social values of the dominant settler culture. Into this analysis is then added reflections concerning the effect of colonialism on aboriginal people generally and on Canada in particular.

The thesis then goes on to situate this tension specifically in current criminal justice by analysing legislation, policy, courts and practice. It examines restorative justice, and demonstrates that it has significant potential to ameliorate the deleterious effects of the colonial project on aboriginal peoples. However, it remains a marginalised practice precisely because it is an anti-colonial force in a powerful colonial justice structure. It concludes that the forces that have the inclination to change this situation have not acted to do so, and the justice system actors with the power to effect change have proven themselves to be similarly disinclined.

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DEDICATION

I dedicate this work to my family; my parents, siblings, children, grandchildren and in particular my partner Karen Eckhart, from whom I have drawn emotional sustenance. I also dedicate it to Kona and Marie, who understand restoration better than anyone does.

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The main question, which has not been addressed by government, is the legitimacy or otherwise of the assumption that white domination of Aboriginal people is in itself a concept of justice.¹

what? Postcolonialism? Have they left?²

1.1 Introduction

In my work as a legal aid lawyer in northern Saskatchewan, I have had the pleasure of working with an almost exclusively Aboriginal clientele. Criminal legal aid assists only those charged with relatively serious offences who are unable to afford the significant expense of retaining private counsel. In the North, this means Legal Aid represents the vast majority of offenders.³ Accordingly, the thesis that follows is the product of the view from the intersection of aboriginality, criminality, and poverty.⁴ However, this intersection is more than just a perspective; it is also a motivation and an inspiration. I am not a member of a First Nation, and have no illusions about the advisability of becoming some sort of latter day Grey Owl. This is not an insurmountable disadvantage.

¹ R. B. Sykes, *Black Majority*, (Melbourne: Hudson Hawthorne, 1989) at 146.

² Australian Aborigine activist Bobbi Sykes at an academic conference on Postcolonialism, quoted in L. Smith, *Decolonizing Methodologies*, (Dunedin: University of Otago Press, 1999) at 24.

³ Personal observation, 1994-2004. According to the 1996 Census, at that time Aboriginal people comprised 11% of the total population of Saskatchewan, 9% of the urban population, 7% of the rural population and 98% of the reserve population. In the north, Aboriginal people are 80% of the population. In the North West census district and the Athabaska, the proportion is 94% and 95% respectively. By the north (census division 18), the census means an area roughly concurrent with the Northern Administration District. This is bounded on the south by a jagged line from Meadow Lake Provincial Park in the west to Cumberland House in the east. See N. L. Quann and S. Trevethan, *Police Reported Aboriginal Crime in Saskatchewan*, (Ottawa: Minister of Industry/ Canadian Center for Justice Statistics, 2000) Statistics Canada catalogue 85F0031-XIE.

⁴ The statistics for northern Saskatchewan with respect to poverty are appalling. Census division 18 1996 figures indicate that 84% of Aboriginal people receive some sort of government transfer (welfare, social assistance and child tax benefit. One might object that the latter would skew the results, but the statistics for

There is a clarity of view, which one can bring to the subject, arising from the distance that a non-Aboriginal living in an Aboriginal society has. This detachment is concurrent with, and corollary to, the barrister's duty to provide clients with dispassionate opinion as to their causes. This said, a passion for social justice can have its manifestation in a real and abiding dedication to issues that transcend the vital causes of one's individual clients.

Northern justice is in a sad way. By this is meant not only the court system, but also the structures, and respects for those structures, which are its foundation, enablement and sequelae. Offending rates are very high. Saskatchewan has the highest provincial crime rate in the country. The violent crime rate, in particular, is triple that of 20 years ago. The general provincial Criminal *Code* crime rate (reported to police, excluding *Criminal Code* traffic offences) in 2001 was 13,458 per 100,000 residents. In La Ronge, the comparable figure was 39,354, in Pelican Narrows 76,388, in Stony Rapids (Black Lake) 84,979 and in La Loche 131,103.⁵

Respect for institutions such as elders, family, teachers and the police is significantly diminished in the primarily youthful offender demographic. This cohort treats the court with contempt, but nothing like the contempt which accrues to the downstream salvations

males and females are very similar). On reserve, the proportion is 82%, off reserve it is 87%. See *ibid.* table 8 at 95.

⁵ These statistics are taken from Saskatchewan Justice and Saskatchewan Corrections and Public Safety *Working together for safer communities*, a submission to the Commission on First Nations and Métis Peoples and Justice Reform (Regina: 2003) at 17. Online: Commission on First Nations and Métis Peoples and Justice Reform <http://www.saskjustice.gov.sk.ca/pdfdocs/WTFSC.pdf> The writers have in turn taken their statistics from a variety of publications of Statistics Canada, produced under the aegis of the Canadian Center for Justice Statistics (CCJS). The most recent statistics, published July 28, 2004, indicate that the comparable Saskatchewan crime rate for 2003 was 15,375. The national average was 8,132. See Statistics

of gaol, fines, probation and the like. These socialisations did not erupt overnight. They are the product of many sociological phenomena acting over a lengthy period. One, colonization, will be addressed at some length herein. Most others are outside the ambit of this study. The existence and pervasiveness of this contempt has led me to the inescapable conclusion that it is to some degree the product of the very system of social regulation, criminal justice, which is imposed in an attempt to conquer it. The tension inherent in this conclusion leads me, as an advocate for the people affected, to ask what can be done about this and about the pernicious incarceratory result so fundamental to our current way of doing 'justice'.

At the same time as my personal dismay at the over incarceration of my clients has coalesced, governments, including the Saskatchewan government, have become highly aware of the disproportionate numbers of Aboriginal people involved with the criminal justice system.⁶ In an effort to reduce this involvement, and ameliorate effects such as incarceration, government imported new restorative notions from New Zealand and Australia, where they are said to work, and has incorporated them into Saskatchewan's

Canada "The Daily July 28, 2004" Online: Statistics Canada
<http://www.statcan.ca/Daily/English/040728/d040728a.htm>

⁶ Saskatchewan's youth crime rate is the highest in the nation at 10,579 charges per 10,000 youth. The national rate is 3,956 per youth aged 12-17. The overall crime rate has increased 16% in the last decade, with a current rate of 13,368 incidents per 100,000 people, as compared to the national average of 7,590. Aboriginal people constitute 13.5% of the provincial population, but approximately 40% of those accused of, and victimised by, crime. See Saskatchewan Justice, *2004-2005 Performance Plan* (Regina: Saskatchewan Justice, 2004). Online: <http://www.saskjustice.gov.sk.ca/Publications/2004-05justiceperf.pdf>
The subject has been extensively studied. Arguably, the problem is not collective guilt, but collective will. See, for example, P. Linn (Chair) et al. *Report of the Indian Justice Review Committee* (Saskatoon, January 30, 1992). These numbers are likely to change profoundly because of the net-widening capability of the *Youth Criminal Justice Act*, S.C. 2002, c. 1 in force from April 1 2003. For example, in 2003 the national number of youth formally charged decreased 15%, but this was more than offset by an increase of 30% of youth offences "cleared otherwise" than by charging. Accordingly, the number of youth offences handled by the police for 2003 increased by 5%. See Statistics Canada *ibid*.

justice policy.⁷ The overhaul of the Criminal Code sentencing provisions in Bill C-41 in 1996 enabled the reception into mainstream criminal justice of indigenous notions of Restorative Justice, which had theretofore lurked in the judicial shadows.⁸ Practices such as circle sentencing and the application of youth diversionary tactics to adults are but two examples of the inventive approaches taken, largely on the sly, to incorporating restorative approaches in the pre-Bill C-41 era.⁹ New section 717 of the *Criminal Code* (hereinafter the *Code*) permitted the promulgation of provincial Restorative Justice programmes.¹⁰ Saskatchewan reacted with a province wide, uniform, Restorative Justice programme. Some Aboriginal organizations have been contracted to administer the programme.¹¹

⁷ A number of antipodean writers view the importation process as occurring the other way around. L. Smith, example, in *Decolonizing Methodologies*, *supra* note 2 at 155 writes of the co-opting of indigenous practices in the Canadian usage of healing circles and victim restoration and of the similar co-option in New Zealand's programmes dealing with children.

⁸ See R. Green, *Aboriginal Sentencing and Mediation Initiatives: The Sentencing Circle and Other Community Participation Models in Six Aboriginal Communities*, (LL.M. Thesis, University of Manitoba, 1995) [unpublished].

⁹ Circle sentencing started to fade from use in remote northern Saskatchewan communities about the same time that C-41 containing new sections 718.2(e) and 742 was enacted. Although interest remains, northern circles are rare. Circle sentencing has been well canvassed in academic writing. See, for example B. E. Orchard, *Sentencing Circles in Saskatchewan* (LL.M. Thesis, University of Saskatchewan, 1998) [unpublished], C. Levis, *Restorative Justice, Circle Sentencing: the silence speaks loudly* (M. A. Thesis, University of Northern B.C., 1998) [unpublished], M. Spiteri, *Sentencing Circles for Aboriginal Offenders in Canada* (M. A. Thesis, University of Windsor, 1999) online http://fp.enter.net/restorative_practices/spiterithesis.pdf, R. Green, *Aboriginal Sentencing*, *ibid*.

¹⁰ *Criminal Code* R.S.C. 1970, c. C-34. Mediation diversion programmes such as Saskatoon Mediation significantly preceded Bill C-41. It had been in operation since the mid 1980s. It is elaborated on a little in *Westfair v. United Food and Commercial Workers* (1998) 174 Sask. R. 27, [1998] S.J. No. 822, reversed on other grounds, [1999] 11 W.W.R. 755 (Sask. C.A.). Like many such schemes, it operated without any more sanction than positive reception by the Crown. In the mid-1990s only it and the Regina Alternative Measures Program were operating. By comparison, in 2002-2003, Saskatchewan Justice funded 25 adult alternative measures programmes. See Saskatchewan Justice *Use of Adult Alternative Measures in Saskatchewan 1999-2000 and 2000-2001*, (Regina: Policy Planning and Evaluation, April 2003 at 1.

¹¹ There are currently 111 people working in Community Justice programmes delivered by Aboriginal organisations in Saskatchewan. 67 of 72 Saskatchewan First Nations are involved in some aspect of Community Justice delivery. It should be noted that these programmes may include, *inter alia*, alternative

Accordingly, the thesis is directed at answering this question: "Given that too many Aboriginal people are in Canadian gaols, *why* are Restorative Justice programmes not ameliorating the problem?"

This thesis will examine the Saskatchewan and Canadian theories of Restorative Justice from an approach that is cognizant of differing Aboriginal cultures. It will refer to similar applications in New Zealand and Australia. The eventual focus is on what has come to be called Alternative Measures for adults and Extrajudicial measures for youth. This comes from a recognition that the business of restoration for Aboriginal offenders is even more poorly done in court than for non-Aboriginal accused. A restorative sentence is a bit of an oxymoron; Restorative Justice is, particularly in the Aboriginal context, community justice.¹² Even circle sentencing is, from the first to the last, at the behest of the sentencing judge. She decides who is permitted to avail themselves of the circle, whatever the wishes of the accused and community, and retains a veto over a circle's sentence proposal.¹³ Diversion takes the call out of judicial hands, although one might

measures, community justice workers, Aboriginal court workers, victim services and family violence schemes. See Saskatchewan Justice *supra* note 5 at 23 and chapter five *infra*.

¹² "[T]here are strong arguments that Restorative Justice will best be achieved outside of court and real concerns about how Restorative Justice will be implemented [in sentencing] given the limited and coercive tools available to sentencing judges." K. Roach and J. Rudin, "*Gladue*: The judicial and political reception of a promising decision" (2000) 42 Can. Jo. Crim. 355 at 363. The authors argue that *R. v. Gladue*, (1999) 133 C. C. C. (3d) 385 was an important recognition of the place of restorative principles in sentencing.

¹³ Judges often assert that while they have this power, they will not use it. The seventh sentencing circle criterion of Fafard, PCJ in *R. v. Joseyounen*, [1995] S.J. 362, [1995] 6 WWR 438, is to the effect that the judge must be willing to take a calculated risk and depart from the ordinary range of sentencing in a case before it. It is at this point where, in practice, the judge decides that she would not impose an in-center incarceratory term. Having made this determination, the judge need not worry about the non-incarceratory result and may therefore comply with her promise to "go along" with the circle's sentence. The acceptance of the circle reference by the Crown is pivotal. A Crown dissatisfied with a circle taking the noted "calculated risk" and departing from the usual range of sentencing will simply appeal the result. See *R. v. Runns*, 2002 SKCA 48, (April 11 2002) where the Saskatchewan Court of Appeal replaced a conditional sentence after a sentencing circle with a penitentiary term.

argue that the power is simply appropriated by the Crown, whose tenderness is suspect.¹⁴

Nevertheless, in practice once the matter is diverted, a favourable report from the Alternative Measures worker will result in a stay of proceedings by the Crown.¹⁵

My objective is to analyse the theory underlying the programme by examining history, legislation, policy and, to a lesser extent, practice. Because it is primarily a theoretical critique, it does not directly suggest changes in policy, but rather is a base on which such normative work might be further developed and implemented. Ameliorative models have been formulated, but have been largely ignored. They are touched on in chapter six. It may be argued that the reasons exposed herein for the marginalisation of Restorative Justice are coextensive with those that perpetuate the marginalisation of the larger issues of Aboriginal self-determination and self-governance. The development of this linkage would be a massive project, and must remain outside the scope of this thesis. One should, however, be aware of the place of Restorative Justice in these larger structures for, arguably, it will only realize its potential as an incident thereof.

The thesis is cognizant of one of the primary goals of Restorative Justice, reducing criminality through the healing of relationships involving the offender, complainant(s)

¹⁴ See C. Cunneen, "Community Conferencing and the Fiction of Indigenous Control" (1997) 30 *Austl. Crim. & N.Z.J.* 292 and H. Blagg "Restorative Visions and Restorative Justice Practices: Conferencing, Ceremony and Reconciliation in Australia" (1998) 10 *Curr. Issues in Crim. Justice* 1. Blagg and Cunneen have been particularly critical of role of the police as gatekeepers. Cunneen argues that it is a factor in concealing the reality of non- indigenous control. . Blagg decries both the notion of "food-hall justice," the practice of touring the smorgasbord of worldwide indigenous thinking and filling one's metaphorical plate with an amalgam of the lot, as well as the superimposition of white police control on the homogenous pile there assembled.

¹⁵ In the youth system, partial or total completion of a diversionary mandate gives the judge jurisdiction to dismiss charges. See generally, chapter four.

and community stakeholders. The lack of cultural similarity between indigenous people in other countries and those in Saskatchewan, and indeed the vast cultural differences between First Nations within Saskatchewan, makes a single practice for all ineffective. However, the shared experience of colonization among indigenous peoples makes comparison at the theoretical and policy levels instructive. Accordingly, spaces for the development of home-grown policies, tailored to specific northern Aboriginal communities, should become plain as should the nature and power of the legal and political restraints that constrain such initiative.

One notable development in the court process is the Cree Court. Notwithstanding the assertion above, this attempt to structure criminal justice differently is innovative and worthy of some study.

1.2 The Chapters

The second chapter will explore the roots of retribution as a guiding principle of that which criminal courts spend most of their time doing, sentencing people. The purpose of this chapter is to attempt to explain why, historically, it has the power that it does. The inquiry is significant because it highlights the entrenchment of the concept in a way that, arguably, perpetuates colonial values. The use of the word “alternative” in describing largely restorative processes is not, I suggest, mere semantics.

The third chapter will examine the theoretical bases of sentencing and explore Restorative Justice in order to assess its potential efficacy in achieving the aims of the traditional

model. What is its place within the theoretical framework of Crime and Punishment? Should it be judged by reference to the traditional model at all? Why is it largely limited to minor offences and/or offending? Is this, too, a mechanism by which colonial values are perpetuated?

The fourth chapter will first survey the adult and youth legislation, and then the judicial response. Much of the jurisprudence developed in response to circle sentencing and has, as noted, been the subject of significant academic evaluation in this regard, evaluation that does not require repetition. Because diversion is just that, the attitude of the judiciary must be ascertained obliquely from writings not directly on point. Academic and judicial consideration of sentencing, as well as diversion, is germane. The purpose of this exercise is to understand Crown motivation. The gatekeepers do not work in isolation. It is true that they are responsive to the ephemeral "public interest." However, Crown policy is more than just a weathervane. It is also driven by the opinion of judges who would be the ones dealing with the case, but for the diversion, as well as the intoned urgings of various public interest groups and the musings of academics and theoreticians. Accordingly, it calls for evaluation. A significant early part of the chapter will be spent on the legislative framework not just of diversion, but also of sentencing theory more generally. A coherent look at restoration requires that this be part of the exercise because sentencing is what the criminal law, by and large, does to people who come into contact with it. What is done by judges not only reveals the approach of that particular judge to a matter before her, but also tells us how the principles in the relevant legislation play out in real life. This has a profound effect of the attitudes of decision-makers throughout the

criminal justice process. The chapter will also spend some time on comparing part of the *Criminal Code*, the *Young Offenders Act*, and the new *Youth Criminal Justice Act*. The latter is of particular interest to us as restoration and diversion are designed in to it.

The fifth chapter will narrow the focus to Saskatchewan Alternative Measures/ Extrajudicial Measures. It situates the programme in the context of the Canadian policy and legislative background, and then goes on to analyse it within the larger paradigm of restoration. It then takes the analysis further still in two ways, one in court, and one without. The first part looks at the Cree Court currently operating in three Aboriginal communities, two in the north and one in central Saskatchewan. The second part examines how the youth Restorative Justice programme is being applied in La Ronge, a northern Saskatchewan community with a primarily Cree population. It examines the methods and modalities used with reference to the philosophies of the workers administering the scheme. No quantitative analysis will be undertaken for the methodological reasons explored below, although certainly the topic cries out for one. These must be designed into the programme from its inception to provide results that do more than just inform as to usage rates and types of measures employed. Rather, the endpoint of the study is an evaluation of the programmes in light of Aboriginal concepts of justice. The purpose is to ground the theory in reality; to provide a normative comparator for both the practice and the theory underlying.

The thesis will conclude with a brief critique of the programme. I will argue that cultural insensitivity is structural, and operates to thwart the espoused intent of Restorative

Justice. This will, in turn, explain the tension between Justice department policy and the punitive imperative that underpins the tactics used in court daily by Crown Solicitors and the police.

1.3 Thesis Themes

A number of themes will emerge in the unfolding of the above. I wish to highlight them here.

1.3.1 Fiscal Imperatives

First, the focus upon fiscal concerns, and the perception that Restorative Justice is a way of saving money, is a misguided, largely political distortion of what should be the aims of the programme. There is an implied promise that reducing incarceration and recidivism rates, particularly among Aboriginal offenders, will save public money. Emphasizing this aspect, while politically expedient, is counterproductive, for it raises unrealistic public and bureaucratic expectations. For example, if the intensive supervision programmes and community support work proves to be more expensive than incarcerating offenders, then the continuation of the programme would be in peril.¹⁶

1.3.2 Colonialism and Conflict Resolution

Second, because what is being proposed is an Aboriginal perspective on criminal justice, the theoretical questions the thesis must pose, and answer, are somewhat different from (but are not exclusive of) those that one would evaluate were one simply considering the

¹⁶ Roach and Rudin, *supra* note 12 at 375 are of the view that the New Zealand experience suggests that the implementation of restorative processes will at least save resources by reducing the need for prison expansions in areas of Canada with large Aboriginal offender populations. One presumes that they are

situation of restorative approaches in the larger questions of the role of Law as a regulator, and definer, of social and inter-social relations. Accordingly, the framework will be built on two bases, the first as just mentioned and the second on an analysis of the colonial structures which underpin relations between Aboriginal people and the Canadian state, acting through its justice institutions.

To develop this a bit, let us consider each of these branches in turn. The massive jurisprudential discourse considering the question of 'what is Law' would be out of place in a thesis with the focus set out above. However, in order to place the theoretical objectives and justifications of criminal justice in general, and its pointy end, sentencing, in particular, in context, one must be reminded that, "[t]his doing of something about disputes, this doing of it reasonably, is the business of law....What [the officials of the law] do about disputes is...the law itself"¹⁷

Accordingly, it makes sense to consider how we have come to the point where the dominant paradigm of criminal justice, the primary *modus operandi* of this particular form of dispute resolution, is overwhelmingly punitive. How has society come to accept uncritically the efficacy of this model in the face of its manifest failure? Two approaches may illuminate the target. First, an historical analysis of the intellectual precursors of the modern punitive approach will enable one to understand the "how." Secondly, an

referring to the youth initiatives in that country, for the reasons set out in the discussion of New Zealand's programme in chapter three.

¹⁷ Llewelyn, K. N., *The Bramble Bush: On our law and its study* (New York, Oceana Publishing, 1951) at

evaluation of the role of the colonization of indigenous peoples will inform the “why” portion of the analysis.

These two different views are necessary because the impact of our criminal justice system on indigenous people is inextricably bound up in the process and legacy of colonialism.

First, the state of Aboriginal people, both socioeconomically and in the face of the law, is part of this legacy. Secondly, the disempowerment of colonization has led to an inability to access traditional notions of conflict resolution. I fear that the latter process has gone beyond the point where this inability is simply caused by the impositive nature of Eurocentric justice and can be remedied by its removal. It has developed into an intrinsic powerlessness which renders the inflicttee (I refuse to use the term victim), even if knowledgeable about the possibility and opportunity to be found in traditional justice, simply unable to access it.

An approach of this nature will touch on the place of Aboriginal governance in the amelioration of Aboriginal overrepresentation in the justice system. This will facilitate a critique of the current involvement of Aboriginals in their own justice. It will allow one to distinguish that which is a genuine function of Aboriginal decolonization, of empowerment, from that which has been justly criticised as merely the indigenization of the colonizer’s justice. The latter point is of particular interest, for it highlights a certain

symbiosis between the colonizer and colonized. We will also look at the Saskatchewan Cree Court to see just how, and if, it may be situated in this circumjacent.¹⁸

There is as well a certain useful identity between Eurocentric criminal justice and the question-begging approach taken by Canadian and other Commonwealth courts to the nature of Aboriginal title in land. As *Delgamuukw*¹⁹ makes clear, the existence of Aboriginal title is predicated on, and crystallized by, the assertion of European sovereignty. It is true that Canadian law, as it can be traced through *Calder*,²⁰ *Baker Lake*²¹ and *Delgamuukw* does require necessary preconditions of Aboriginal occupation, territorial exclusivity and the like. However, the construction of section 35 of the *Constitution Act, 1982*²² as a decolonising force in the area of Aboriginal title loses a great deal of its vitality in this context. Aboriginal land law is, arguably, the area where decolonization has proceeded most apace. If the *sine qua non* is recognition, which denies Aboriginal title existed before the colonizers said it was so, then what can one draw about the level of development (and potential for incorporation) of Aboriginal norms in criminal justice?²³

¹⁸ Analysis cannot be achieved in any depth given the youth of the initiative, however some attention is mandatory as this is the only in court project that accepts, as a fundament, that the cultural loadings of language are pivotal to decolonised justice.

¹⁹ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010.

²⁰ *R. v. Calder* (1973), 34 D.L.R. (3d) 145, [1973] S.C.R. 313 (*sub nom Calder v. British Columbia (Attorney General)*), [1973] 4 W.W.R. 1

²¹ *Baker Lake (Hamlet) v. Canada (Minister of Indian Affairs and Northern Development)* (1979), 107 D.L.R. (3d) 513, [1980] 5 W.W.R. 193 (F.C.T.D.)

²² *Constitution Act 1982* enacted by the *Canada Act 1982* (U.K.), c. 11.

²³ I am not ignorant of the jurisprudence that constructs Aboriginal title as a burden which existed before settlement and which encumbers thereafter. Rather I wish to make the pragmatic point that the hocus-pocus

More importantly, what conclusions can one form for criminal justice so that this course can be avoided? This may be most helpful in establishing a theoretical structure to support an argument that indigenous self-government and economic power are far more promising ameliorative bases than the empty promises of white paternalism.

1.3.3 The uncomfortable place of Restorative Justice

It is impossible not to consider the questions raised by the role of the rule of law, as opposed to the rule of man, in all of this. One of the most frequently raised criticisms of Restorative Justice is that it is irrational, that it is individualised and inconsistent. The fear of this is well founded, especially in the Byzantine intrigues of First Nation politics. When the white judge comes to town, bringing all of his baggage, he also brings with him the grand impartial illusion. However, Restorative Justice is not impartial; it is tailored. If one can argue that white Restorative Justice bears the same drawbacks as the punitive/retributive approach but simply hides them better (and is all the less “fair”, and more dangerous for this reason) then one could undermine this persistent detraction. This challenge to formal, as opposed to substantive parity in sentencing is framed in the context of the current debate over the role and power of the justice system to advance social equity.

1.4 Methodology

This thesis uses three different methodological approaches, the historical, the comparative and the analytical. Methodology may be distinguished from method in this way: “[a]

of acquired Crown sovereignty has the *effect* of making Aboriginal title subordinate to, and derivative from, Crown asserted territorial sovereignty.

research methodology is a theory and analysis of how research does or should proceed....

A research method is a technique for (or way of proceeding in) gathering evidence.”²⁴

The three will be intertwined to some degree because of the perspective of the exercise.²⁵

This thesis is primarily expositive and theoretical. However, it touches ground, so to speak, in the practice of the theory. Accordingly, and quite deliberately, the methodology employed is eclectic. This being said, each approach is, taken individually, theoretically and conceptually valid. The reason why these approaches are used in the way that they are is entwined in the subject matter. To explain further, it would make very little sense to purport to undertake a postcolonial critique of a system of procedures and sanctions imposed on Aboriginal people from a perspective that is not reflective of the current discourse surrounding the decolonization of research. This consciousness finds expression not only in the examination that forms part of chapter five; it also informs the developed explorations in the earlier chapters. For example, the tracing of retribution as a guiding principle of criminal corrections in the second chapter is a relevant and evocative way of exposing the development of a colonialist norm. It is in turn demonstrative of the formation of a wider epistemology of control. The development of liberalism and modernism from the enlightenment onward are the larger projects of which retribution, imperialism and colonialism are both symptomatic and foundational. The gathering of knowledges, the ranking of civilization, and the development of what Said calls “flexible positional superiority” is the means by which the colonial project, Orientalism, “puts the

²⁴ S. Harding, *Feminism and Methodology* (Bloomington, Indiana University Press, 1987 at 2-3, as cited in Smith, *Decolonizing supra* note 2 at 142

Westerner in a whole series of possible relationships with the Orient without ever losing the relative upper hand."²⁶

Linda Tuhiwai Smith, in her seminal *Decolonizing Methodologies*²⁷ establishes the importance of doing research (which includes the exploration and development of theory) in such a way that it does not compound the legacy of imperialisms such as colonization.

The word itself, 'research' is probably one of the dirtiest words in the indigenous vocabulary...[because] Western researchers and intellectuals can assume to know all that it is possible to know of us, on the basis of their brief encounters with some of us.²⁸

She rails, as does Said, against the violence and perpetuation of violent means by Western scholarly discourses.

[I]t is surely difficult to discuss *research methodology* and *indigenous peoples* together, in the same breath, without understanding the complex ways in which the pursuit of knowledge is deeply imbedded in the multiple layers of imperial and colonial practices.²⁹

Part of her approach stems from the ruthless exploitation and appropriation of indigenous knowledges that centuries of western researchers have perpetrated. This is germane to my thesis, for it is a pivotal assertion that when one deconstructs the process of the justice system's appropriation of Aboriginal knowledge of restoration and the application of it in turn through the criminal justice system, one finds that the result can be the doing of violence to Canadian Aboriginal peoples by purporting to use their own systems of

²⁵ As Smith, *ibid* at 143 notes, "Some important work is related to theorizing indigenous issues at the level of idea, policy analysis and critical debate, and to setting out in writing indigenous spiritual beliefs and world views."

²⁶ E. W. Said, *Orientalism* (New York: Vintage Books, 1979) at 7.

²⁷ Smith, *supra* note 2.

²⁸ *Ibid.* at 1.

healing. One is therefore most mindful that “research is not an innocent or distant academic exercise but an activity that has something at stake and that lives in a set of political and social conditions.”³⁰ If I fail to make explicit in my methodology the harm which I can create through simply another construction of indigenous people as the ‘Other’, as ‘not us’, then I will run the risk of becoming the very problem which I hope to identify and explore.

In his analysis of colonial racism, writer Albert Memmi identifies four related strategies used to maintain colonial power over Indigenous peoples: (1) stressing real or imaginary differences between the racist and the victim; (2) assigning values to these differences, to the advantage of the racist and the detriment of the victim; (3) trying to make these values absolutes by generalizing from them and claiming that they are final; and (4) using these values to justify any present or possible aggression or privileges. All these strategies have been the staple of Eurocentric research, which has created and maintained the physical and cultural inferiority of Indigenous peoples.³¹

These challenges are here addressed in a number of ways. The first is through acknowledgement, of which no more need be said other than to emphasize its importance. The second is by applied humility. I acknowledge the limitations placed on the project by my inability to communicate in Cree and Dene, and the fact that my life in the north is but a decade old. There is not the ultimate depth of cultural experience which might assist. Language is important; indeed it has been asserted that it is impossible to understand Aboriginal worldviews unless one speaks the Aboriginal language in question.³² The discussion of the place of the Cree court acknowledges the central place of language in

²⁹ *Ibid.* at 2.

³⁰ *Ibid.* at 5. The most shameful effect of research is, however, the way that it is used by government to delay and defer action that may be expensive or unpopular.

³¹ Memmi, A., *Dominated Man: Notes Toward a Portrait*, (Boston: Beacon Press, 1969) at 186 as cited in Battiste, M. and Henderson, J. Y., *Protecting Indigenous Knowledge and Heritage*, (Saskatoon: Purich Publishing, 1999) at 135 (reference removed).

decolonization. I do not, however, accept that linguistic challenge makes the initiative impossible. Indigenous researchers may provide invaluable contributions to the art without claiming to understand every Aboriginal language. The application of humility is ameliorative.³³

The most important and essential quality in ensuring that research and thinking in this area is conducted ethically is to name and to challenge racist and ethnocentric thinking. For example, doing research *to* people is an exploitative tradition in western research, which is antithetical to a relationship of respect. Similarly, purporting to formulate observation in this field, whilst failing or refusing to recognise the history(ies) of the impositive relationship involved, would leave the study open to (deserved) criticism that it lacks credibility. Accordingly, the third and most important technique is that it be bold, that it not shy away from telling the stories, analyzing the writings and drawing the conclusions, which are called for by the investigation. The difference between doing research *to* a person, group or peoples, and doing it *about* them, is the place of the voice of the culture being considered. By this I mean not only honouring the stories of those who honour us by speaking, but also by understanding that the deconstruction necessary to make space for those stories must take place in the bulwarks of Eurocentric legal thought. One must do both to be able to say to Aboriginal people, about whom this thesis

³² Battiste and Henderson, *ibid.* at 133.

³³ For an excellent current example of care and respect in research about Aboriginal people, see the University of Western Australia-Crime Research Center/ Law Reform Council project "Aboriginal Customary Law Reference: Project Overview" online: government of Western Australia <http://lrc.justice.wa.gov.au/Aboriginal/ACC20overview.pdf>. It notes the need to "make spaces for Aboriginal voices to be heard," to ensure that cultural taboos are respected and necessary Aboriginal permission for the gathering of information obtained in advance. The information so gathered can then be

is primarily written, that this is the best effort of a non-Aboriginal person to “research back” in a holistic way.

1.4.1 The Comparative method

It has been argued that, “[t]here is only one analytical method in the social sciences; the comparative method.”³⁴ Havemann lists a number of justifications for this assertion. He says that it helps to,

- improve taxonomies and typologies for categorising knowledge
- refine the conceptual grid
- provide some perspective on one’s own context from the knowledge of what occurs elsewhere and so avoid ethnocentrism
- discover general relationships among variables and factors—for example, what difference a treaty makes, if any
- evaluate the performance of systems, agencies, and institutions, and isolate factors that make for success or failure
- explore the scope and limits of generalization from one context to another
- provide conceptual frameworks to assist with policy analysis, both for predicting outcomes and for advocating reform.³⁵

The primary drawback to this methodology is the logical one: that one can only draw valid conclusions from comparisons if the comparators are sufficiently similar. The fact that two different systems operate in different ways, and with different objectives and outcomes, is mere happenstance if the systems are indeed fundamentally distinguishable. Accordingly, it is essential to find sufficient identity in the *salient* features of the jurisdictions examined to make comparison useful. The emphasized term is a rejoinder to the caution that “overconsciousness of a multiplicity of fine differences might lead to the

“constructed from within... a firm cultural paradigm...” so as to give resulting recommendations “the necessary cultural contextualisation.” (at 3).

³⁴ D. Denoon, *Settler Capitalism: The Dynamics of Dependent Development in the Southern Hemisphere* (Oxford: Clarendon Press, 1983) at 8.

conclusion that valid comparison is methodologically impossible because there are just too many factors.”³⁶ One need only find identity in factors made relevant by the nature of the enquiry in order for comparisons derived therefrom to be useful.

Furthermore, this thesis asserts that Aboriginal communities, whilst sharing certain commonalities of relevant colonial experience, are as different from one another as they are from the norms of the settler societies that dominate them. Indeed, it is the very juxtaposition of dominance with paternal homogenization of indigenous peoples that I argue has a pernicious sequela in the area of restoration. For the purposes of this exercise, the exposure of difference is as vital as the demonstration of identity.

Consequently, this project requires, in part, a comparative methodology. The exposition of structural homogenization is pivotal.

1.4.2 Historical Analysis

The use of an historical approach is both essential and problematic, ironically for the same sets of reasons. Tracing the origin of ideas and ideologies foundational to current justice norms is absolutely necessary in order to effect a meaningful analysis. The challenge that I set up, and the theoretical framework examined, was not created out of whole cloth yesterday. The criminal justice system’s operative paradigm is the product both of millennia of western thought and of the imperatives of elites in western society. The desires, methods and objectives of those elites have in turn been shaped and given

³⁵ P. Havemann, ed. *Indigenous Peoples Rights in Australia, Canada and New Zealand* (Auckland: Oxford University Press, 1999) at 2.

³⁶ *Ibid.* at 3.

life by that same intellectual history. It is more than the oft-quoted words of Georges Santayana imply, that those who forget history are condemned to repeat it. Rather, it is impossible to understand the structural power of colonialism as it works in and through the Canadian criminal justice system unless one understands just how that system's underlying norms developed.

There are two historical sub-themes playing out that I would like to make explicit. The first stems from a rejection of the Restorative Justice mantra that traditional justice is simply community justice. Much has been made of the move away from the latter in the period from 1050 to 1150 in England, as it then was. It is a perfectly reasonable historical project to travel back up the road to discover where it forked and then consider the social factors that precipitated quantum-thinking shifts and which sustained them. Sound bases for this approach can be found in an acceptance of the circular dynamic of social change. This is more than 'plus ça change, plus ça que même chose.' Rather it involves usage of a critical tool which accepts that law is subject to a sort of corrupt Hegelian process, whereby any attempts to effect meaningful change at a structural level are met with powerful resistance. This should engage a dialectical conflict leading to a cogent synthesis, but it does not so do. The reason is because reaction takes the form of a series of feedback loops which destabilize the bases of this initiative and in due course subvert it to the agenda of the powerful and the propertied: in our context, the colonizer. I do not reject the process, but rather suggest that it partially begs the question. A focus on the *locus* of justice misses the point. Justice can take place in communities, between people, and still incorporate colonial notions of punishment and retribution. A consciousness of

the depersonalization of justice certainly illuminates the structure of imposition, but it fails to shed light on what lurks beneath, the paradigm of revenge.

The shift to state crime and non-community authority *follows* the establishment of the retributive paradigm by a very significant margin. The problem with making the assertion that our system is restorative, if only one goes back far enough, is that an uncritical acceptance of the primacy of the *locus*, without an understanding of the importance of the *ideas* underlying and preceding, leads people to try and graft restoration on to the entrenched and consider the project complete. This is especially problematic in the colonial context because satisfaction with just doing that much means that what must be done can never be done; it is not on the agenda. It is hidden. Accordingly, the first theme is an historical exposé of the proportionality principle that is now entrenched in section 718.1 of the *Criminal Code* as a fundamental principle of sentencing law.

The second theme is an analysis of the social necessity of retribution and proportionality. This is undertaken not only to tie the concept into the colonial project, but also to exemplify how the demands of a society are reflected in its justice, in its way of 'doing law'. For two reasons, it is not good enough to say that this is what our society is, and therefore this is how we do business. First, such positivistic fatalism is permissive of the continuation of social control by moneyed elites, by the powerful. A control analysis of the relationship of the Canadian state with Aboriginal people need not be more than superficial to ascertain which group is dominant and which is subservient. Complacency

in its acceptance, and complicity in the maintenance of its validity, can only be based on a host of ethnocentric assumptions about people's places in society.

Second, the history of colonialism was as formative of the current state of affairs as the retributivist history was of normative thought in criminal sentencing theory. The confluence of these two histories illuminates the reason why an historical base is necessary for credibility. Unless the history on which one is relying is made explicit, the reader will find it very difficult to interpret the biases and assumptions that pervade the project. The writing that follows is the product as much of my orientation and biases as it is of my intellectual exertions. This is true of every writer. I submit that it is important to make one's agenda clear; it is even more important to delineate the foundations of one's biases. The way in which I do history is, in a way, as important as the explicit conclusions that I draw from it. The study of the past and interpretation of it is, particularly in the area of intellectual history,³⁷ a window into understanding which history it is that I accept. The privileging of western histories of westerners and of their adventures in the lands abroad is an Orientalist mechanism for legitimising domination.

There are numerous oral stories which tell of what it means, what it feels like, to be present while your history is erased before your eyes, dismissed as irrelevant, ignored or rendered as the lunatic ravings of drunken old people. The negation of indigenous views of history was a critical part of asserting colonial ideology, partly because such views were regarded as clearly 'primitive' and 'incorrect' and

³⁷ The history of ideas is particularly important. Smith asserts that the primacy of the western culture is based on centuries of philosophical and social debate that has defined what makes ideas real, and the place of individuals within society. This "cultural archive" is the basis for "Ideological appeals to such things as literacy, democracy and the development of complex social structures [that] make this [Western] way of thinking appear to be a universal truth and a necessary criterion of civilized society." This is the reification of western reality so foundational to colonialism. (*Ibid.* at 48).

mostly because they challenged and resisted the mission of colonization....
Reclaiming history is a critical and essential aspect of decolonization.³⁸

I submit that one need not purport to indulge in remedial historical revisionism to engage the importance of this approach. It is necessary for what it does as much for what it says; it lays bare assumptions and loadings. It makes explicit my use of history that privileges liberal, modernist historicism. Smith asserts that,

[t]he enlightenment project involved new conceptions of society and of the individual based around the precepts of enlightenment project involved new conceptions of society. The modern state became the point of contrast between the pre-modern and the modern. History in this view began with the emergence of the rational individual and the modern industrialized society.³⁹

This defines what is worthy of historical record.⁴⁰ It also justifies Said's "positional superiority." I would be hard pressed to argue the credibility of research about structural racism without revealing sources tainted with it.

Coming to know the past has been part of the critical pedagogy of decolonization. To hold alternative histories is to hold alternative knowledges...this access to alternative knowledges...can form the basis of alternative ways of doing things.⁴¹

Finally, an historical analysis makes it possible to contextualise meaning in a way that makes it amenable to deconstruction.

1.5 Deconstruction

It might be objected that deconstruction is simply an overly fancy term for critical analysis. I think that this is somewhat justified in result, if not in process. However, the

³⁸ L. Smith, *Decolonizing*, *supra* note 2 at 29-30. Smith rejects western history as dogmatically linear, universal, patriarchal and agenda driven, even as it asserts that it must be otherwise. She draws on the following: R. Young, *White Mythologies, Writing, History and the West* (London: Routledge, 1990), J. Abu-Lughood, "On the Remaking of History, How to Reinvent the Past", in *Remaking History*, (Seattle: Bay Press, 1989) among others.

³⁹ Smith, *ibid.* at 32.

term is a useful one to define a particular species of analysis, with a set of tools that makes it useful here. Its utility is derived from the way in which an analysis of this sort challenges the teleological validity of truth-discourses, in our study, justice and law, and makes it possible to take,

an attitude of downright skepticism toward all such ‘totalising’ projects or creeds”...[It argues that] “there is no truth, either inward or outward, that could validate one set of codes and conventions above another...”⁴²

The colonization project, because of its *a priori* privileging of one epistemology over another, calls out for analysis which is able to pull apart the language on which its hierarchies and its power structures was and still are grounded. This is necessary if one accepts that the critical tools normally available to one, and sometimes the only tools that one has, are constructed in the same way, and from the same things, as the Eurocentric norms that one wishes to critique. As Smith notes, albeit in a somewhat different context, “[t]he master’s tools will never dismantle the master’s house.”⁴³

Deconstruction is the drawing out of “conflicting logics of sense and implication” a “process of rhetorical close-reading.” Developed by the French philosopher, Jacques Derrida, its mechanism is described by Norris as follows:

One begins by locating those key-points in the text where its argument depends on some crucial opposition of terms....Then it is a matter of showing: 1. That the terms are hierarchically ordered, the one conceived as derivative from, or supplementary to, the other; 2. that this relation can in fact be inverted, the supplementary term taking on a kind of logical priority; and 3. that the pattern of

⁴⁰ Smith, *ibid.* at 31.

⁴¹ *Ibid.* at 34.

⁴² C. Norris and A. Benjamin, *What is Deconstruction?* (London: St. Martin’s Press, 1988) at 29.

⁴³ L. Smith, *supra* note 2 at 19, citing A. Lorde, in C. Moraga & G. Anzaldua, *This Bridge Called Me Back*, (New York: Kitchen Table Women of Colour Press, 1981) at 98.

unstable relationships thus brought to light is characteristic of the text in every last detail of its rhetorical organisation.⁴⁴

Accordingly, deconstruction demands that one not only look for the hidden, but also expose it by revealing the tensions in the language and concepts through which it works. It makes ambiguous and illogical the hierarchical by showing that they hold within themselves the reasons why they lack structural integrity and validity. This, I submit, is a core strategy for the decolonization that I review herein. However, it is but a tool and nothing more. To take it further would require an analysis of the method so as to avoid the recent criticism that deconstructionists, “[a]rmed with an impenetrable new vocabulary, and without having to master any rigorous thought...could masquerade as social, political and philosophical critics.”⁴⁵ The resulting “undisciplined nihilism”⁴⁶ would be of little utility here.

⁴⁴ Norris, *supra* note 42 at 8.

⁴⁵ *The Economist*, October 21, 2004 at 95.

⁴⁶ *Ibid.*

Reactionary as it is, corporal punishment is better than nothing.¹

2.1 Introduction

This chapter will explore the historical and theoretical bases of the modern retributive paradigm, with a view to explaining why it has the power and prevalence that it does.

The purpose of the exercise is to set the field for an explanation of its resilience in the face of modern restorative perspectives and demonstrate its role in undermining decolonisation in the field of sentencing. In chapter four in particular we shall consider its resonance in current Canadian sentencing law.

2.1.1 Punishment

Is it justifiable to punish at all in the context of criminal justice? Punitive retribution has been rightly (and voluminously) criticised for many years and by many authors.²

Punishment is inefficient, does not work, it hurts more than it helps and so on. It has been clearly and empirically demonstrated that, for the most part, punishment in sentencing and corrective policy is counterproductive in attaining the ostensible primary goals of the criminal justice system.³ Yet retribution remains a primary theoretical and

¹ F. Dostoyevsky, *Notes from Underground* (1864) Part one, section nine.

² At the theoretical level, the discourse between retributivists and consequentialists has been the stuff of careers made for decades. We shall look later at retributivism in its modern context.

³ In the context of Aboriginal imprisonment, see A. C. Hamilton and C. M. Sinclair *Report of the Aboriginal Justice Inquiry of Manitoba* Vol. 1 (Winnipeg: Government of Manitoba, 1991). Hamilton has recently followed up this work with the more anecdotal, *A Feather, not a Gavel: working toward Aboriginal justice* (Winnipeg: Great Plains Publications, 2001). See also Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada*, (Ottawa: Supply and Services Canada, 1996) particularly as it cites the Donald Marshall enquiry at 33 ff., M. Jackson, "Locking up Natives in Canada" (1989) U.B.C. L. Rev. 23. More generally, see Canadian Centre for Justice Statistics, *Corrections Utilisation study: A Review of the National and International Literature and Recommendations for a National Study on Recidivism* (Ottawa: Statistics Canada, 1997).

legislative justification for punitive sentencing. The two concepts are firmly linked.

Retribution as a justification has been vigorously debated, but the efficacy of its counterpart, punishment, is a given. Crown Counsel are never called upon to justify punishment. The concept is simple, “[p]unishments are like electrified fences. At the very least they teach a person, via pain, that there is a barrier to the action she wants to do....”⁴

There are many explanations for why punishment works, and consequent justifications for using punishment, with their various ontological and utilitarian faces. They all assume that punishment *does something*. The sceptic replies that it does not accomplish any of the aims ascribed to it. Punishment, taken from the realm of theory, is just the infliction of something unpleasant on a person. Find what is unpleasant, inflict it, and you will demonstrate to society that the predicate conduct is wrong, or whatever your aim (or mix of aims) happens to be. The sceptic retorts that the offender (and the population of offenders generally), by doing as they do, perforce demonstrate that they are sanction proof. Does it accomplish any aim to sue an indigent debtor, or bullwhip a Brink’s truck? The proof is in the result, in the fact that this person did this act despite the longstanding and ongoing punishment of those who have acted similarly.

For a recent American survey of the efficacy of “boot-camps” and rehabilitative programmes generally, see C.A. Kempinen & M.C. Kurlychek, “An Outcome evaluation of Pennsylvania’s Boot Camps: Does rehabilitative programming within a disciplinary setting Reduce Recidivism?” (2003) 49(4) *Crime and Delinquency* 581. With respect to youth, but using sources drawing on evaluations of adults, see R. Green and K. Healy, *Tough on Kids* (Saskatoon: Purich, 2003)

⁴ J. Hampton, “The Moral Education Theory of Punishment” in J. Coleman, ed. *Crimes and Punishments* (London: Garland, 1994) at 498.

This said, punishment is what the system does. The sharpest part of the exercise, incarceration, is the *sine qua non* of judicial action. It stands in for other, less modern punishments.⁵ Judges know that in this area of the law the biggest stick is deprivation of liberty. This chapter asks, from where has this imperative come, such that anything less than incarceration is seen as an exercise in leniency?

Punishment is the judge acting as the agent of state coercion.

While some criminal law pronouncements may have a moral tone, the domain of the criminal law within a social structure is not congruent with conceptions of morality. It is an instrumental regime that derives from the political character of the jurisdiction. Turner has aptly described its role:

In fact, criminal offences are basically the creation of the criminal policy adopted from time to time by those sections of the community who are powerful or astute enough to safeguard their own security and comfort by causing the sovereign power in the state to repress conduct which they feel may endanger their position.

J. W. C. Turner, *Russell on Crime* 12th ed., vol. 1 (London: Stevens and Sons, 1964) at 18

.... Conspicuously absent is any reference to moral legitimacy or justification.⁶

A power analysis makes clear the reasons for the move from community justice to a division between public and private law, the historical roots of which are examined

⁵ It has been argued in modern times that a return to corporal punishment would be effective as it "reflects the crime in the punishment." See G. Newman, *Just and Painful: A case for the corporal punishment of criminals* (London: Macmillan, 1983). This approach is too far to the fringe to concern us. Durkheim argues that detention "...fills the void....To the extent that archaic forms of repression were removed from the catalogue of punishments..." See E. Durkheim, "Two Laws of Penal Evolution" (1969) U. Cinn. L. Rev. 32 at 38. Durkheim's exposition of what he means by 'less advanced societies' is cursory and unenlightening. at 50. The Supreme Court in *Gladue* said, "The penitentiary sentence was itself originally conceived as an alternative to the harsher penalties of death, flogging, or imprisonment in a local jail." *R. v. Gladue*, [1999] 1 S.C.R. 688 at ¶ 27.

⁶ A. Manson, *The Law of Sentencing*, (Toronto: Irwin Law, 2001) at 3.

below.⁷ The development of the state and the need for the state to exercise power provide the underlying reason for this arbitrary distinction.

...the distinction was grounded on morally arbitrary choices about which actions could threaten the rulers' social position or control. Thus, the distinction between what is a crime and what is not was, and remains today, the will of those with the power to define crime with an eye to social control. The arbitrariness of this distinction is apparent when one understands acts in terms of their resulting harm instead of according to their classification as criminal or not.⁸

The elites of societies may have a number of priorities that are reflected in the espoused values of that society. Like Hitler's theory of the Big Lie,⁹ the constant positing of that which perpetuates the values of the elites enshrines the materialistic objectives as moral objectives. Sentencing is the imposition of pain, of punishment, in an attempt to achieve these objectives.¹⁰ Accordingly, whilst the moral structure of each society can be seen reflected in its construction of penal policy, it is important to link those morals with the predicate objectives of those with the power to define law and, through it, the mores of a society. This exercise is an essential one, for the use of the state as the mechanism of coercion in a colonial project means that one must abandon positivism and consider

⁷ My focus is on the development of the concept in antiquity and thereafter, rather than the divorce of justice from the community which occurred after 1050.

⁸ J. J. Llewelyn, & R Howse, *Restorative Justice, A Conceptual Framework* (Ottawa: Law Commission of Canada, 2001) Online: Government of Canada <http://www.lcc.gc.ca>. The authors draw this from an argument developed by Martin Wright, in *Justice for Victims and Offenders* (Philadelphia: Open University Press, 1991) who notes that there is very little difference between harm actionable, for example, in tort and that actionable through the criminal law. Indeed, some harms are actionable both ways. A theft is fundamentally an argument over ownership, he argues. This type of approach may be useful to ground a theory regarding the development of state sanctions and in particular to situate historically the fine-restitution dichotomy, but it is less satisfactory when explaining notions of fault and culpability.

⁹ Hitler was quite explicit about the power of untruths. He believed that if one told a small lie on a single occasion, one would be disbelieved and thought of as untrustworthy. The better course is to tell a big lie, on scores of occasions for then neither one's veracity, nor one's lie, is likely to be questioned. Adolf Hitler, *Mein Kampf*, trans. by J. Murphy (London, New York, Melbourne: Hurst and Blackett Ltd, 1942) at 134.

¹⁰ It would be simplistic to assert that states are solely responsible for crime control, or even consider themselves solely responsible. Out of much hand wringing about the impotence of states in controlling crime has developed crime-control models that Garland calls a "responsibilization" (sic) strategy;

whether the state is guilty of what Omaji (with an ironic reference to Otto Von Bismarck's *Realpolitik*) calls *Realcrime*. He argues that,

Conventional justice scholarship in Australia focuses on the symptom, e.g. the 'Aboriginal problem', which is usually presented as seemingly defying solution. It hardly occurred to this genre of intellectual work that, since the state has had almost total control over Aboriginal lives for over two centuries, 'it is the operations of state government which should be investigated to reveal the reasons for the disastrous conditions that persist.'¹¹

This involves looking at both the institutional level and the broader field of legislative framework and policy that are discussed in chapters to follow. This chapter looks at the development of the retributive imperatives that underpin the policies that are explored below.

2.2 History

How did we arrive at this state of affairs? It is far beyond the scope of this chapter to be comprehensive; rather the point is to expose and exemplify the theme so that later chapters may work with it in practice. Emphasis is given to roots, rather than branches, as the retributive/corrective tree has grown well in fertile soil and holistic viewing is only possible from a great distance, leaving detail unascertainable.

essentially a devolving of crime control to community actors. See D. Garland, "The Limits of the Sovereign State: Strategies of Crime Control in Contemporary Society" 36 *Brit. Jo. Crim.* 445 at 452.

¹¹ P. O. Omaji, "The *Realcrime* of the state and Indigenous People's (sic) Human Rights" in S. Garkawe, L. Kelly and W. Fisher, *Indigenous Human Rights* (Sydney: Sydney Institute of Criminology, 2001) at 231. The author takes the quoted portion from R. Kidd, *The way we civilise Aboriginal Affairs- the Untold Story* (St. Lucia: University of Queensland Press, 1997) at XIX. Omaji's point is that the over-representation of Aboriginal youth and adults in Australian jails is simply the continuation of a process that began with the condoning of hunting of Aborigines and continued in the forced removal of children from their families, a process now known as the stolen generation.

Retribution is not vendetta. This is dealt with in some detail later. Suffice it to say that it is misleading to identify “retribution” with vengeance.¹² It is equally misleading to identify it with the punitive outcomes of desert or deterrence theory, such as incapacitation. As shall be seen, retribution, like consequentialist/ utilitarian theories, is posited as a coherent justification for corrective systems. Neither preclude parsimony in punishment as a guiding principle. A simplistic synonymy of “retribution” with “punish harder” is false. The objective is not to enter the Byzantine debate between, for example, desert theorists and consequentialists, although in looking at Hart’s version of retributivism (which is an enlightening hybrid of the two approaches) I touch upon it.¹³ Rather the purpose is to isolate the retributive theme historically, make its modern place evident, and later argue that it is in the way of justice. In a sense, this develops a species of punishment scepticism that originates not from its conventional scholarly sources such as Marxism¹⁴ or psychology but from postcolonial thinking.

2.2.1 The Ancient World

Drapkin writes that prehistoric humans initially derived their social norms from the demands of kinship. While there may have been no psychopaths or sociopaths,

¹² As Locke notes, even in a state of nature there is a difference between punishing an offender and inflicting one’s revenge on him although “they are not easy to distinguish.” J. Locke, *Second Treatise on Government* (London: Churchill, 1690) in N. Walker, *Why Punish?* (Oxford: Oxford Univ. Press, 1991) at 4.

¹³ The literature positing and promoting all sorts of variations and combinations of justifications for punishment is voluminous and covers centuries. From time to time, writers try to find space for new approaches in the “thick transcendent structure of reason” that is classical theory in this area. Even modest efforts are extremely involved. See, for example, T. Y. Blumoff, “Justifying Punishment” (2001) *Can. J. L. & J.* at 161-211.

¹⁴ Jeffrie G. Murphy, “Marxism and Retribution” in A. John Simmons *et al.*, eds., *Punishment* (Princeton University Press, 1995) Although, as Corlett notes, Murphy is arguing more that class struggle diminishes responsibility, rather than obviating it. See J. A. Corlett, “Making Sense of Retributivism” 76 *Philosophy* (Cambridge University Press) 2001 at 77-110.

nevertheless, "...it is difficult to imagine that the Australopithecus or Pithecanthropus had even the faintest idea of behavioural prohibition."¹⁵

As humans increased in number and came together in groupings of kinship, norms of interactions developed. An example he gives is the incest taboo that has been present in just about every civilisation, no matter how primitive.

Drapkin is of the view that morality was not innate to early humans; it was the result of centuries of social development. The earliest of social necessities, such as the casting out of unproductive members of society by ancient Inuit, was an established custom foundational of the morality of that group. Religion was distinct from morality. Morality was a matter of social interaction whilst religion was the relationship of that which is not human with the individual. The two could conflict. Both were, in their own ways, developments on the 'real' natural law, the law of the strongest, and the law of revenge. This natural law had potentially adverse consequences for social groups. The applicator defined its measure and its means in accordance with the wronged party's view of the slight. Vengeance was personal and private. Accordingly, the reply might have little relation to the original act. If the reply was viewed as disproportionate (or even simply unwanted, as opposed to undeserved) then it in turn called for vengeance in reply. The scarce resources of a subsistence unit could be squandered, threatening the continuation of the whole. Worse, the originally wronged party, seeking to avoid the reply, might kill

¹⁵ I. Drapkin, *Crime and Punishment in the Ancient World* (Lexington: D.C. Heath and Co., 1989) at 6.

his adversary to pre-empt the problem. With the rise of larger kinship structures, the result was a process and conclusion with an undesirable inevitability.

Societies¹⁶ developed two notable responses to “revenge as an inherent, if unconscious, element of man’s psychological structure.”¹⁷ They were collective punishment, or blood revenge, and divine revenge. The former meant that the offender’s family or community took responsibility for atoning for the offender’s transgressions. The latter was initially the simple fear that if one offended God then wrath in the form of natural phenomena would ensue. Oral codes developed to limit the consequences of revenge and, eventually, to quantify compensation. In due course primitive states, governances, arose that gave rise to public justice as state revenge.¹⁸ Kinship clusters needed to protect their land. As societies became settled, with defined tracts of land for hunting or agriculture, groups developed the dynamics that individuals had previously exhibited, such as dominance of the strongest.

¹⁶ Drapkin is generalising here. Obviously, there would be differences from place to place. His thesis seems to be that at the earliest times of human pre-history, the development of societies, and their structures, had certain similarities.

¹⁷ *Ibid.* at 9. Drapkin cites Steinmetz, writing in the late 19th century, for this view. S. R. Steinmetz, *Ethnologische Studien zur ersten Entwicklung der Strafe* (2 vols.) Leiden, 1894. One questions whether the need for vengeance is inherent or rather a socialisation, a morality, which resulted from facets of early social interaction. What social imperative could give rise to it? I might argue that it could not have been anything other than the earliest form of deterrence arising neatly from the natural law of the strongest prevailing. There may have developed a social utility in defeating the earliest form of social Darwinism. Primitive society, at some point, came to value attributes other than brute strength and vengeance was born.

¹⁸ Driver & Miles refer to the primitive blood feud amongst the early Semites as a “primitive form of criminal procedure.” They trace the change in the response to murder from basic vengeance inflicted by the victim’s kin, to the same, but under the supervision of some person in authority, (as among the Semites) to merely allowing the aggrieved to be present at the execution (as in ancient Athens). The Code of Hammurabi, they suggest, distinguishes between crimes, the punishment of which allow the victims to do the killing, and those to be done by an agent of the state. G. R. Driver & J. C. Miles, *The Babylonian Laws*, vol. 1 (Oxford: Clarendon Press, 1952)

In all of this one can see a change in the nature of vengeance and a concurrent change in its agencies of exercise. The legitimacy of vengeance is so foundational to these societies as to be unquestioned. These human groupings would simply have accepted that this is the way that people act. It is critical to note, at the very earliest stages, the formation of concepts of justice as a function of reply to the harmful social effects of its antecedents. As Berman puts it, albeit in the context of the twelfth-century development of the “science of law” in Europe, “[w]estern concepts of law-and perhaps more important, Western attitudes toward law-cannot be understood unless they are seen partly in terms of what they first emerged from and reacted against.”¹⁹ Primitive societies acted no differently than later ones in this regard.

The contextual definition of “harmful” is noteworthy. At this point in human prehistory, the pre-eminent social interest was survival. As this imperative faded for the resourced classes, one can trace the development of the criminal law as a system designed to protect the material (and less material) interests of these resourced people.²⁰ The genesis of this theme is rooted here, in prehistory. We turn now to three early historic societies whose formulations of corrective theory connect modern thinking with the most primitive.²¹

¹⁹ H. J. Berman, *Law and Revolution: The Foundation of the Western Legal Tradition* (Cambridge: Harvard Univ. Press, 1983) at 50.

²⁰ An interesting parallel can be drawn to the much more recent role of subsistence in Canadian First Nations cultures. Rupert Ross argues that one of the primary forces in the change in Aboriginal ways is the fact that the demands of everyday life no longer mean living with nature in a way necessitated by the imperative of survival. See R. Ross, *Dancing with a Ghost* (Markham: Octopus Publishing, 1992).

²¹ The mechanism of influence is interesting. Berman, *supra* note 19 at 3 suggests that while some concepts fundamental to western law were transmitted directly, for example Roman Law in Germanic folk law, the most powerful mechanism was the regular renaissances of older thought. “What accounted for the major part of their [early societies’] influence were the rediscoveries, re-examinations and influences of older texts.”

The law of the ancient civilisation of southern Mesopotamia (Babylonia) reflects the pattern. Written laws appeared there for the first time. Private ownership of property developed as an incident of this part of humankind's earlier move to an agrarian society. Law reflected the need to establish a code of relationships that defined acceptable social behaviour in a property-based culture. Six collections²² that precede the code of Hammurabi have been found. Three are significant. They were the Laws of Eshunna, Ur-Nammu (c. 2100 BC) and Lipit-Ishtar (c.1930 BC). They speak of a variety of responses to transgressions of the law.²³ For example, the earliest collection, that of Bilalama (2268-2259 BC), king of the ancient Accadian city-state of Eshunna, (about thirty miles from modern Baghdad) we see an example of a form of *talionis*²⁴ but styled in terms of monetary compensation rather than physical retribution. However, it would be incorrect to assert, as Drapkin does, that they were primarily compensatory. Murder and various offences perpetrated at night called for capital punishment. Less serious matters called for pecuniary compensation. Similarly, Laws 1, 2, 6 and 7 of Ur-Nammu impose the death penalty for murder, acting lawlessly,²⁵ rape and for a woman who

²² Calling any of these laws "Codes" has attracted criticism, as they are fragmented and chaotic. Some find it incredible that, for example, the laws of Ur-Nammu have been ascribed to a single sovereign.

²³ S. 42 of the Laws of Eshunna prescribes, "If a man bit the nose of a man and severed it—he shall weigh out one mina silver. An eye—one mina; a tooth-half a mina; an ear-half a mina; a slap in the face—he shall weigh out ten shekel of silver." Drapkin, *supra* note 15 at 24. These are measures of money.

²⁴ The *lex talionis* is a law that prescribes retribution in a measure proportional to the offence and reflective of it. The classic formulation, discussed below, is "an eye for an eye."

²⁵ VerSteeg calls this "curious and enigmatic" as it is undefined and its potential mischief is significant. R. VerSteeg, *Early Mesopotamian Law*, (Durham: Carolina Academic Press, 2000) at 108

commits adultery. They prescribe fines, imprisonment or monetary compensation for a number of other offences.²⁶

Hammurabi overran and razed Eshunna in about 1720 BC. By 1700 BC, when he issued his famous Code, he was the ruler of much of Assyria. In the Code,

The State's reaction to deviant behaviour was essentially one of vengeance: death for death. The code also introduced the principle of *expressive* or *sympathetic* punishment, a form of corporal punishment in which the part of the body that had committed the crime was either amputated or mutilated.²⁷

If one stole, one's hand was cut off. A valuation of that which had been taken determined the severity of retribution. The higher the social status of the victim, the harsher the punishment would be.²⁸ Mutilation, execution, and even desecration of the corpses of offenders was prescribed.²⁹ The *lex talionis*, which plays so large a role in the history of retributivism, had arrived. Why did the nature of punishment shift from compensatory to retributive?³⁰ One can certainly understand how the demands of empire would require

²⁶ Some writers on restorative justice have asserted (or repeated the earlier assertions of advocates) to the effect that early civilisations used restorative means of justice. An example is a very recent repetition of Daniel Van Ness's belief that "the Code of Ur-Nammu, a Sumerian King in 2500 BC, provided for restitution even in violent offences." That king was not born until 2112 BC. While it is true that some physical injury called for specified restitution in silver (such as forty shekels for cutting off a person's nose) it also, as noted, allowed for other, more severe penalties. See R. Green and K. Healy, *supra* note 3 at 106 citing D. Van Ness, *Crime and its Victims* (Downer's Grove Ill.: Intervarsity Press, 1986). For solid material on the Sumerian Laws, see R. VerSteeg, *supra* note 25 and Driver & Miles, *supra* note 18.

²⁷ Drapkin, *supra* note 15 at 26. For a list see Driver & Miles, *supra* note 18 at 499.

²⁸ The punishments were "severe and often cruel" but not unusual at that time.

²⁹ Driver & Miles, *supra* note 18 at 503.

³⁰ This assertion is not without controversy. Edwards states that, "...although the Code of Hammurabi was probably a great advance in Babylonian jurisprudence, yet the laws themselves were not innovations, but a digest of previous customs." C. Edwards, *The Hammurabi Code* (London: Kennicat, 1904 (1971) at 14. There was a common customary law throughout the Fertile Crescent with similar forms and structures for each. For example, the pre-2000 BC Accadian Law tablet (numbered as K 251 in the British Museum collection) required that a woman who hated her husband enough to renounce the marriage be thrown into the river. Hammurabi's code (paragraphs 142-143) required an assessment of fault. Only if the woman were at fault was she so punished. If the husband were to blame, she was allowed to take her dowry and return to her father. The Code is silent as to punishing the errant husband. Hammurabi's law was well

uniformity and formality³¹ but *talionis*? It may be the character of the man. More likely, it followed Durkheim's first law of penal evolution. "The severity of punishment is greater where societies are of a less advanced type and where the central power is more absolute in character."³² It would be inordinately simplistic to describe the Code as exclusively retributive. It lacked fines payable to the state in favour of compensation (if not always full compensation) to the injured party. The measurement of compensation was, to be fair, often along *talionic* lines, although perhaps one can see this as an early application of the "golden rule" that one do unto others as one would be done to. Imprisonment or forced labour was unknown.³³

The genesis of *talionis* in the Code may also be viewed as part of the as a response to the destructive "blood feud" that was prevalent, and even characterised as "criminal procedure", amongst Semite groups such as the Hittites (c.1650 BC).³⁴ A murder could be completely atoned for by shedding the blood of the murderer. The Semitic groups also developed a system of "composition", substituting damages for talionic vengeance that was not explicit in the Code for talionis-oriented matters.³⁵ Composition in Babylonia

organised, in contrast to its predecessors. Part of the problem is that only 26 sections or partial sections, (4 tablets) of the pre-Code laws remain. They are made of clay. Hammurabi's Code is much more complete and is carved on stone. It is believed that the pre-Hammurabic tablets were for scholastic or pedagogical, rather than statutory purposes. See Driver & Miles, *supra* note 18 at 1-17. All of this having been said, it is clear that the Hammurabic Code was *talionic* and its Sumerian antecedents were not. See VerSteeg, *supra* note 25 at 128.

³¹ *Ibid.* at 22.

³² Durkheim, *supra* note 5 at 38. Durkheim's exposition of what he means by 'less advanced societies' is cursory and unenlightening. VerSteeg believes that Hammurabi simply imported the "brutal" and aggressive requirements of war and conquest into his laws *supra* note 25 at 33.

³³ The only exception being the detention of debtors by their creditors. VerSteeg *supra* note 25 at 127.

³⁴ This view and the discussion preceding are taken from Driver & Miles, *supra* note 18 at 490-503.

³⁵ Paragraph 8 of the Code permits a thief to avoid death if he could come up with a set amount of money to be paid to his victim.

was used primarily by the humbler classes to mitigate the deleterious sequelae of a feud. Men of honour considered *talion* to be the proper remedy.³⁶

The Code cannot be viewed in isolation. It reflects the fact that Babylonian society under Hammurabi explicitly valued centralisation of social control and expansion of this power; it was imperialistic. It is my submission that the demands of empire cannot be ignored when evaluating the legal system that developed. Centralisation of control combined with the need to delegate coercion, in a way predictable and desirable to the ruler, argue in favour of accepting the application of Durkheim's law.³⁷

2.2.2 The Greeks

Bianchi³⁸ states that the Romans and Greeks had no word meaning crime or punishment.³⁹ This is, at best, a matter of semantics for both dealt with questions of justice and morality, of punishment and of corrections, at great length and with a great deal of care.⁴⁰ The Greeks did not have a word for the abstract concept of "law" either.

The history of reflective jurisprudence began with the Greeks. They developed normative

³⁶ Miles & Driver, *supra* note 18 at 502.

³⁷ This is not a conclusion that I have read elsewhere, nor have I seen the contrary. As noted at note 27, *supra*, Hammurabi was very much the warrior.

³⁸ H. Bianchi, *Justice as Sanctuary: Toward a new System of Crime Control* (Bloomington: Indiana University Press, 1994) at 10-11.

³⁹ In the case of the latter assertion, he is simply wrong. The Greek word *timoria* is the "ordinary, general" Greek word for punishment. See J. M. Kelly, *A Short History of Western Legal Theory* (Oxford: Oxford University Press, 1992) at 73. It can also be used to mean retribution, see R.F. Stalley, *An Introduction to Plato's Laws* (Oxford: Basil Blackwell, 1983) at 141. Bianchi decries constructions of the Latin word *peona*, derived from the Greek *poinë*, as punishment, to be anachronisms. By this, he means the imposition of modern values on ancient societies.

⁴⁰ Athenian law allowed for the death penalty, clubbing to death, and torture, particularly to extract evidence from slaves. "Expressive mutilations", the practice of inflicting great pain before an execution, were not practised. This may be distinguished from many early societies such as the Egyptians or those governed by Manu on the Indian subcontinent. See Durkheim *supra* note 32 at 36-40.

codes as opposed to ones merely descriptive of the customs and practices of a given society. For the first time in Western cultures, philosophers calmly reflected on what should be the human condition and wrote it down. Objective reasons of policy were formulated to justify punishment. Greek jurisprudence was neither explicit⁴¹ not homogeneous. There is no single text that encompasses the entire spectrum of their legal thinking; rather it has to be divined from the writings of its many different authors, playwrights, orators, and philosophers.⁴² Of course, concepts of justice were constantly changing and differed from place to place in the hundred or so city-states of the time. Plato discusses justice in *Gorgias*, the *Laws*, and in his *Republic*. In the latter, Plato develops a distinction between act-centred and agent-centred ethical theories.⁴³ He postulates a variety of the former, which may be contrasted with both Kantian and utilitarian act-centred approaches. The sphere of justice is a person's inward self. The just person is one who is intrinsically morally healthy, without reference to her acts. It is impossible to lay down in advance what a morally just person will do in a particular situation; her acts will depend on the circumstances.

Plato does not doubt that guidelines for behaviour can be formulated, for one can predict that particular circumstances might arise. However, the moral appraisal of actors is primary. Law arose from the development of civic existence. Zeus gave to humans in their polity the gifts of justice and mutual respect, which make this existence possible.⁴⁴

⁴¹ J. W. Jones calls it a "law without jurisprudence" in his preface to *The Law and Legal Theory of the Greeks* (Oxford: Clarendon Press, 1956)

⁴² Kelly, *supra* note 39 at 5-9.

⁴³ J. Annas, *An Introduction to Plato's Republic* (Oxford: Clarendon Press, 1981) at 157 ff.

⁴⁴ Kelly, *supra* note 39 at 12.

The Greeks recognised well that some may not be just and the rule of law was a central, even defining feature of their civilisation. Athenians took pride in the fact that their society was one based upon what one of Socrates' interlocutors termed a sort of social contract.⁴⁵

[T]hey decide that the most profitable course is for them to enter into a contract with one another, guaranteeing that no wrong will be committed or received. They then set about making laws and decrees and from then on they use the terms "legal" and "right" to describe anything which is enjoined by their code.⁴⁶ [The state's laws]...makes it clear that what is right and moral for its subjects is what is to its own advantage: and each government punishes anyone who deviates from what is advantageous to itself as if he were a criminal and a wrongdoer.⁴⁷

The Greeks also allowed that not all law was positivistic, that there could be transcendent natural laws. Aristotle speaks of them in terms of laws of the physical universe, but others suggest that relationships involved natural laws and duties. One of these is that punishment for wrongdoing should be symmetrical, that it should match the offence.⁴⁸

The early Greeks approached retribution as a matter of necessity, as a way of restoring the balance. Punishment for wrongdoing redressed the "balance of things produced by the wrongful act."⁴⁹ Plato later added educational and deterrent rationales for punishment

⁴⁵ Indeed, Socrates refused to escape from the prison where he was ultimately to taste hemlock (despite ample opportunity to do so) precisely because to do so would have been a refutation of the very laws, which he held fundamental, and which held him. Escape would be a political act tending toward the dissolution of the polis, which would be the worst of all possible calamities. See Jones *supra* note 41 at 1. Kelly calls this "Quixotic." *Supra* note 39 at 16.

⁴⁶ Plato, *The Republic* trans. R. Waterfield (Oxford: Oxford University Press, 1993) at 46.

⁴⁷ *Ibid.* at 19. Plato posits this cynicism as an assertion against which Socrates argues. By the time of his later *Laws*, this had become uncontroverted. See Kelly, *supra* note 39 at 19.

⁴⁸ Plato put it in these terms: "However the best and soundest procedure is to class each sort with that which it resembles, discriminating the one from the other by the presence or absence of premeditation, and legally visiting the slaughter where there is premeditation as well as angry feeling with a severer, that which is committed on the spur of the moment and without purpose aforethought with a milder, sentence. That which is the graver crime should receive the graver punishment, that which resembles the light a lighter." (Plato, *Laws*, Book 9, 867, Trans by A. E. Taylor), and "[t]he law must take careful aim at its mark; it must be exact in determining the magnitude of the correction imposed on the particular offence, and, above all, the amount of compensation to be paid." *Ibid.* at 934. See Corlett, *supra* note 14 at 92.

⁴⁹ Jones, *supra* note 41 at 41.

that supplement this earlier concept. The incorrigible would be either banished or killed.⁵¹ This was to be done by the state rather than the aggrieved. This was part of the political process whereby loyalty to the state replaced loyalty to one's family or group. In cases of homicide, the family harmed retained the right to pursue the wrongdoer. However, over time the mechanism of dispensation of punishment became judicial process rather than family vengeance.⁵² Killing, even accidental killing, polluted and defiled the victim, and the *polis* of which he was part and had to be expunged. These ideas were founded on the belief,

...that the gods punish the wrongdoer not only in the next world but in his own lifetime and in his own land...To take no action would be to approve or at least condone the murder; and this in turn would provoke the hatred of the victim and of the furies acting on his behalf and at his instigation.⁵³

"Men expected to see the retributive power of the gods visibly active upon earth."⁵⁴

Socrates approached punishment from both an educational and a political perspective. We have noted his fundamental commitment to laws as a divine foundation of the polity. Offenders suffered from a disease of the soul that had an environmental criminogenesis. Their appetites needed to be rebalanced with their spirit and their rationality. Factors such as poverty and deprivation resulted in the criminal being unable to distinguish betwixt justice and injustice. Teaching could correct offenders. Retribution played no

⁵¹ Jones, *supra* note 41.

⁵² *Ibid.* at 253.

⁵³ *Ibid.* at 255. Also see the *Laws*, Book 9 at 863 (Taylor translation)

⁵⁴ *Ibid.* at note 1.

part in his analysis. "We ought not to repay injustice with injustice or to do harm to any man, no matter what we may have suffered from him."⁵⁵

Plato expands on these consequentialist concepts in *Gorgias*, where he formulated two justifications for punishment: the corrective will encourage the perpetrator to act differently, and the deterrent will encourage others to do likewise. The earlier imperative of retribution was so noticeably absent⁵⁶ that the Roman writer Gellius wondered why the "vindication of injured honour" was not listed.⁵⁷ If an offender understood that what he wishes to do would be unjust, he would certainly desist. Plato viewed the causes of criminal conduct as originating in the actor, as well as in his environment, hence his theoretical bifurcation is a little illusory. The purpose of punishment would be to educate actors and potential actors in the goodness of the divine and thereby cure them of their appetites. If the offender was truly contrite, no sanction need ensue. There could be no educational value, to anyone, in punishing the repentant.⁵⁸ If he was not, punishment was simply "medicine for the soul."⁵⁹

⁵⁵ Plato, *Crito*, X. This is the translation found in Plato, *Euthyphro, Apology, Crito*, trans. by F. J. Church (Indianapolis: Bobbs-Merrill, 1956) at 59. For more on the moral education theory of punishment, see J. Hampton, "The Moral Education Theory of Punishment" in J. Coleman, ed. *Crimes and Punishments* (London: Garland, 1994) at 494 and the authorities cited therein.

⁵⁶ The Greek orators called upon the juries to join them in administering private revenge. Plato rejects this. Stalley, *supra* note 39, at 139-140.

⁵⁷ Kelly, *supra* note 39 at 73.

⁵⁸ This interpretation is the subject of some debate. Stalley, *supra* note 39 at 142 argues that this is a modern spin and that the Laws assume throughout that punishment is *prima facie* consequent on offending.

⁵⁹ Drapkin, *supra* note 15 at 211. This is a fascinating concept, insofar as it foreshadows the *pena medicinalis* of the medieval Christian philosophers, which is in turn reflected in the justification for putting the "penance" in penitentiaries.

Aristotle allows explicitly for the conscious actor who voluntarily does what is unjust. His criminal action is the direct result of his appetites, which in turn result from both his pathologies and his social influences. In Aristotle, one sees the “divorce of philosophical speculation in order to enter the world of facts and observation.”⁶⁰ He was an advocate of incapacitation for community protection and of severe punishments with deterrent effect.

Aristotle speaks of justice as requiring proportionality in all things.⁶¹ A failure to be proportional would work an injustice. Plutarch reports that the lawgiver Solon amended the statutes of Dracon so as to add elements of proportionality.⁶² Plato writes in his *Laws* that an offender must, “...suffer the same evil as one has inflicted [a concept he calls] ‘justice according to nature’, the mode of punishment which nature itself suggests.”⁶³

Kelly notes that Plutarch wrote that the “half legendary” founding king of Athens, Theseus, administered “[j]ustice which was modelled on the offender’s injustice” but seems to have little confidence in this source.⁶⁴ Retribution seemed to materialise as an incident, rather than a fundament, of corrective thinking.⁶⁵ Curative considerations were paramount.

⁶⁰ *Ibid.* at 212.

⁶¹ For example, see the discussion of proportionality in the *Laws*, *supra* note 48.

⁶² Kelly, *supra* note 39 at 35.

⁶³ Plato, *Laws* at 870 d, e and 872 d and e, as cited in Kelly, *ibid.* at 35. To be fair, though, this is a part of the *Laws* to which Stalley refers in note 39 *supra*.

⁶⁴ Kelly, *supra* note 39 at 35.

⁶⁵ Financial penalties could be either fines or compensation, although the same word was used for both and so it is very difficult to tell the difference. S.C. Todd, *The Shape of Athenian Law* (Oxford: Clarendon Press, 1993) at 144.

Accordingly, retribution took a subordinate role in ancient Greek justice. Unlike Hammurabi, and unlike the Romans who were to make Greece one of their provinces, Athens was not a determined imperialist. Rather, the society's thinkers prided themselves on concepts of civilisation, of *polis*,⁶⁶ and of quiet reflection on the human condition. We see again a reaction to historical practices that did not accord with the self-perception of the society. Greek thought was highly influential on Roman and subsequent social theory. Retribution, in the justifying sense that Hart constructs, had no place in ancient Greek criminology. What little there is of it in either natural or positive law has other roles.⁶⁷

Greek concepts resonate in modern thought. Firstly, Socrates' dialogues went beyond pedagogy and were, in their availability to all that would listen, an assertion that life and values can and should be tested in light of the "universal good." Sakej Henderson sees this as supplementary to Aristotelian 'wonder' and foundational to Eurocentrism.⁶⁸ Going forth to gather information, formulating firm ideas (convenient to oneself, of course) and imposing these notions is symptomatic of what I call intellectual imperialism.

Secondly, and as a sort of corollary, Henderson says,

⁶⁶ Stalley, *supra* note 39 at 150. Stalley asserts that the Athenians saw punishment as a way of enforcing social conformity. The education of the offender was for this purpose, to keep the state unified and orderly. He emphasises that the practice and the theory differ in that the penal code is less about educating and curing and more about deterring, in whatever way is necessary, and of exiling and killing evil men. This, like the accounts of the vengeance of the Gods, "look troublesomely irrational" in the context of a curative model. In the end, he argues, the theoretical appearance of enlightenment is refuted by the fact that the actual penal code is "reactionary and even barbaric."

⁶⁷ This has been a source of comfort to some 20th century curative theorists such as Lady Wootton. B. Wootton, *Crime and the Criminal Law* (London: Stevens, 1963)

⁶⁸ J. Y. Henderson, Benson M. L., and I. M., Findlay, *Aboriginal Tenure in the Constitution of Canada* (Scarborough: Thompson Canada, 2000) at 270.

What Socrates and the prophets of the Bible shared was the notion of a universal mission inviting the attention of all humans. National laws of the time attempted to end the idea of this new knowledge and the transformation to a universal civilisation. The executions of Socrates and of Christ were both legally sanctioned and have made subsequent generations suspicious of legal institutions and aware of the contradictions in preserving legal order and doing justice. With these deaths came the idea of a civil republic and the search for universal knowledge, truth, and a just order.⁶⁹

The discussion above indicates that he is not quite correct in the latter part of this assertion. These quests are very large projects to lay at the feet of these deceased, no matter their renown. However, the identification of these events as origins of one of the colonial imperatives is valuable indeed.

2.2.3 The Romans

Roman criminal law had two major phases, the republican and the Imperial or Principate.

An empowered aristocracy dominated the lawmaking of the Republic through, *inter alia*,

the magistrates and the Senate.⁷⁰ With Augustus in 27 BC, the emperors became the

supreme rulers. The Emperor was not only above the law, but his very will was the law;⁷¹

“acquiescence in the will of an individual, the emperor, became fundamental.”⁷²

⁶⁹ *Ibid.*

⁷⁰ Drapkin puts it succinctly; “the patricians kept the keys of power.” *supra* note 15 at 221. The *lex Calpurnia* of 149 BC set up the first *quaestio perpetua*, or permanent jury courts. By about 8 BC, sufficient *quaestiones perpetuae* had been created to cover virtually all criminal matters. Each had its own idiosyncratic offence jurisdiction. The courts of the *lex Calpurnia* had exclusively Senators as jurors. The laws of the dictator Sulla (82-81 BC) also so required, but in 70 BC the *lex Aurelia* expanded the scope to a larger section of wealthy Roman men. These courts were not abolished with the coming of the Empire, but gradually fell into desuetude. See O. F. Robinson, *The Criminal Law of Ancient Rome* (Baltimore: Johns Hopkins University Press, 1995) at 4-6.

⁷¹ “quod principi placuit legis habet vigorem,” “What the Emperor has determined has the force of statute” is attributed to Ulpian in the *Digest* (or *Pandects*) of Justinian (promulgated December 16th 533). The jurist and lawyer Ulpian held the Prefecture of the Praetorian guard under Alexander Severus from 222 AD until murdered by his own troops in 228 AD.

⁷² Kelly, *supra* note 39 at 41.

The influence of the Greeks was paradoxical, for the civilisation of the Greeks was pervading the Romans while the Romans were conquering Greece. As Horace later wrote, "Graecia capta ferum victorem cepit et artis intulit agresti Latio (captive Greece took captive her wild conqueror and brought the arts to rustic Latium)." ⁷³

There was no Greek-Roman continuum of Law. While Philosophy may have been greatly influenced by Greek roots the practical elements, the science of law, had no counterpart in classical Greece; they "grew spontaneously from some part of the Roman spirit." ⁷⁴ This may be partly because the Greeks did not produce a formal jurisprudence. The Romans did to a high degree and mated it to a formal and hierarchical court structure.

In almost all their other intellectual endeavours, the Romans were the eager pupils of the Greeks, but in law they were, and knew themselves to be, the masters. In their hands, law became for the first time a thoroughly scientific subject, an elaborately articulated system or principles abstracted from the detailed rules which constitute the raw material of Law. ⁷⁵

Law was a profession from the earliest days. ⁷⁶ Law as a practical science, without focus on theoretical foundation, would have been quite unknown to the Greeks. ⁷⁷ One cannot discount, however, the impact of Greek philosophy on Roman thinking. The Stoic school of Zeno (of the generation after Aristotle), for example, was highly influential on Roman concepts of natural Law. The Stoics believed that,

⁷³ Horace, *Epistulae* 2. 1. 156. See Kelly, *supra* note 39 at 46. Kelly notes the paradox.

⁷⁴ Kelly, *ibid.* at 46.

⁷⁵ B. Nicholas, *An Introduction to Roman Law* (Oxford, Clarendon Press, 1962) at 1.

⁷⁶ It is important to distinguish between the jurist and the advocate. The latter would have been a professional whose vocation was persuasion. Jurists were statesmen learned in the law who "built up a great legal literature...undertook what legal teaching there was and...influenced the practice of law at every point." They "have no exact parallel in the modern world." See Nicholas, *supra* note 75 at 28ff.

⁷⁷ Kelly notes that Twelve Tablets would have been as sophisticated a system of laws as the Greek version of the same time; the difference in the structure of legal enforcement between the two civilisations is quite profound Kelly, *supra* note 39 at 48). Only fragments of the Tablets exist. They have been reconstructed from the recollections of contemporary writers.

Everything in nature can be explained by reason and every act must be justified by reason. [and so] The wise man therefore must live in accordance with reason that is nature; his conduct in accordance with that principle will enable him to rise superior to the application of any force or temptation.⁷⁸

In *De Legibus*, Cicero made clear that the law of nature (*iure naturali*) is of quite a superior order to the positive laws of men (*iure civile* and *iure gentium*). He saw true law as “right reason in agreement with nature”, a reason of which God was “designer, expounder and enactor.”⁷⁹ Kelly notes, however, that the natural law of the jurists and its counterpart for the philosophers was different. For the former, nature was rather the physical nature of things, human instincts and “the order inherent in conditions of life as the Romans saw it.”⁸⁰ Accordingly, the jurists of Rome, “...found an employment for the concept of the ‘natural’ only on the practical, working level of that which was simple and obvious, having regard to the actual conditions of life and society.”⁸¹

It is important to trace the philosophical flow-through from the Greeks to the medieval Church.⁸² One can lose the thread if one is misled by the dichotomy between the absence of Greek influence in the science of Roman law, and the prevalence of it in the philosophy that underlies it.

It might not be too crass a comparison to say that the relation between Cicero’s eternal, divinely inspired natural law and the practical natural law of the jurists

⁷⁸ *Ibid.*

⁷⁹ Cicero *De Republicis* 3. 22. 33.

⁸⁰ Ernst Levy, “Natural Law in Roman Thought”, *Studia et Documenta Historiae et Iuris* 15 (1949), 7.

⁸¹ Kelly, *supra* note 39 at 66. Henderson, citing Roberto Unger in *Law in Modern Society: Toward a Criticism of Social Theory* (New York: Free Press, 1967), takes this a step further, “The law of nature was a higher law that arose from the understanding of the cultural diversity of peoples and provoked a search for overarching principles that underlay the variety of customs.” This law was universal. See *supra* note 68 at 17.

⁸² “[Ambrose and Augustine] took natural law from Cicero, baptised it, and handed it on for preservation to the Church.” G. Watson, “The Natural Law and Stoicism”, in A. Long (ed.) *Problems in Stoicism* (London, 1971) at 235-236.

somewhat resembles the relation which was to emerge, at the dawn of modern time, between the divinely appointed natural law of Aquinas and the medieval Catholic church and the secular, rationalist natural law on which Grotius was to build a law of nations and which dominated the legal theory of the seventeenth and eighteenth centuries.⁸³

The earliest penal law, as set out in the Twelve Tablets (c. 451-450 BC), marked the transition between private revenge and the adjudicative role of the state, between the talion based self-help of the blood –feud and defined measure of damages. It did not distinguish between civil and criminal law.⁸⁴ Indeed, offences which modern law would see as being subject to criminal sanction, such as some offences against the person, were civilly actionable.⁸⁵

...[I]ts value lies in underlining the symbolic aspect of punishment; the connection between the nature of a crime and its penalty, most visible in the mode of execution in capital cases; and with occasional substitution of monetary compensation for physical retaliation...⁸⁶

The law of the Tablets remained the law throughout Roman civilisation. They did not change, but were substantially added to, and somewhat superseded, over time.⁸⁷ The

⁸³ Kelly, *supra* note 39 at 60-61.

⁸⁴ Drapkin, *supra* note 15 at 232. It was not until the time of the *lex Calpurnia* that accused stopped appearing in front of juries composed of community members. Robinson, *supra* note 70 at 1

⁸⁵ Drapkin, *ibid.* notes that crimes were offences against the divine and punishment an expiation of the wrong. Later, the state took the place of the divine. These matters later became criminally actionable. See *infra* note 90.

⁸⁶ J.J. Aubert, "A Double Standard in Roman Criminal Law? In J.J. Aubert & B. Sirks, eds. *Speculum Iuris: Roman Law as a Reflection of Social and Economic Life in Antiquity* (Ann Arbor: Univ. of Michigan Press, 2002) at 96. For example, depasturing or cutting a neighbour's crops by night was punishable by death, except for those under the age of puberty, who were to be scourged at the discretion of the magistrates. XII Tables 8.9. as reconstructed in D. Naismith, *Naismith's Outline of Roman History* (London: Butterworths, 1890) at 24 ff.

⁸⁷ It is important not to overstate the importance of the Twelve Tablets. Firstly, they dealt more with procedure than substantive law. Secondly, to a large degree they codified the customary law that preceded them. Thirdly, statute was a relatively minor source of the civil law. After the Tablets, the Romans produced only about thirty statutes. The Edicts of the Magistrates (and in particular the Praetor), the *interpretatio* of the jurists and the edicts of the Emperors are more significant sources of Roman law. See Nicholas, *supra* note 75 at 14-59.

quaestiones perpetuae, or jury courts, of the Republic and early Principate assisted the traditional magistrates in trying cases. Each had their own punishments, depending on the offence to which they had jurisdiction. They included death, fines, infamy and temporary exile.⁸⁸ During the Principate, and beginning with the legal reforms of Augustus, prosecution before the *cognitio*, an official such as a Prefect sitting alone as a judge, or before the Senate became far more common. The Prefects replaced the magistrates. They had significant legal experience and “justice was administered swiftly and with more coherence.”⁸⁹

Bianchi, in attempting to trace restorative justice to ancient times, argues that the Romans,

...to the end of their culture kept the sharp differences between civil and public crimes. The former, (the far greater part of crime control) was settled predominantly by repair and compensation, the latter mainly within the system of political control, a system that conveys the impression of merciless punitive control.”⁹⁰

The civil branch of Roman law, which governed the relationship between citizens of the state, was primarily a system for the resolution of conflicts. “There was no trace of what we call public criminal prosecutions as we know it.”⁹¹ Rather, any adult male citizen

⁸⁸ Incapacitation may not have been used as a punishment, but those confined to do hard labour would argue that the distinction between imprisonment for its own sake and confinement to do hard labour was a specious one. See Robinson, *supra* note 70 at 7.

⁸⁹ Aubert, *supra* note 86 at 98-99.

⁹⁰ Bianchi, *supra* note 38 at 13. Theft, for example, was always a crime as well as a delict, and the accuser could choose to proceed civilly or criminally. In practice, if he was duly compensated, and in the absence of circumstances that required public disapprobation, the state would not be involved. See generally Robinson, *supra* note 70 at 24. Similarly, the civil remedy of *injuria* generally dealt with assaults and other offences of “outrage”, although the Praetor retained the ability to punish if the wrongdoer did not have sufficient means to compensate. *Ibid.* at 129.

⁹¹ Bianchi, *supra* note 38 at 15.

could begin, or discontinue, a criminal prosecution against another.⁹² The role of the state was to provide the *quaestiones* who facilitated a process that remained in the hands of the litigants. The state's role in punishment, he says, was reserved for offences against the state that were political in nature.⁹³ In this, he is wrong. The imposition of punishments was part of the jurisdiction of the magistrate being assisted by the *quaestiones*, not the prosecutor.⁹⁴ In Imperial times, the *cognitio*, Senate and Emperor all heard trials. The emperor could impose the death sentence.⁹⁵ The history of Roman criminal procedure is one of a gradual, but certain, disempowerment of the citizen in favour of the state. Furthermore, the procedural distinction between redress for private wrongs, or *delicts*, and public wrongs is illusory.

The fundamental characteristic of a moral law broken, and a reparation prescribed therefor by the State, unites the two spheres in an essential identity, and the difference, whether the reparation is realized in a suit at public or at private law, appears in comparison superficial and accidental.

By the second century AD, the criminal procedure now known as the *cognitio extra ordinem* gave the magistrate the power to decide the criminal's punishment.

⁹² This assertion is subject to dispute. During the Republic, a victim had to ask the President of the relevant *quaestio* for permission to prosecute. Robinson, *supra*, note 70 at 4-5.

⁹³ The magistrates took over the power of the King upon the expulsion of the last King, Tarquinius Superbus in 510 BC. They retained criminal jurisdiction even after the creation of the praetorship in 367 BC. The Praetors took over civil jurisdiction at that time. Bianchi allows that in the late empire, after about AD 284, state prosecution appears, but attributes this to the "decline of Roman legal culture or to the first traces of Christian doctrine." Bianchi *supra* note 38 at 15. He is referring to the Dominate, an administrative period beginning with the ascendance of Diocletian in AD 284. The decline of Rome is considered to have begun with the death of Constantine in AD 337 and to have ended with the sacking of Rome by the Vandals in AD 455. See generally the seminal E. Gibbons, *History of the Decline and Fall of the Roman Empire*, (New York: Alfred Knopf, 1993). It was a "savage" period, marked by the arbitrary exercise of power, and by the consolidation and rationalisation of central power over what had become a far-flung empire. See Robinson *supra* note 70 at 13, D. Cary, *A History of Rome down to the reign of Constantine* 3rd ed. (London: Macmillan, 1979) at 517 ff. *Contra* Aubert *supra* note 86 at 99 who says that the reforms of Augustus established a new criminal procedure in which the representative of the state was in charge of the whole prosecution.

⁹⁴ Robinson, *supra* note 70 at 6-7. Also see Aubert, *supra* note 86 at 99.

While providing a more flexible and therefore potentially fairer instrument of retribution for crimes, the *cognitio extra ordinem* also left room of a great deal of arbitrariness and opened the door to institutionalized abuse and injustice.⁹⁶

Roman penology, from early times, “underline[d] the symbolic connection between crime and punishment.”⁹⁷ The Twelve Tablets superseded earlier, *talionic* forms of self-help. For example, capital punishment by private suit vanished.⁹⁸ The punishments that followed, while not explicitly *talionic*, were harsh and expressive.⁹⁹ In due course, the *talionic* forms returned.¹⁰⁰ The demands of imperialism required that brutal penalties ensue for those who interfered with it. Treason was punishable by death and confiscation of property.¹⁰¹ Punishment for the advancement of the aims of the state is strikingly apparent; this is retribution with a purpose. “...[W]hen governmental power tended to become absolute in the Empire, the penal law worsened.”¹⁰² It is significant that as the empire grew and became more populous (and less heterogeneous) the criminal law changed to become a powerful instrument of state repression.¹⁰³

⁹⁵ Robinson, *supra* note 70 at 9.

⁹⁶ Aubert, *supra* note 86 at 99. The example given is that of the governor at Lyons in AD 177 who was ordered to behead all Christians who refused to deny their faith after an uprising. He chose to have the killing done by animals, “a more spectacular” (and expressive) mode of execution.

⁹⁷ *Ibid.* at 105.

⁹⁸ J.L. Strachan-Davidson, *Problems of the Roman Criminal Law* (Oxford: Clarendon Press, 1912) at 42.

⁹⁹ Punishments by the mid to late Principate were classified into three sophisticated grades of mandatory punishments, the *summa supplica*, such as crucifixion or burning at the stake, the *mediocres peona*, such as being fed to the beasts or condemned to work in the mines, and *minima peona*, such as relegation to an island or community service. The choice of punishment class, as well as the punishment within that class, depended on the offender’s social status as well as the crime. Aubert, *supra* note 86 at 109.

¹⁰⁰ Aubert, *supra* note 86 at 139. He asserts that the decree of Constantine of AD 319 introduced *talio* back into Roman law. Others have, less reliably, put this with the reign of Septimius Severus (AD 193-211).

¹⁰¹ This was true even in the time of the Kings that preceded the Republic with the fall of Tarquinius in 509 BC. King Tullus Hostilius, c. 674-642 BC after executing for treason, expressed disapprobation of a division of loyalties by directing that the body be stretched and quartered. Aubert, *supra* note 86 at 105 citing Livy. In the later Empire, torture was added to the range. Even wearing purple, the colour of the divine emperor, was treasonous. Robinson, *supra* note 70 at 77.

¹⁰² Durkheim, *supra* note 32 at 40.

¹⁰³ The Roman oppression of the Christians, of which examples are legion, is an obvious exemplar. Durkheim says that the Romans prided themselves on the “relative mildness of their repressive systems.”

The influence of Roman law on western legal practice is profound. Law is practised in similar ways, that is, by professionals trained in a discrete expertise. Like their Roman counterparts, Western legal institutions (structured arrangements for performing specific social tasks) are distinct from other social institutions and, indeed, in a “complex, dialectical” relationship to the body of law that governs them.¹⁰⁴ Roman notions of punishment also became part of the Western tradition. I wish to look at this before turning to discuss biblical concepts, for the two are linked.

...there was a radical discontinuity between the Europe of the period before the years 1050-1150 and the Europe of the period after 1050-1150....modern legal institutions and modern legal values...have their origin in the period 1050-1150 and not before.¹⁰⁵

As with the influence of Greek thought on the Romans, the reflective influence of earlier cultures also works here. The great codifications and reconstruction of the Roman, and in particular the Justinian, *corpus juris* by European scholars of the twelfth and thirteenth century were foundational to the canon law of post-1050 Europe.

It was not the Roman law of sixth-century Byzantium, but the revived and transformed *Romanist* law of eleventh and twelfth century Christendom to which the parentage of canon law must be traced.¹⁰⁶

In this context, St. Anselm (1033-1109) built a new theology; one that incorporated a theory of atonement that “gave Western theology its distinctive character and its distinctive connection with Western jurisprudence.”¹⁰⁷ God absolved humans from their

He cites Livy, “Let no nation claim to have established milder punishments.” See Durkheim, *ibid.* citing Livy I, 28.

¹⁰⁴ Berman, *supra* note 19 at 7-10.

¹⁰⁵ Berman, *ibid.* at 4.

¹⁰⁶ Berman, *ibid.* at 204. Berman notes that canon law was also sourced in Biblical and Germanic law.

¹⁰⁷ Berman, *ibid.* at 177.

original sin and gave them the responsibility to choose not to do what the law prohibited. Divine justice required that an offender be punished in a way “commensurate with the offence” for the fact of his violation of the law and in order to vindicate the law, as opposed to vindicating the victim’s honour or repenting for a sin.¹⁰⁸ Crime and sin were divorced, but remained morally intertwined.

According to Bianchi, the Catholic Church adapted the Roman law of slaves to the activities of the Inquisition. Slaves were property, and there was no question of the right of owners to treat their slaves harshly if they so desired. The *inquisitio* was a Roman procedure that could only be used against slaves.¹⁰⁹ Punishment in Roman times, while generally growing more barbaric as time went by, was always stratified along class lines, with slaves being subject to particularly brutal forms.¹¹⁰ The Church “wanted for political reasons to make the religious life and dogmatic opinions of the faithful an object of inquisitory examination.”¹¹¹ Bianchi draws a parallel between this and the Henry II’s assizes of Nottingham of 1178 in that both marked repressive prosecution founded on a decided power imbalance between the prosecuted and the prosecutor. The King’s peace was the social heresy that allowed the Inquisitorial means of enforcement to be applied to

¹⁰⁸ Berman, *ibid.* at 182.

¹⁰⁹ Bianchi is wrong in this. Under the *lex Acilia*, once the praetor allowed the accuser’s *nominis delagatio postulatio*, or application for leave to accuse, the formal charge (*inscriptio*) was made and accepted. The praetor would then allow the accuser, on request, such time as the praetor thought fit for the accuser to conduct an *inquisitio*, along with up to forty-eight summons to witnesses. See A. H. M. Jones, *The Criminal Courts of the Roman Republic and Principate* (Oxford: Basil Blackwell, 1972) at 60-70. One will recall that the Greeks used torture to extract evidence from slaves. Torture was applied to regular citizens during the Principate, and even to the upper classes, the decurions, by the time of Constantine.

¹¹⁰ See generally Aubert, *supra* note 86.

¹¹¹ Bianchi, *supra* note 38 at 16.

non-religious matters.¹¹² The rise of modern states, with their need to maintain control over large number of non-homogeneous peoples, fostered the process. States adapted the ecclesiastic model of social control that had, in turn, incorporated Roman imperial mechanisms. The Church, particularly after the concordat of Worms in 1073, obtained a good deal of secular power. It already had a hierarchical system of control that included punishment and the payment of fines to a central authority for breaches of Canon Law. The secular courts retained some of the practices of the ecclesiastical courts whilst adapting the existing mechanisms for their own ends.¹¹³ The Enlightenment, and in particular the rise of the modern Liberal state, crystallised the power of the sovereign in positive Law. Combined with this were a number of other factors, such as the Calvinistic requirement of good works for the expiation of moral guilt and the ecclesiastic notion of monastic imprisonment. All of these together allowed the adaptation of Roman structures to the command of the powerful in modern states.¹¹⁴

2.2.4 The Christian Heritage and its modern resonance

The Mosaic Law is to be found in the first five books of the Old Testament. In the name of God it directs justice in the form of tightly measured retribution. The *lex talionis* is popularly cited¹¹⁵ as a divine basis for dealing with the judgement of human injustices. It

¹¹² *Ibid.* at 17.

¹¹³ See generally, A.K.F Kiralfy, *Potter's Historical Introduction to English Law*, 4th ed. (Toronto: Carswell, 1958)

¹¹⁴ This is a deliberate over-simplification. Many authors have traced and argued about these and many other factors as they have shaped modern law.

¹¹⁵ Although let it be said at the outset that even those who are thought of as retributivists, such as Kant, recognise that even in the most devoutly (if I may use the term) retributivist system, presuming to apply *talionis* may produce an absurd result. States do not rape rapists, or steal from burglars. See Corlett, *supra* note 14 at 95. Kant is not a pure retributivist. He would not have a man punished if there was no social utility at all in doing so.

may be expressed in this way: "And if any mischief follow, then thou shalt give life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burning for burning, wound for wound, stripe for stripe."¹¹⁶

As Solomon and Murphy note, there are volumes of literature that detail the links and discontinuities between the Old and New testaments on this point and in particular the change in emphasis from divine retribution in the Old Testament to forgiveness and mercy in the New.¹¹⁷

The shift has been analysed. Perhaps in an attempt to justify the disparity, writers such as Zehr¹¹⁸ argue that the "eye for an eye" demand is an oversimplification. Bianchi goes even further, arguing that the phrase is deliberately mistranslated in order to provide a basis for the state's exercise of retributive power.¹¹⁹ In fact:

"An eye for an eye" was intended as a limit not a call to retribution. German Theologian Martin Buber has translated the passage as "an eye for the compensation of an eye and a tooth for the compensation of a tooth." This suggests, as Zehr does, that the *lex talion* was intended to bring peace through compensation aimed at maintaining the power balance between groups.¹²⁰

¹¹⁶ Exodus 21:23

¹¹⁷ Solomon, R. and Murphy, M. *What is Justice: Classic and Contemporary Readings* (Oxford and New York: Oxford University Press, 1990)

¹¹⁸ Howard Zehr "Retributive Justice, Restorative Justice" *New Perspectives on Crime and Justice -- Occasional Papers Series* (Kitchener: Mennonite Central Committee, Canada Victim Offender Ministries 1985) at 12.

¹¹⁹ Bianchi, *supra* note 38 at 29.

¹²⁰ Llewelyn & Howse, *supra* note 8. Bianchi's influence is significant. The former authors refer to him extensively in their recent Canadian work. Here, the point being made is that in using the modern language of crime and criminality we are, in an almost Orientalist way, constructing the past in terms of modern notions of social interaction. The authors argue that this is, to use Bianchi's term, an anachronism, which deliberately perverts the concepts of compensation and restitution that the tribal community structure had as the basis of their social justice.

Buber is a philosopher of great stature. However, the *lex talion* in the Book of the Covenant¹²¹ is explicit in providing a complex *talionic* code for the regulation of human interaction. For example, it is the word of the Lord, given to Moses, “[a]nd he that stealeth a man, and selleth him, or if he be found in his hand, he shall surely be put to death.”¹²² It may be that composition, or the payment of monetary reparation, could be tendered in satisfaction for all woundings that did not result in homicide.¹²³ However, expressive and *talionic* punishments are legion.¹²⁴

The books of the Pentateuch are replete with laws that require the community to reply to breaches with measures that are retributive and proportional. Leviticus and Deuteronomy prescribe matters of both law and morality and are directed to governing human conduct. Not all breaches called for *talionis*; restitution could be made in the case of less serious matters, such as failure to attend to the basic etiquette of animal husbandry.¹²⁵

Zehr asserts that Biblical retributive justice has been justified on a philosophical basis as an enlightened advance on more primitive and punitive systems.

Part of this effort to recreate a history supportive of our current justice system, has lead to the portrayal of premodern justice "...as vengeful and barbaric, in contrast to the more rational and humane approach of modern justice."¹²⁶

¹²¹ It commences at Exodus 20:22.

¹²² Exodus 21:17

¹²³ Numbers 35:31

¹²⁴ For example, a wife's interference with her husband in a fight with another man required that her hand be cut off. Deuteronomy 25: 11-12. This chapter also prescribes for a punishment of forty lashes for men judged to be "wicked."

¹²⁵ An example is the escape of cattle into another's field. Exodus 22:5.

¹²⁶ Llewelyn & Howse, *supra* note 8 citing H. Zehr, *Changing Lenses: A New Focus for Crime and Justice* (Waterloo: Herald Press, 1990) at 106. Bianchi came to the same conclusion five years earlier, calling this a "sad fabrication." *Supra* note 38 at 28. The edition of Bianchi's book cited is a translation and revision of *Gerechtigheid als vrijplaats*, (Baarn: Ten Have, 1985) published in Dutch.

Accordingly, while one might be reluctant to go as far as Bianchi, nevertheless support can certainly be found to explain the basis of his accusations of moral and historical revisionism in interpreting this part of the Bible.¹²⁷ Zehr maintains that understanding the historical link between ancient thinking and modern practice is important,

Today punishment is usually justified in pragmatic, utilitarian terms—as deterrence, as incapacitation, as rehabilitation. Behind it remain important symbolic functions, however, which may retain elements of earlier forms of punishment. As I observe punishment being imposed, I often suspect a need to dramatize the power of the state and the law over the individual.¹²⁸

It must be emphasised that the *lex talionis* is, whether interpreted through revisionist eyes or not, fundamentally a measured response. This is significant for it denotes another source of retribution as an alternative to, or evolution of, the earlier forms of punishment such as simple revenge.¹²⁹

2.3 Vengeance in Modern Practice

Talionis developed, in part, as a socially viable way of attending to personal calls for vengeance. It is instructive to carry through to modern thinking the biblical distinction between the God of vengeance of the Old Testament, and the God of Judgement of Anselm, Aquinas and the New Testament. Vengeance and retribution are not the

¹²⁷ Bianchi argues that *talionis* is but a measure for compensations; it does not command revenge. The Latin word for retribution meant the assignment of the duty to repair damage. “The influence of the Enlightenment on the punitive model was to give a rational mold to a historical misunderstanding generated by religious anachronism.” *Supra* note 38 at 30-31.

¹²⁸ Zehr, *supra* note 126 at 123.

¹²⁹ Durkheim would argue that the lack of a central, absolutist king of the Biblical Hebrews meant that their penal code was far less brutal than its contemporaries were. One must recall that the Mosaic Law was formulated long before Rome.

same¹³⁰ although it has been argued that, at least at a theoretical level, there is no reason why vengeance should *not* be part of retribution.¹³¹ As Lamer C. J. (as he then was) stated in *R. v. M. (C. A.)*,

...retribution bears little relation to vengeance.... vengeance has no role to play in a civilized system of sentencing.... Vengeance, as I understand it, represents an uncalibrated act of harm upon another, frequently motivated by emotion and anger, as a reprisal for harm inflicted upon oneself by that person. Retribution in a criminal context represents an objective, reasoned and measured determination of an appropriate punishment, which properly reflects the moral culpability of the offender.... Furthermore, unlike vengeance, retribution incorporates a principle of restraint; retribution requires the imposition of a just and appropriate punishment, and nothing more.¹³²

Lamer J. meets three of Nozick's distinctions between vengeance and retribution. They are that punishment be limited, that it be imposed without emotion, and that it is imposed for a morally valid reason, not for a mere slight. Nozick's fourth distinction, that an

¹³⁰ Vengeance *per se* has been put forward as a justification for punishment. According to Corlett, there are, "three versions of the vengeance theory: the 'escape-valve' version holds that legal punishment is an orderly outlet for aggressive feelings; the 'hedonistic' version says that punishment is justified because of the pleasure it gives persons to know that a criminal suffers for her offense; and the 'emotional' version holds that punishment is justified in the retributive emotions that it expresses." *supra* note 14 at 90 citing Joel Feinberg, ed., *Reason and Responsibility*, 7th Ed. (Belmont: Wadsworth Publishing Company, 1989) at 348.

¹³¹ Corlett *supra* note 14 at 104 argues that as long as the emotion of vengeance has no influence on the punishment, for example, by letting the victim vent emotion at the sentencing hearing, there is nothing inconsistent in this approach. This is absurd in practice viz. the current abomination of judges permitting complainant opinions in Victim Impact Statements under s. 722 of the Criminal Code. In a sentencing scheme based on pure proportionality, these would be simply irrelevant.

¹³² *R v. M. (C.A.)*, [1996] 1 S.C.R. 500, 105 C.C.C. (3d) 327 at ¶ 80 (emphasis added). To this might be added characterisations such as capricious and arbitrary, and based on the perception of harm be the recipient of the predicate act, rather than the existence of any actual wrong. It has recently been argued that, "...Chief Justice Lamer interprets retribution in a mellow, rationalistic light. Retribution is not synonymous with vengeance, but with "just deserts"...However humane this approach to retribution appears in principle, though, it is deeply anachronistic, and in practice mostly counter-productive or at least inconsistent with other such laudable sentencing aims such as rehabilitation, reintegration and restitution... [retribution's] original meaning never involved a notion of punishment." See C. Nowlin, "Meeting the Challenge of Canada's Sentencing Reforms, 4 Can. Crim. Law Rev. 175.

How judges are to divine the "moral culpability" of an offender is highly problematic. I think that the Chief Justice has mixed up morality with legal responsibility or culpability. Hart, whose approach is discussed *infra*, asks rhetorically, "can human judges discover and make comparisons between the motives, temptations, opportunities and wickedness of different individuals?" Hart, *infra* note 148 at 162.

impersonal authority imposes it with no tie to the victim, is implied by the judicial setting but should not be lost sight of in a restorative discourse. Fifthly, vengeance is personal as opposed to generalised; all people who do X are subject to censure Y. This is equally germane to restoration.

The *lex talionis* harbours, even on Bianchi's reading of it, the retributive precondition that maintains that there is a power that must be exercised by someone other than the victim of the harm. Justice Lamer's view also has implicit in it this assumption deidentifying the actors from the agency of response. This alienation is a critical element of the appeal of coercive, non-restorative justice. Furthermore, the attributes that distinguish revenge from retribution are precisely those that are reified in order to diminish the scope of applicability of restorative approaches. For example, the personality of restoration means that it will necessarily, if one uses this retributive value-set, attract accusations that revenge is its policy base. This demonstrates vividly that the playing field on which the restorative discourse is explicated is dominated by a language defined in, and refined since, ancient times. Accordingly a significant factor, which I argue makes the ascendancy of restoration problematic, is that the language reflects, and is defined by, the dominant historical paradigm of punishment in retribution. To explain further, under this model, vengeance is bad; measured retribution is good. When one talks of responses to crime one has to avoid being bad because states are not supposed to do bad things. "Just" institutions act justly. From the Romans, we developed the profession of law, divorced from community. From the Church, the Romans and the Greeks we developed a concept of justice in a language that equates fairness and justice with formal equality before the

law. The combination of the two results in a language in which justice can be constructed as a process that is just because the process is just. This positivistic tautology is self-perpetuating in that it requires no assistance from concepts of morality or rights.¹³³ Its words, and validations of words, mean that when one speaks of personal justice, which is what restorative justice is, one is speaking outside the concept of what is just. This is a powerful funnel for thinking. It is even more powerful for being very hard to discern.

Canon Law and the parallel theology that developed began to identify crime as a collective wrong against a moral or metaphysical order. Crime was a sin, not just against a person but also against God. It was the church's business to purge the world of these transgressions. From this, it was a short step to the assumption that the social order is willed by God, that crime is also a sin against this social order. The Church (and later the state) must enforce that order.¹³⁴

The sixteenth-century Protestant Reformation encouraged the trend toward punitive sanctions administered by the state. Luther actively endorsed the state as God's agent in administering punishment. Calvinism tended to emphasise images of God as a punitive judge. It also gave the state an important role in enforcing the moral order.¹³⁵ Writers such as Hobbes adopted religious structures in justifying the power of the state. Hobbes' seventh law of Nature is,

¹³³ Bentham called rights "nonsense on stilts." See R. Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1978) at 184.

¹³⁴ Zehr, *supra* note 126 at 113. For a discussion of the early English civil and Canon law, and the transformation of the time of William the Conqueror and St. Anselm, see K. Healy & R. Green, *supra* note 3 at 106-107.

That in Revenges (that is retribution of Evil for Evil), Men look not at the Greatnesse of the evill past, but the greatnesse of the good to follow. Whereby we are forbidden to inflict punishment with any other designe, than for correction of the offender or direction of others....Besides, Revenge without respect to the Example, and profit to come, is a triumph, or glorying in the hurt of another tending to no end; (for the End is alwayes somewhat to Come;) and glorying to an end, is vain-glory, and contrary to reason and to hurt without reason, tendeth to the introduction of Warre; which is against the Law of Nature; and is commonly stiled by the name of Cruelty.¹³⁶

His laws of nature are immutable and eternal. Their reason is to be found in Hobbes' version of the Biblical golden rule, "Do not that to another, which thou wouldest not have done to thy selfe."¹³⁷ This reformulation is powerful because it draws on the extant morality, whilst simultaneously appealing to an advance from the savage.

The writings above exemplify a recurring historical theme. It has two parallel and complementary aspects. The first is that, historically, the formulation of new paradigms, in our case in the area of corrections, is largely a reaction to perceived barbarisms in the existing one, such as private revenge. Secondly, in order to avoid too much change, it is necessary to indulge in a little historical revision. By this, I mean that history could be constructed in such a way as to make the new paradigm appear fair and inevitable.

Recognition of this theme is useful for recognition provides a tool for exposing the inertia of structures, of institutions, within the criminal law. From this explanation can be developed a model of the dynamic of change and from this a method of intercepting conservatism at points in the dynamic where it can be effectively blunted. I suggest that

¹³⁵ *Ibid.* at 116.

¹³⁶ T. Hobbes, *The Leviathan* (London: Penguin, 1985) at 210.

¹³⁷ *Ibid.* at 214.

an awareness of what is going on *now*, using this analysis, makes it possible to effectively criticise policy and influence outcomes.¹³⁸

Zehr deals briefly with this as a way of rationalising paradigm shifts.¹³⁹ He suggests that the epicycles of criminal justice are analogous to the development of the scientific paradigm as a response to society's pressing concern with the Black Death. The physical and social environment engendered disease and society responded accordingly.¹⁴⁰ He also discusses retrenchment but in terms of epicycles rather than resistance. This is because he views these paradigm shifts as being essentially progressive. A shift to a restorative paradigm would be the next logical step based on society's appreciation of what he calls a "sense of dysfunction" in criminal justice. Empirically, his anticipation turned out to be optimism. The paradigm shift that he anticipated in his seminal *Changing Lenses* has been relegated to the margins.

Zehr suggests that the emergence of the retributive paradigm was a response to the need of emerging nation-states, as "greedy institutions," to legitimate and consolidate their exercise of coercive power. However, it is more than this. In the historical context of the development of statehood, the demonstration of internal sovereignty and control was essential for both internal and external recognition. Punishment is not, and never has been, purely a social expression. Its normative, social –shaping role is not

¹³⁸ Throughout this thesis, I attempt to do the first part of this in analysing the relationship of colonialism and restoration in current sentencing law.

¹³⁹ Zehr, *supra* note 126 at 124-125.

¹⁴⁰ Zehr, *ibid.* refers to Lawrence Leshan and Henry Margenthau, *Einstein's Space and Van Gogh's Sky: Physical Reality and Beyond* (New York: Collier Books, 1982)

happenstance.¹⁴¹ Accordingly, there is more to paradigm change than the fact of social change. The former only follows the latter when it is in the interest of the powerful that it be so. Let us apply the theory to a current example. It would indeed be a revelation if the current development of the transnational state, such as the European Union or the North American Free Trade zone, along with the vast empowerment of multi and transnational corporations, opened space for restorative justice. The fact that it is unlikely to do so is instructive. International norms do sometimes have an impact on states' internal justice processes. No matter what the United Nations might say, however, it is always possible for a state simply to ignore their opprobrium. For example, Australia has been (justifiably) castigated for its treatment of its Aboriginal people. The government simply responded that they did not agree. That ended the decolonising initiative.¹⁴² Australia denied that the "perceived barbarism" existed. In the longer run, one would hope that the normative values of the international community would be highly influential on nations and transnational organisations in defining the justness of "just institutions," which value their connection to, and involvement in, this community. This goes beyond avoidance of the status of pariah, flowing as it does from the definitional capability of these values.

¹⁴¹ For a detailed review of the concepts in this area see D. Garland, *Punishment and Modern Society: a study in Social Theory*, (Oxford: Clarendon Press, 1990)

¹⁴² This is not without precedent in Canada. The Federal Government's response to the Report of the APEC Inquiry was similar. Australia seems to be particularly uncaring toward international opprobrium. Their 1998 amendments to the 1993 Native Title Act resulted in High Court Cases that have effectively dispossessed Aborigines of land and riparian rights. See generally, International Committee on the Elimination of all forms of Racial Discrimination "Findings on the Native Title Amendment Act 1998 (Cth), UN doc. CERD/C54/Misc.40/Rev2, 18th March 1999. See also M. Castan & S. Kee "The Jurisprudence of Denial" (2003) 28(2) *Alternative Law Journal* 83. Of course, Canada's dualist constitutional structure creates challenges in the relationship between international executive acts such as treaty making and the federal-provincial legislative role. See "Promises to Keep: Implementing Canada's Human Rights Obligations", (Ottawa: Standing Senate Committee on Human Rights, 2001) online: <http://www.parl.gc.ca/37/1/parlbus/commbus/senate/com-e/huma-e/rep-e/rep02dec01-e.htm>

The difficulty with this approach is that there has not been a linkage of restoration with decolonisation sufficiently cogent to define new international norms. There is no imperative to motivate empowered entities to reconstruct the present and near past to support change. Why would a rejection of Biblical concepts of the legitimacy of retributive punishment possibly be made part of the *modus vivendi* of organisations for which profit is foremost? The new imperialism of offshore part and labour sourcing in the sweatshops of Southern and Eastern peoples undermines any political structural shift. The argument presented above is that, historically, penal justice is simply the adoption of punitive retribution by those with an interest in, and the power to, use it for their own ends. Empowering colonized people will not make manufacturing more profitable in countries subject to economic colonisation. Accordingly, I suggest that this situation exemplifies why restoration as people 'doing their own justice', is marginalised; it simply does not fit the agendas of the powerful. Throughout this thesis, we will see this theme repeated, first in the theory of modern retributivism, then in the legislation, the guidelines, and finally in alternative justice programming.

2.4 Modern Retributivism

As the quote from *M. (C.A.)* above makes apparent, retribution is a very important part of current Canadian sentencing law.¹⁴³ Section 718 of Part XXIII of the *Criminal Code*¹⁴⁴ encompasses restorative and consequentialist objectives as well as retributive ones. We

¹⁴³ The Saskatchewan Court of Appeal's decision in *R. v. Morrisette*, (1970) 1 CCC (2d) 299 has often been cited for its explicit statement that the factors to be considered when sentencing are punishment, deterrence, protection of the public, reformation and rehabilitation of the offender. S. 718 does not refer to punishment. I am unable to find authority that specifically says that the consideration of punishment is outdated. Indeed, Ruby seems to be of the view that s. 718.2, which is expressly retributive, continues the pre-1996 amendment principle that "retribution requires the imposition of a just and appropriate punishment." See C. Ruby, *Sentencing* (Toronto: Butterworths, 1999) at 15 citing *R. v. M. (C.A.) supra* note 132 at ¶ 80)

shall examine it in detail in chapter three. Changes in types and justifications for sentencing have changed along with western society. Justice is relativistic. This highlights, on one hand, the essentially sociological and positivistic nature of sentencing law, "Legal positivism is the view that law is best understood as a sociological phenomenon, as a way of structuring social life"¹⁴⁵ and, on the other, the influence of normative approaches dependent on a society's moral aspirations. By the latter, I mean the arguments set out below that characterise rationalisation of sentencing in terms of the "fundamental moral conceptions at the heart of a legal system."¹⁴⁶ Let us consider a modern justification of punishment to explore how it reflects social values and deconstructs the retributive justifications of punishment in Canadian sentencing law.¹⁴⁷

H.L. A. Hart defines punishment in terms of five elements:

- i. It must involve pain or other consequences normally considered unpleasant.
- ii. It must be for an offence against legal rules.
- iii. It must be of an actual or supposed offender for his offence.
- iv. It must be intentionally administered by human beings other than the offender.
- v. It must be imposed and administered by an authority constituted by a legal system against which the offence is committed.¹⁴⁸

¹⁴⁴ *Criminal Code of Canada* R.S.C. 1985 c. C-46 as amended.

¹⁴⁵ D. Dyzenhaus & A. Ripstein, eds. *Law and Morality: Readings in Legal Philosophy* 2nd ed. (Toronto: University of Toronto Press, 2001) at 1.

¹⁴⁶ *Ibid.*

¹⁴⁷ There are far too many attempts to justify retributivist or consequentialist approaches, or combinations of them, to list here. Hart is chosen for his clarity of exposition and the useful relevance of this to an analysis of current law.

¹⁴⁸ H. L. A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford: Clarendon, 1968) at 5. Hart credits Prof. Anthony Flew in "The Justification of Punishment", *Philosophy* (1954) at 291 and C. I. Benn "An Approach to the Problems of Punishment" *Philosophy* (1958) at 325-326 for this most useful definition. It is interesting to compare it with an approach such as Rawls', which contains many of the same elements. It posits,

A person is said to suffer punishment whenever he is legally deprived of some of the normal rights of a citizen on the ground that he has violated a rule of law, the violation having been established by trial according to the due process of law, provided that the deprivation is carried out by the recognized legal authorities of the state, that the rule of law clearly specifies both the offence and the attached penalty, that the courts construe statutes strictly, and that the statute was on the books

He argues that: "What is needed is the realization that different principles (each of which may in a sense be called a 'justification') are relevant at different points in any morally acceptable account of punishment."¹⁴⁹

Hart wrote in the context of the post-Second World War realization that simplistic Benthamite confidence in the deterrent effect of pain on the calculating actor, and indeed the retributivist's confidence in the rational and calculating actor, was empirically unjustified. This "modern scepticism" called into question, "...the rational and moral status of our preference for a system of punishment under which measures painful to individuals are to be taken against them only when they have committed an offence."¹⁵⁰

First, he, "...assumes that retribution, defined simply as the application of the pains of punishment to an offender who is morally guilty, may figure among the conceivable justifying aims of a system of punishment."¹⁵¹

Hart is careful to note that theories of punishment, be they retributive, deterrent, reformatory and so forth are not theories in the scientific sense. They are instead, moral claims, moral justifications, as to why punishment should, or may, be used. He used the then-current debate about capital punishment as the stage for his explanation. The

prior to the time of the offence. See J. Rawls, *Collected Papers* S. Freeman ed. (Cambridge: Harvard University Press, 1999)

¹⁴⁹ Hart, *ibid.* at 3.

¹⁵⁰ *Ibid.* at 6.

¹⁵¹ *Ibid.* at 9. This must be distinguished from the purpose of sentencing, which Hart accepted to be public safety. The situation is no different in Canada today as is seen later in this chapter and in chapter four.

utilitarian position is that what justifies the practice is its propensity to protect society from harm.¹⁵² State killing is morally justifiable because it has a salubrious social effect. The reason for the practice, after all, is an *ex post facto* justification from result.

On the other hand, absolutists, including both pure retributivists and abolitionists, would assert either that state killing is something that morality commands, a “uniquely appropriate means of ‘retribution’ or reprobation,”¹⁵³ or, alternately, something which is the epitome of evil and should never be used whatever its efficacy. This requires no consideration of factual consequence.

The point is that the utilitarian approach, Hart argues,

...which treats the welfare of society as the justification of punishment, is also a moral claim just as the absolute positions are; what differentiates them is that the utilitarian position commits one, as the absolute positions do not, to a factual inquiry as to the effects upon society of the use of the death penalty.¹⁵⁴

Finally, one must distinguish the question of why men do, in fact, punish, from the quite separate question of what justifies them in so doing. The fact that men do punish, and for many different reasons, is not a justification for punishment. Hart argues, quite rightly, that just because something is commonly done, that does not make it right.

¹⁵² One has to be somewhat careful not to over-simplify utilitarianism. While act-utilitarians such as J. J. C. Smart would punish the innocent to maximise overall social benefit, rule-utilitarians argue that principles of positive-retributivism, such as “only the guilty deserve punishment” are properly present in the rules of happiness-maximising institutions.

¹⁵³ Hart, *supra* note 148 at 72.

¹⁵⁴ *Ibid.* at 73.

All of this having been said, Hart carefully distinguishes the general justification for punishment from the secondary question of to whom that punishment should be distributed. Should retribution be paramount in the first as the “General Justifying Aim?” This is a moral assertion; it is morally right to apply the pain of punishment, to be retributive. He also considers whether retribution should also be present in the derivative, secondary question of distribution.¹⁵⁵ A proper study of punishment requires a distinct analysis of the two different points at which retribution may be a justification.

...the moral importance of the restriction of punishment to the offender cannot be explained as merely a consequence of the principle that the General Justifying Aim is Retribution for immorality involved in breaking the law. Retribution in the Distribution of punishment has a value quite independent of Retribution as Justifying Aim.¹⁵⁶

Pain should only be distributed to the legally responsible. This does not follow from classic retributivism that posits a prior moral obligation to apply pain to those who have offended. The two are separate issues. Retribution cannot solely justify the practice of punishment itself. If it were to be the sole justification at this point in the analysis, it would mandate punishment even if it did no good. Hart therefore allows that the justification of punishment has a consequentialist component, that “the practice of punishment is justified by the belief that penalties are required as a threat to maintain conformity to the law.”¹⁵⁷

¹⁵⁵ There is, in point of fact, a third question, being that of how much pain should be inflicted. It is not as usefully explored. See W. Cragg, “H. L. A. Hart and the Justification of Punishment” (1992) 5(1) Can Jo. Law & Juris. 43.

¹⁵⁶ Hart, *supra* note 148 at 12.

¹⁵⁷ Cragg, *supra* note 155 at 47.

At the stage of distribution, however, the situation is different. If pure utilitarianism makes protection of society from harm its primary justification, it would require punishments that are morally wrong. One could justify, for example, the vilest of punishments, inflicted on people in situations of little legal liability and justify them in the common good. Sane utilitarianism requires that no punishment must cause more misery than the offence unchecked. Hart argues, however, that this sanity does not fully account for unwillingness to take the principle this far. The real moral objection is that most people would think the application of draconian punishment to the innocent to be unfair and unjust.

The secondary issue of Distribution, therefore, is problematic for utilitarians. What justifies the application of punishment to a particular individual? Utilitarianism must be qualified to admit, "that the individual has a valid claim not to be made the instrument of society's welfare unless he has broken its laws", even if punishing him would be socially salubrious.¹⁵⁸ This is retributivism in distribution applied to the issue. Retribution in distribution also provides an essential check on excessively harsh punishment. "[T]he moral gravity of the offence is in itself a proper determinant of the severity of punishment."¹⁵⁹ This neatly escapes the "serpent-windings" of utilitarianism.

Hart describes his approach as being a middle way. He so calls it because although it bears the justificatory hallmarks of retribution, it insists upon the retention of the general notion of *mens rea* and allows a subordinate place for considerations of proportionality in

¹⁵⁸ That is, that he is legally responsible. See Hart, *supra* note 148 at 82.

the determination of severity of punishment. Hart concedes that modern retributive theory is accused of deviating toward the model that he denigrates as “social hygiene” but asserts that, in the main, the thesis remains cohesive. He gives three examples. First, he allows that proportionality is the concern of both types of justification. However, one must distinguish between the question of the relationship between acts and punishments, and the real issue of proportionality, the gradation between punishments for various offences. Whilst the deterrence of murder, argues the utilitarian, calls out for more serious sanctions than the deterrence of theft, the retributivist replies that the same measure is justified by the relative moral gravity of the offences.

Second, and as a corollary, “...there is a vast area of the criminal law where what is forbidden or enjoined by the law is so remote from the familiar requirements of morality that the very word ‘crime’ seems too emphatic a description of lawbreaking.”¹⁶⁰ The field may be so divided with the acceptance that, in this area, punishment should be measured and justified by reference to utilitarian theories. These are, however, not really moral crimes, they are regulatory, and so the moral disapprobation, which retribution has as its fundament, is out of place.

Finally, Hart notes the shift to what he terms a theory of ‘reprobation’. By this, he means that punishment, rather than being a means of “intrinsic goodness for the return of suffering or moral evil done”¹⁶¹ is instead a matter of moral condemnation, making

¹⁵⁹ *Ibid.* at 233.

¹⁶⁰ *Ibid.* at 236.

¹⁶¹ *Ibid.* at 234.

explicit what is good and what is evil. Is the sentence, however, intrinsically of value because of its moral denunciation or is its value in the social utility that results both in the offender and in society? The latter, which Hart argues “trembles on the margins” of utilitarianism, foreshadows later communicative theories of sentencing.¹⁶²

The deontological character of retributivism is problematic. One believes either that punishment is justified, or one does not.

Either he [the retributivist] appeals to something else—some good end—that is accomplished by the practice of punishment, in which case he is open to the criticism that he has a non-retributivist, consequentialist justification for the practice of punishment. Or his justification does not appeal to something else, in which case it is open to the criticism that it is circular and futile.¹⁶³

The need to link moral culpability of offenders with desert, and desert to punishment, has its own serpent-windings.¹⁶⁴ Moore asserts that “we can justify a moral principle by showing that it best accounts for those of our more particular judgements that we also believe to be true.”¹⁶⁵ Retributivism best accounts for the rendering of justice and is therefore analogous to a justifiable moral principle. Walgrave, in discussing the search for foundational theory for restorative justice, formulates a simplistic dichotomy between the retributivists, deontological and retrospective, and the consequentialists, who look to the social effects of implemented policy. Von Hirsch, a staunch retributivist, argues, as

¹⁶² Hart’s approach has been recently revived and refreshed. See D.E. Scheid, “Constructing a Theory of Punishment, Desert and the distribution of Punishments” (1997) 10 *Can. J. L. & Juris.* 441-506. Duff argues that punishment communicates the censure that is “owed” to responsible citizens as an honest response to their crime. See A. Duff, “Punishment, Communication and Community” in M. Matravers, ed. *Punishment and Political Theory* (Oxford: Hart Publishing, 1999) at 50.

¹⁶³ H. Bedau, “Retribution and the Theory of Punishment” 75 *Jo. of Phil.* 601.

¹⁶⁴ Bedau’s nihilism is discussed, and a refutation attempted, in M. S. Moore “The Moral Worth of Retribution” in A. Von Hirsch & A. Ashworth, *Principled Sentencing: Readings on Theory and Policy* (Oxford; Hart Publishing, 1998) at 150 ff.

does Hart, that the need for punishment is to ensure a proper measure of censure, and the reason that censure is required is to define and enforce morality.¹⁶⁶ “The sanction should still express blame as an embodiment of moral judgements about criminal conduct.”¹⁶⁷

Walgrave questions this assumption, but wrongly. In my view, the correct question is “whose morality”? He says, however that morality is a socially defined institution (and I use the latter term deliberately). As such it is, in reality, a target, a socially defined desire, the purpose of which is “to keep life in community liveable.”¹⁶⁸ These attempts to save retributivism from being tautological are premised on the validity of underlying moral claims. But if one questions that morality, by asserting, for example, that it is a Eurocentric value-imposition, then one exposes the fact that the justification, retribution, and what it justifies, the oppressor’s morality, are in a symbiotic relationship. Each supports the imposition of the other. Retributivism presupposes an “indefensible objectivism about morals”¹⁶⁹ to the exclusion of the morality of colonized peoples. Its power is its deontological character that allows it to operate *a priori*.

What of the other merit of retributivism, that it places wrongs in order, that it categorises offences relative to other offences? Is this enough to support the construction of

¹⁶⁵ *Ibid.* at 151.

¹⁶⁶ I am not ignoring the rejoinder to retribution which Nigel Walker puts so well, “If the censorious message need have no utility, why is it morally necessary?” N. Walker, “Desert: Some Doubts” in Von Hirsh & Ashworth, *ibid.* at 160. I ask the reader to bear in mind the arguments set out in this part when reading the discussion of the principles of the *Youth Criminal Justice Act* in chapter four. Also see the detailed discussion of punitive theory in M. Matravers, *Justice and Punishment: the Rationale of Coercion* (Oxford: Oxford University Press, 2000)

¹⁶⁷ Von Hirsh & Ashworth, *ibid.* at s. 4.4.

¹⁶⁸ L. Walgrave “Restorative Justice: Philosophy to Practice” Ch. 10 in H. Strang and J. Braithwaite eds. *Restorative Justice and the republican theory of Criminal Justice: an exercise in normative theorising on Restorative Justice* (Sydney: Ashgate, 2000)

¹⁶⁹ I borrow Moore’s words here, but not his opinion. See *supra* note 164 at 153.

retributive theory as a cogent justification? Proportionality is retribution in operation.¹⁷⁰

The fact that doing more wrong justifies more punishment begs the question of the justification of *any* punishment. Hart's (and my) "modern sceptical doubt about the whole institution of punishment" he expresses in this way:

If we believed that nothing was achieved by announcing penalties or by the example of their infliction, either because those who do not commit crimes would not commit them in any event or because the penalties announced or inflicted on others are not among the factors which influence them in keeping the law, then some dramatic change concentrating wholly on actual offenders, would be necessary.¹⁷¹

2.5 *Retribution in Canadian Sentencing*

Retribution in the form of just deserts is maintained in modern sentencing law as an important limit on the possible excesses of punishment that can arise from distributive and consequentialist approaches.¹⁷² We have seen how retribution, and *talionis* in particular, was a vengeance-based response to modes of wrongdoing that were socially undesirable. Hart's arguments with respect to the importance of having a cogent and coherent underlying scheme, or General Justifying aim can be viewed similarly as a response to the supposed threat of the capricious and the arbitrary. Below, we look at

¹⁷⁰The reader may notice the shift from *talionis* to "proportionality." It has been argued that crime is exceedingly complex and many types of offending do not lend themselves to talionic reply. See J. Braithwaite & P. Pettit, *Not Just Deserts: A Republican Theory of Criminal Justice* (Oxford: Clarendon Press, 1990) at 148. I am not convinced that *talionis* does not inform the new retributivism. Reducing Hart's cohesive theory to little more than an anchoring point for one to scale the relative seriousness of crimes does not leave enough room to justify the continued existence of the paradigm. To say it another way, if all that can be taken from classical retributivism is that it provides starting points for evaluating the relative seriousness of offences, then from where does the fundamental and theoretical imperative arise which requires that the response not only be measured but that, first and foremost, it be punitive? There is too much power to be this sanguine.

¹⁷¹Hart, *supra* note 148 at 27.

¹⁷²For an interesting discussion of this point, see D. Dolinko, "Three Mistakes of Retributivism" (1992) 39 UCLA Law Rev. 1623.

recent case law from the Supreme Court of Canada on the topic of conditional sentencing that exposes, if not with perfect clarity, the role of desert theory in limiting the harms that might be caused by rehabilitative objectives in sentencing. From this, arise two questions. First, is this antithetical to Restoration as a guiding theory of society's response to antisocial behaviours, that is, is it an example of the entrenchment of retribution in a place that gives it inordinate anti-restorative power? Second, is there a role for desert theory in limiting the excesses (whatever they may be) of restoration? Consideration of the latter issue will in turn make explicit why the principles of sentencing as formulated in section 718 of the *Criminal Code* are fundamentally in tension with restoration and leave it no room beyond the area defined by the trivial and the non-recidivist.¹⁷³

Section 718 sets out the Purpose of sentencing. In it, one finds a *melange* of denunciation, deterrence, rehabilitation and restoration.¹⁷⁴ It states,

718. The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance

¹⁷³ One example of an acceptance of the trivialisation of restoration may be found in the nicely argued, but basically wrong, view of D. Kwochka in "Aboriginal Injustice: Making Room for a Restorative Paradigm" (1996) 60 Sask. L. Rev. 153. He allows that one of the limitations on the application of restorative justice is that some crimes are too serious to permit it. It is precisely this *a priori* assertion that must be challenged. One of the key elements of the Supreme Court's decision in *R. v. Proulx* (2000), 140 C.C.C. (3d) 449 is that even very serious offences can be dealt with by the imposition of a conditional sentence on the offender. In the earlier Supreme Court decision in *R. v. Gladue*, [1999] 1 S.C.R. 688 the Court recognised the role of conditional sentencing as a way of reducing the use of incarceration.

¹⁷⁴ Prof. Mark Carter notes this as potentially propagating a "cafeteria" approach to sentencing. See "Addressing Discrimination through Sentencing" 44 C. L. Q. 399 at 416. Dr Harry Blagg has objected to this approach to selections of restorative approaches in "A Just Measure of Shame? Aboriginal Youth and Conferencing in Australia" 37 Brit. Jo. Crim. 481. He argues that "Food-hall multiculturalism" is inappropriate in restoration and constitutes an illegitimate appropriation of Aboriginal culture, a "new and virulent form of neo-colonialism" (at 487). Perhaps it can also be argued that this part of Canadian sentencing law is the same disease working through a mechanism fundamentally in tension with cultural and legal pluralism.

of a just, peaceful and safe society by imposing just sanctions which have one or more of the following objectives:

- (a) to denounce unlawful conduct;
- (b) to deter the offender and other persons from committing offences;
- (c) to separate offenders from society, where necessary;
- (d) to assist in rehabilitating offenders;
- (e) to provide reparations for harm done to victims or to the community; and
- (f) to promote a sense of responsibility in offenders, and acknowledgement of the harm done to victims and to the community.¹⁷⁵

Proportionality follows in 718.1 as the Fundamental Principle,

718.1 A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

There is an issue as to whether there is a “preponderance of utilitarian aims” in section

718.¹⁷⁶ Quigley argues that section 718.1,

is most assuredly a retributive concept. Moreover, by inserting it in a separate section entitled “Fundamental Principle”, Parliament may well have elevated retribution to a higher position among the aims of sentencing.¹⁷⁷

Roberts rejects any assertion that section 718 is “largely utilitarian and focused on crime reduction.”¹⁷⁸ He argues that not only 718.1, but also the words of section 718 itself reify proportionality. The section identifies a single fundamental purpose and a single

¹⁷⁵ The Court in *Gladue* stated at paragraph 70, “the aims of restorative justice [are] now expressed in paragraphs (d) (e) and (f) of s. 718.” See *supra* note 173.

¹⁷⁶ Carter, *supra* note 174 at 417.

¹⁷⁷ T. Quigley “Are We Doing Anything about the Disproportionate Jailing of Aboriginal People” (1999) 42 *Criminal Law Quarterly* 129 at 133. Parliament was well informed of the debate around enshrining proportionality in this way. As the 1987 *Report of the Canadian Sentencing Commission* (Ottawa: Supply and Services Canada, 1986) noted at 72, “Whether disparity in sentencing exists depends on one’s theory of sentencing.” Indeed, one of Quigley’s earlier articles suggests that Parliament’s intention is far from clear and the supremacy of retribution could be contested. See “New Horizons in Sentencing?” (1996) 1 *Can.Crim L.R.* 277 at 289.

¹⁷⁸ M. Campbell, “Sentencing: Advocacy, Art or Science?” (1999) 4 *Can. Crim L.R.* 127 at 138.

fundamental goal, neither of which are directly associated with a “utilitarian sentencing goal.” In two ways, he says, the section is retributive. First, the words “contribute to respect for the law” means that a sentence that does not encourage lawful public opinion and public behaviour contravenes the section. Any sanction that is arbitrary (by which he means disproportionate) will be seen as illegitimate, *ergo* satisfying public opinion requires proportional retribution. This begs the question of what engenders public respect for the law. It assumes that proportionality necessarily makes a sentence acceptable. Second, and similarly, “by imposing just sanctions” means that sanctions that are “just” are those that are deserved. If one defines that which is deserved in proportional terms then, logically, to be just the sanction must be proportional. The interpretation is tautological. Both approaches assume that proportionality is fairness, a position that begs the larger question he examines, that of the respective places of deontological and consequentialist goals in the new sentencing legislation.¹⁷⁹

The conditional sentence is a measure designed to reduce the harshness of the imposition of incarceration.¹⁸⁰ In the event of breach, the result can be that an offender is incarcerated for more than the length of time that he or she would have been subject to had the sentencing not included this measure. The crime, on a purely retributive analysis, would call for less than the offender receives from a conditional sentence that is designed to include both punitive and rehabilitative elements. Why is this so? Manson discusses, at some length, the current conditional sentencing regime, its relationship to the principles

¹⁷⁹ J. V. Roberts, “Utilitarianism versus Desert in the Sentencing Process” (1999) 4 Can. Crim L. R. 143 at 148-150.

set out above, and the Supreme Court's approach to the principles in *Proulx*.¹⁸¹ The "bite" of the sentence is the "constant threat of incarceration." The *quid pro quo* for initial freedom¹⁸² is that if the offender breaches, the sentence is longer than retribution would demand.¹⁸³ The principle of proportionality set out in section 718.1 should not allow that conditional sentences be longer than an in-centre alternative.¹⁸⁴ The Court in *Proulx* has constructed conditional sentencing in a way that makes it politically acceptable to those for whom just desert is essential, whilst paradoxically making it less defensible, at both theoretical and empirical levels, as a manifestation of retribution as a fundamental principle.

I had earlier posed two questions arising from this line of enquiry. Let us return to them. Given the structure of Canadian sentencing law, is it necessary to give just deserts pre-eminence? In view of how conditional sentencing has been constructed in *Proulx*, the answer is yes. The operative role of desert, so clearly delineated by Hart, has an essential place in ameliorating the excesses of consequentialism *even within the rehabilitative*

¹⁸⁰ A. Manson, "The Conditional Sentence: a Canadian Approach to Sentencing Reform, or Doing the Time Warp Again" 44 *Crim. L. Q.* 375 at 377.

¹⁸¹ *Ibid.*

¹⁸² There are others, such as the Court's requirement that the sentence have a negative impact upon the offender's liberty through the imposition of house arrest and the like. *Gladue*, *supra* note 173 at ¶ 36.

¹⁸³ D. North, in "The Catch-22 of Conditional Sentencing", 44 *Criminal Law Quarterly* 342 analyses a number of different scenarios with respect to the various criticisms levelled at conditional sentencing such as net-widening, sentence elongation on breach and the like. She concludes that this new(ish) sentence has the potential to reduce incarceration. The analysis is pre-*Proulx* and so can only look forward to analysing the effect of that decision. It also totally misses, as does all of the current academic writing on this topic, the influence of conditional release on actual sentence duration. Saskatchewan Justice's policy of denying early release to conditional sentence breachers has had a significant effect that has escaped academic examination.

¹⁸⁴ To be more accurate, Justice Lamer's view was that conditional sentences need not be the same length as in-centre counterparts. I have argued in a number of cases that because of the factors set out in this section of my chapter a conditional sentence should be *shorter* than its counterpart. The judicial reaction has ranged from bemusement to hostility.

operations of a corrective model with restorative and anti-incarceratory aims.

Parliament has spoken clearly about its restorative intent in grafting on section 718.2 (e).

Gladue interprets the subsection as mandating restorative thought. However, the structure of the formulation of sentencing principles requires desert. Attempting to wedge Restorative Justice in in this way causes a fundamental structural tension. It does not play well with others. Furthermore, if the structure remains as it is, then there will continue to be the unspoken objection that desert is needed to control the individualisation of restoration, just as Hart invokes it to reign in the consequentialists.

I submit that the power that binds us to retributivism is the power to marginalise. I have said that Kwochka's views about the place of restoration are wrong. It is, however, more accurate to criticise him for begging the normative question of what should be the place of restoration, not for describing what is. The danger of asking the wrong question is all too apparent. For example, the Supreme Court in *Gladue* referred to his opinions, (formulated before the proclamation of Bill C-41, which introduced the conditional sentence in 1996) with approval.¹⁸⁵ The Court acknowledged what it believed to be the common desire among Aboriginal peoples to avoid the alienating effect of non-community based dispositions. However, it also accepted that restoration's place was defined by its legitimacy as punishment; the focus was on ensuring that it was not seen as "lighter" punishment.¹⁸⁶ Perhaps for this reason the Court was unable to back away from its tradition. It had to avoid reaching the obvious conclusion from its analysis, that

¹⁸⁵ *R. v. Gladue*, *supra* note 173 at ¶ 72.

¹⁸⁶ *Ibid.*

Aboriginal people should not be punished because punishment itself is not a reasonable and rational response to Aboriginal offending given the value-sets of Aboriginal people.

This leaves us with an irony, implied by my second question, arising from the role of desert theory in limiting the potential excesses of restoration. It is ironic for it is the very existence of the retributive paradigm that makes it necessary to apply retribution in this way. Let me explain. The Supreme Court in *M. (C. A.)*¹⁸⁷ referred to sentencing as an “inherently individualised process” that countenanced some disparity across offences, offenders and geography.¹⁸⁸ Tension arises when the balancing of purposes is played out in the presence of the Fundamental Principle. Proportionality, which is nothing more than the egalitarian side of retributivism, is a demand that limits disparity. Restoration is driven largely by the consequence of wrongdoing rather than being a function of the wrongdoing itself. The making of reparation is inherently individualised. A trivial but wrongful act may result in a lifetime of restitution. Bringing the offender and those in her community back into balance may require a similar commitment. If one views these sequelae as punishment, then it is unfair to visit such punishment on minor offenders; it would be unjust not to limit the punishment that flows from restoration.

The fallacy in all of this is that retributivism is set up to protect equality only in the formal sense. The Supreme Court and Parliament have spoken at length of restorative justice reform as an ameliorative measure. With this in mind, let us turn to the last question for this chapter and the question with which it started: why is the retributive

¹⁸⁷ *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, 105 C.C.C (3d) 327, 46 C.R. (4th) 269.

paradigm so pervasive? There is at least one more factor that gives it sustenance; I call it the myth of equity.

A liberal state values the equality of people before the law. Correctional law based on just deserts powers these privileged notions of equality. However, there cannot be real equality in a society that is fundamentally unequal. The “liberal consensus” is problematic.¹⁸⁹ It holds that personal responsibility rests upon individual autonomy in acting. People have the same opportunities to offend, or not, and so must be held to the same standards and treated by the law in the same way.¹⁹⁰ If the society is unjust then, perforce, the identical treatment of people within it must be unjust. Desert theory is a way of putting an equitable face on inequality and thereby keeping people in their place.¹⁹¹ The historical origins of Retributivism demonstrate the linkage between the imperatives of a society’s elites and the measures that ensue. The slavery of Greece, the Imperialism of Hammurabi and Rome, and the religious hierarchies of the early Catholic Church all find this expression.

¹⁸⁸ *Ibid.* at 567 S.C.R.

¹⁸⁹ Henderson *et al.* put it well in the context of colonialism, “...the idea of individualization arose as a manifestation of the colonizer’s liberties in the colonial situation, and as a way of maintaining these liberties.” (*supra* note 68 at 255)

¹⁹⁰ K. Daly “Revisiting the Relationship between Retributive and Restorative Justice in S. Strang, & J. Braithwaite, *Restorative Justice; Philosophy to Practice* (Ashgate: Sydney, 2000) at 33. I am not ignoring the consequentialist arguments, but rather focussing on restoration and retribution. As the recent Saskatchewan Court of Appeal case of *R. v. Laliberte* [2000] S. J. No. 138, 143 C.C.C. (3d) 503 at ¶ 15 makes clear, deterrence is alive and well and includes the wider sociological effect of social disapprobation. “If the sentence adequately emphasises community disapproval of such conduct by branding it as reprehensible, one can hope that it will have a moral and educative effect on the attitude of the public.”

¹⁹¹ Nowlin argues that Justice Lamer’s reference to “moral culpability” as a basis for proportionality in *M. (C.A.)* does not allow for structural social inequities (*supra* note 84 at 190-191). He is influenced by a socio-economic analyses based on:

“the dynamics of the capitalist economy: the manner in which it allocates benefits and injuries among classes, races and sexes...inequitable distribution in this regard is downplayed in retributivist approaches to sanctioning, which themselves demonstrate “an abstract moral

...the forms and processes of punishment are driven more by the wider social fabric than by rational choices about the purposes and means of punishment. [They] both reflect and reinforce a range of social meanings. They tell us about the sort of society we are and want to be, the values we regard as important: the State, and the way in which that authority gains and maintains its legitimacy.¹⁹²

Retributivism, by its appeal to equity, has a particular value in maintaining the liberal 'consensus' in the face of anti-colonialism. Restorative Justice is a challenge to the institutionalised and systemic racism that has been built upon this 'consensus'. The appeal of desert theory is that one can build such structures upon it and it appears to be a cohesive unit. However, pull apart the fundament; expose the fallacy in the consensus that underlies the *justice of deserts*, and one can make clear the unacceptability of the continuation of this state of affairs. As with the language used, 'fairness' has a role in concealing justice in plain view.

All of this is in the theoretical, but it resonates with tremendous force in the empirical. Much has been written about the tragedy of Aboriginal contact with the criminal justice system in Canada and abroad. The statistics are shocking and are getting worse.¹⁹³ What I want to argue is that not only is the proof of the pudding in the eating but that from the product one can divine the basest values of the cook. The maintenance of the status quo,

preoccupation with the conduct of the individual offender" quoting Greenberg, D. and Humphries, D, "The Co-option of Fixed Sentencing Reform" (1980) 26 *Crime and Delinquency* 206 at 215.

¹⁹² A. Morris & W. Young "Reforming Criminal Justice: The Potential of Restorative Justice" in S. Strang, and J. Braithwaite, *Restorative Justice: Philosophy to Practice* (Ashgate: Sydney, 2000) 21 at 25 (references deleted). One should not fail to note in passing, the ascendancy of vengeance in retribution in the United States in the 1980s and 1990s. The legitimacy of "retributive hatred" is questioned as the basis of justice.

"A theory that legitimates anger and hatred as appropriate responses to crime and proper bases for punishment, and presents the infliction of such punishment as a virtue in itself...is a heady, dangerous brew at a time of intense fear and loathing of criminals." Dolinko, *supra* note 172 at 1652.

business as usual in a stable climate, free access to lands and resources and so on are seen as jeopardised by the empowerment of indigenous people.¹⁹⁴ Just desert is the key to linking this perpetuation to the liberal fallacy. Restorative approaches, or at least those that deny that there is any justice in desert as an enabler of punishment, challenge this linkage. The failure of restoration to ascend as a dominant mode of dealing with offending may be compared with the advance of Aboriginal interests in the non-criminal sphere. Only the most reactionary politician would decry the purposive advantaging of Aboriginal peoples through treaty and non treaty-based programmes. Yet the application of such principles to Aboriginal criminal offending, in a way that makes any substantial difference, is marginalised.

To approach this in another way I pose the question: what is the most basic incident of colonialism? It is the power to define what is wrong and right, what is good and evil. It is the reordering, and perhaps substitution, of belief systems, of epistemologies. This is part of Eurocentrism's claim that its thinking is universal and general.¹⁹⁵ One cannot conceive of any such redefinition more powerful than the imposition of religion, particularly given the position of the church in society at the time of colonisation.¹⁹⁶

With religion comes its protectors, the lawyers. The structure of law, being hierarchical, is ideally suited to the perpetuation of a superior socio-economic position, that is, to the

¹⁹³ This is canvassed in some detail in chapter four. I do not repeat the references here.

¹⁹⁴ I say, "seen as" because I do not believe for a minute that it necessarily has to be so.

¹⁹⁵ Henderson *et al.* note 68 at 270. The authors limit Eurocentrism to two premises "which forb [ade] Europeans from resting content with developing their own society or part of the world." I think this limit oversimplifies the matter by ignoring the basic elements of human greed and lust for power. Neither of these can easily be constructed within this bifurcation.

¹⁹⁶ C. Achebe, *Things Fall Apart* (Oxford: Heinemann, 1996 ed.) is a vicious expose of the place of the "messianic prophecy of monotheism", to use Henderson's words.

development of social hierarchies.¹⁹⁷ All of this is predicated on classical liberal thinking that accords a pre-eminent place to the role of law in perpetuating the civilising power of the sovereign. Liberalism,

...was a mystical invitation to European colonisers to act in a self-interested manner, without impediment from the sovereign or state as long as their actions did not harm other Europeans or the sovereign.¹⁹⁸

In time, however, the oppressed could come to see that the acts that ensued did not reflect the morality espoused by the invaders. The initial agencies of oppression, Eurocentric diffusionism,¹⁹⁹ which would have been terribly pervasive and dominating in the early stages of colonisation, became visible and repulsive. The challenge for the colonisers was to delay awakening the consciousness of the colonized and, recognising that it was inevitable, establish a framework to render it impotent. Society could effectively conceal inequity by putting it in plain view, but constructing it in such a way that it did not seem to permit of inequity. Retribution as both a religious and a legal imperative satisfies the call of this project. It produces what L. Ghandi calls "Postcolonialism", an "historical condition marked by the visible apparatus of freedom and the concealed persistence of unfreedom."²⁰⁰ It accomplishes this by appropriating to itself the right to define what is fair. It is fair to visit a proportional consequence on a wrongdoer; after all, this is but a species of the golden rule. Hidden behind this is the usual positivistic reliance on fairness

¹⁹⁷ We have seen the adoption of religious structures by civil legal institutions earlier in this chapter.

¹⁹⁸ Henderson *et al.*, *supra.* note 48 at 267

¹⁹⁹ Henderson *et al.*, *ibid.* expose at some length the dominance and power of Eurocentrism and the mechanisms by which it works through the thinking of James Blaut, *The Colonizer's Model of the World: Geographical Diffusionism and Eurocentric History* (New York: Guildford Press, 1989). As my purpose here is not to rewrite colonial "theology", but rather to situate retributive concepts within its legacy, I leave further exploration of this area to the reader.

²⁰⁰ L. Ghandi *Postcolonial Theory-a critical introduction*, (Edinburgh: Edinburgh Univ. Press, 1998) at 6. She attributes this "pessimism" to Albert Memmi.

in process as a justifiable guarantor of substantial fairness, of justice. However, proportionality, as we have seen, begs the questions that must be asked to ensure justice. Clothing the exercise in a sort of secular religion gives the power of the vestments to the enrobed.

I submit that the fact that retribution continues to form a part of our correctional thinking supports this analysis. It is a way of founding formal equity in process that works to subvert equity in result. It is part of what the Supreme Court in *Williams* was talking about when it said, "[t]here is evidence that this widespread racism has translated into systemic discrimination in the criminal justice system."²⁰¹

Retributivism is not making the journey alone. The sections of the Code cited above encompass, as noted, a variety of purposes and aims. It is simply my point that desert has a very special place. It is, to borrow the term from Hart, a General Justifying Aim. It is more important, however, to try to answer the question: "What does the practice really aim to Justify"? The larger colonial epistemology is manifest in assertions, like those from the Supreme Court in *Gladue*, to the effect that Aboriginal people believe in the corrective principles of deterrence, denunciation and separation.²⁰² Whether or not this is so, the assertion does little to further an examination of the compatibility of these principles with Aboriginal epistemology rather than with current practices founded in colonial thinking. The fact that this acceptance is unquestioned of itself raises the fear

²⁰¹ *R. v. Williams* [1998] 1 S.C. R. 1128, 124 C. C.C. (3d) 481 at ¶ 58 as cited in *Gladue supra* note 173 at ¶ 61.

²⁰² *Gladue, supra* note 173 at ¶ 78.

that it might so remain, at least in the thinking of the court most influential on Canadian justice policy.

2.6 Conclusion

I have tried to demonstrate that desert theory derives its power from a number of different sources. I have also explored its metamorphosis into current law and its role in underpinning resistance to what I argue is the decolonising effect of restoration in addressing crime. One has to be careful to distinguish between fairness in process and fairness in result. At this point, I think it wise to distinguish as well between intention and result. I should not be taken as ascribing to policy-makers a deliberate intent to oppress, but rather a disinclination (for many reasons) to remedy oppression. The opprobrium of Manson's with which I began can be laid at the foot of bureaucratic inertia, fear of the unknown, and an unwillingness to take off the old eyes and substitute for them a new way of seeing. If one approaches the issues addressed in this chapter historically, rather than by simply looking at current practice, then at least the questions, if not the answers, become clear.

3.1 Introduction

This chapter will discuss the paradigm commonly known as restorative justice. It will attempt to situate the programme within its theoretical and conceptual frameworks. In so doing I will use primarily an analytical approach but will draw upon antipodean sources to conduct some comparative analysis. The latter are useful when considering these practices within an Aboriginal and colonial context. This chapter will continue to explore why restorative justice as it is practiced is unlikely to be harmonized with diverse indigenous notions of justice. It argues that restorative justice is being constructed in a way that does not further decolonialism.

3.2 Restorative Justice

Restorative justice is not a specific, definable practice. It is practiced in differing ways in various places and cultural settings. Each society has the ability, and the right, to define its own restorative processes. Restorative justice is no less than any other form of “justice” a manifestation of cultural norms and a reflection of the social contracts that regulates the interaction of members of a society. It is highly pluralistic both in theory and in practice. It is also commonly claimed to be an adaptation of the justice concepts of Aboriginal/indigenous people to the indigenous and non-indigenous world, and in this to have decolonising potential. Its touted strength is the ability to reflect a culture and be responsive to it. The peril of accepting these claims is that to do so facilitates agenda-

makers terming just about anything “restorative” even when the process may be far from a cultural expression.¹

Restorative justice, like criminal justice generally, is being appropriated by power elites² who have a stake in sustaining and maintaining punitive and coercive methods of correction.³ Justice institutions are tremendously powerful. Their inertia currently outweighs the ability of traditional Aboriginal justice to ameliorate the tragedy of modern Canadian Aboriginals in conflict with the colonial aftermath. This is partly rooted in economic neo-colonialism and partly, I argue, in what I call bureaucratisation. By this, I mean the same sort of ‘imposed from above with the best of intentions’ that was manifest in the original colonial enterprise. It is impossible to analyze all of the strengths and weaknesses of all of the hundreds of different schemes in operation around the world. Rather I will focus the study on the operation and theory of a few and, from that, tease out some critical points.⁴

¹ As Kathleen Daly puts it, “...because the idea of restorative justice has proved enormously popular with governments, the term is now applied after the fact to programs and policies that have been in place for some time, or is used to describe reputedly new policing and correctional policies...we cannot be certain what is going on, or the degree to which any of these new or repackaged practices could be considered ‘restorative’.” See K. Daly, “Restorative Justice: the real story”. A paper presented at the Scottish Criminology Conference, (Edinburgh, September 2000) [unpublished but available online: Griffiths University http://www.gu.edu.au/school/ccj/kdaly_docs/kdpaper12.pdf at 6.

² A. Manson, *The Law of Sentencing*, (Toronto: Irwin Law, 2001) at 3.

³ Carol La Prairie argues that there has been an increase in the punitiveness of crime control measures at the same time that governments have been offloading responsibility (and cost) to private actors. “This contradiction has come about as a result of government awareness of its limited capacity to be the primary and effective provider of security and crime control but, at the same time, its recognition of the political risks of withdrawing from the “sovereign state” role in criminal justice.” In “Some Reflections of New Criminal Justice Policies in Canada” (1999) 32 *Austl. Crim. & N. Z. J.* at 140.

⁴ I repeat the *caveat* in the introduction that my expressions of Aboriginal norms and values are derivative and are the products of my Eurocentric interpretations and experiences. They do not attempt to describe precisely any particular Aboriginal reality. See R. Ross, *Dances with a Ghost* (Markham: Octopus, 1992) at xxiv. Ross is not the only commentator to note the peril of generalization. Finch, JA in *R. v. Johnson* (1994), 31 C.R. 262 at 295, acknowledged Eurocentrism, “...our understanding of the native (sic) perspective is imperfect at best. All one can try to do is to balance sensitivity for the individual offender

What is restorative justice? I discern three broad roots that, for want of better terms, I call the religious, the commercial and the indigenous. Each has different origins and different *modii operandi*. In practice, restorative schemes tend to blend processes from each of the roots. It is important to state that in each type, and in restorative justice as a whole, restoration is not and should not be simply a different way of punishing. It is not a change in the agent of state punishment: rather it flows from a fundamental scepticism about the efficacy of punishment in the context of social control. This assertion is controversial. A dichotomy in thinking has evolved. One group, epitomised by writer such as Daly and Kwochka, assert that there is a place for restoration within the larger framework of a traditional adversarial and punitive justice system. Daly does not see restoration and retribution as antithetical. She argues that,

Both censure and reparation may be experienced as 'punishment' by offenders (even if this is not the intent of decision makers), and both censure and reparation need to occur before a victim or community can 'reintegrate' an offender into the community.⁵

with an equal and dispassionate application of the law." This recognition of Eurocentrism, and refusal to ameliorate it, is "ironic." L. McNamara, "Appellate Court Scrutiny of Circle Sentencing" 27 Man. L. J. 210 at 212.

⁵ Daly, *supra* note 1 at 10. Daly's research on the South Australian Juvenile Justice Programme supports this view. For example see Daly, K, M. Venables, M. McKenna, L. Mumford, and J. Christie-Johnston, *South Australia Juvenile Justice (SAJJ) Research on Conferencing, Technical Report No. 1: Project Overview and Research Instruments*. (Brisbane: School of Criminology and Criminal Justice, Griffith University, 1998) Online: Australian Institute of Criminology <http://www.aic.gov.au>. A summary of the research is available in K. Daly, *Does Punishment Have a Place in Restorative Justice?* Paper presented to the Australia and New Zealand Society of Criminology Annual Conference, (Perth, Australia 28-30 September 1999) online: Griffiths University http://www.gu.edu.au/school/ccj/kdaly_docs/kdpaper2.pdf. The research establishes that having to perform restorative acts (although not, by and large, actual attendance at a restorative conference) may well be perceived as punishment by the actor.

"The SAJJ findings suggest that whether work is done for a victim or someone else, it is similarly viewed by over 90 percent of young people as punishment because it is work, something that takes them away from "fun things" or "spending time with my friends." at 15.

Given that the offenders were teenagers, this is hardly surprising.

Kwochka wrote before the 1996 sentencing amendments to the Criminal Code⁶ had taken effect. He was of the view that restoration could be accommodated within a system that retained incarceration as its ultimate sanction. He encouraged limiting the circumstances that justify deprivation of liberty by placing a new and higher value on it.⁷ However, “[i]n any event, more serious incidents may necessarily warrant a necessary term of imprisonment and, therefore, be outside the purview of the restorative paradigm (my emphasis).”⁸ The result of this approach is that he accepts as “most promising” an indigenisation of punitive justice that I argue below is counter-productive.⁹

The second school of thought questions the efficacy of punishment. Zehr, for example, is sceptical that it has any role to play, and rejects any application of pain as a means of social control. If one inflicts pain, one would do so because it is right to inflict pain, not out of some misguided notion that it will be rehabilitative or contribute to social control.¹⁰ Some recent Canadian thinking is even less accepting,

A closer look at punishment through a restorative lens reveals its impossibility within a restorative justice system....Whatever other interests might be served,

⁶ C-41, 41-42 Eliz. II, 1995 *An Act to Amend the Criminal Code and other Acts in consequence thereof*, significantly reformed the enforcement of fine defaults, one of Kwochka’s major justifications for this approach. See D. Kwochka, “Aboriginal Injustice: Making Room for an Aboriginal Paradigm” (1996) 60 Sask. L. Rev. 153 at 177-182.

⁷ Perhaps without being aware of it, Kwochka was reflecting an analysis which Braithwaite and Pettit elaborate on, and which I discuss below.

⁸ Kwochka, *supra* note 6 at 184. Kwochka’s submission found a warm reception by the Supreme Court in *R. v. Gladue* [1999] 1 S.C.R. 688, 133 C.C.C. (3d) 385. ¶ 77 of the decision holds that in serious cases, Aboriginal and non-Aboriginal sentencing should not be methodologically divergent. Whatever the relative seriousness of a case, sentencing judges are loathe to label any matters as not being serious. The potential for emasculation of the fine intent of *Gladue* is obvious.

⁹ Kwocha, *ibid.* at 156.

¹⁰ H. Zehr, *Changing Lenses: a new focus for Crime and Justice* (Waterloo: Herald Press, 1995) at 209. In so doing, Zehr is adopting the thinking of Nils Christie in, for example, his seminal *Limits to Pain* (New York: Columbia University Press, 1981). Why one would ever punish is a question unanswered.

inflicting pain cannot bring restoration, and cannot be the path to relationships of dignity based on equal concern and respect.¹¹

The divergence between the two views is philosophically profound. The former accepts that punishment is necessarily (and properly) an agent of social/corrective control, while limiting its scope. The latter says that it has no place, and causes more harm than good.¹²

Restorative justice has been defined as,

...a way of dealing with victims and offenders by focusing on the settlement of conflicts arising from crime and resolving the underlying problems which cause it. It is also, more widely, a way of dealing with crime generally in a rational problem solving way. Central to restorative justice is recognition of the community, rather than criminal justice agencies, as the prime site of crime control...¹³

It is “both a way of thinking about crime and a process for responding to crime.” It provides “an alternative framework for thinking about wrongdoing” which, along with the values and principles underpinning this framework, suggests new ways of responding to offending.¹⁴ As such it is a “movement rather than a particular practice. It is a way of thinking about crime and informing or reforming systems for achieving justice.”¹⁵ It defines crime as a conflict between people that puts “them and their relationship at center stage.” It has four basic principles:

¹¹ J. J. Llewelyn & R. Howse, *Restorative Justice, A Conceptual Framework* (Ottawa: Law Commission of Canada, 2001) Online: Government of Canada <http://www.lcc.gc.ca> at 44-45. To similar effect, see R. Ross, *Returning to the Teachings* (Toronto: Penguin, 1996). Ross holds out the Hollow Water Community Holistic Circle Healing Programme as an example of how matters “too serious for jail” can be dealt with restoratively. In his view, it breaks the link between accountability and punishment (at 37 ff.).

¹² This dichotomy echoes the retributivist/consequentialist debate discussed in the second chapter, with a little punishment skepticism added to the second point of view.

¹³ T. Marshall “The Search for Restorative Justice: A paper presented on a speaking tour of New Zealand, May 1995” [unpublished] cited in, *Restorative Justice: a discussion paper* (New Zealand Ministry of Justice: Wellington, 1995) at 1.

¹⁴ New Zealand Ministry of Justice *Draft Principles of Best Practice for Restorative Justice Processes in the Criminal Court* (Ministry of Justice: Wellington, 2003) online: Government of New Zealand http://www.justice.govt.nz/pubs/reports/2003/restorative-justice/RJ_Discussion_Paper.pdf

1. Shared responsibility for resolving crime and for one another;
2. Use of informal community mechanisms rather than criminal justice professionals;
3. The inclusion of victims as parties in their own right;
4. Crime is to be understood as an injury, not just as law breaking.¹⁶

“[I]t is a process involving the direct stakeholders in determining how best to repair the harm done by the offending behaviour.”¹⁷ It recognises the importance of the relationship between victim, offender and community. It is personal, healable, and ascendant over the state’s right of control over its members. In the restorative ideal, the latter becomes almost irrelevant because crime is seen as harm done to victims and communities rather than violation of state formulated rules. It is the *relationship* between the various stakeholders that must be healed.

Accordingly, there is no theoretical identity between harm to the community and the traditional focus on harm to the power of God, or God working through the sovereign.

¹⁵ *Ibid.*

¹⁶ C. LaPrairie, “Altering Course: New directions in Criminal Justice. Sentencing Circles and Family Group Conferences” (1995) 28 *Austl. Crim. & N.Z.J.* 78 at 80. It is interesting to compare this formulation with that of Van Ness, which asserts three foundational principles:

- (i) Crime results in harm to victims, offenders and communities.
- (ii) Not only government, but victims, offenders and communities should be actively involved in the criminal justice process: and
- (iii) In promoting justice, the government should be responsible for preserving order, and the community should be responsible for establishing peace. See D. Van Ness “Restorative Justice” in B. Galway and J. Hudson (eds.) *Criminal Justice, Restitution and Reconciliation* (Monsey N. Y.: Criminal Justice Press, 1990)

¹⁷ P. McCold & T. Wachtel, “Restorative justice theory validation” in E. G. Weitekamp & H-J. Kerner *Restorative Justice: theoretical foundations* (Willan Publishing: Devon, 2002) at 111. By “direct stakeholders,” the authors mean offenders, victims and their “communities of care.” This expressly excludes state, or indirect stakeholders, whose role is to “support and facilitate processes in which the direct stakeholders determine for themselves the outcome of the case.” *Ibid.* at 114.

The community does not become a proxy for the state.¹⁸ Furthermore, it centers on community and family empowerment and has a number of objectives, including, “repairing the damage done by the offender, involving the victim, reconciliation between the offenders and the victims, creating an alternative to imprisonment and current criminal justice sanctions and...making society, at large, more humane.”¹⁹

This means that it is contextualised; that it is concerned with both the wrong being addressed and the social relationships that have been affected by the offending. It is designed to restore these relationships not to the *status quo ante*, which might have been a terribly dysfunctional state of affairs, but rather to “an ideal of a relationship of equality in society.”²⁰ Furthermore, whilst it has conceptual elements, it is fundamentally result-oriented. This means that,

A well-intended restorative process, which does not actually restore is not a restorative process at all....The ultimate aim of restorative justice as justice could not be fully accomplished, either by forgetting the discrete wrongs of the past, or by ignoring the task of broader social transformation.²¹

Accordingly, definition can be accomplished on two interrelated levels. The first is the philosophical, the second, the exemplars that are informed by this philosophy and which in turn inform it.

¹⁸ This is significant in practice for, as is seen in chapter four, the latest Canadian legislation on point (the *Youth Criminal Justice Act* S. C. 2002, c. 1), has an overarching focus on sanctions that effect public confidence in the right of the state to regulate human interaction.

¹⁹ C. LaPrairie, “The New Justice: Some implication for Aboriginal communities” (1998) 40 *Can. J. Crim.* 61 at 63.

²⁰ Llewellyn & Howse, *supra* note 11 at 3. One of the objections made to restoration is that the word implies that the social relationships being addressed were once healthy. For this reason, sometimes the term “Transformative Justice” is used. Except to those who are trying to justify a fee for training sessions, the difference is purely semantic. Restoration must be understood, definitionally, as a process that has as its intended result the improvement and formation of healthy relationships.

Restoration has been criticized as a movement without a proper theoretical underpinning; indeed, the connection between philosophy and practice is difficult to discern. "Practice continues to lead theory as a physics of social transformation reveals itself."²² This makes the whole enterprise vulnerable to accusations that it lacks basic justification, that it lacks coherence and structure. Alternative approaches, such as retribution and consequentialism, are touted by their advocates as not only coherent, but also as comprehensive justifications for the criminal justice responses that they espouse.²³ Later on in this chapter, I shall discuss an approach to formulating restorative justice theory. No critical attention has been paid to the actual impact of this supposed problem. Creating normative theory is an interesting academic exercise, but if one's objective is to bring restoration into the mainstream (and this is the obvious objective of its advocates) then formulating theoretical justifications may be a distraction from more productive, practical enterprises.²⁴ It could be argued that advocates have already tried everything else, that they have established that the current, punitive paradigm is unworkable and that supporting it is simply irrational.²⁵ Since it persists then logically the only reason left why restoration has not triumphed is that it lacks the theoretical foundation to connect

²¹ *Ibid.*

²² McCold & Wachtel *supra* note 17 at 110.

²³ See, for example the discussion of the approach taken by H. L. A. Hart, in *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford: Clarendon, 1968) in chapter two wherein Hart argues at length that a cogent justification for punishment must include retributive notions.

²⁴ On the other hand, every movement needs its cadres.

²⁵ The statistics on Aboriginal overrepresentation in custody are shocking, not only Canada, but in the antipodes as well. Kwocha calls jail the "perennial default solution" and his statistics, as dated as they are, bear this out. Currently, 76% on the Saskatchewan provincial jail population (with some exceptions, those serving two years less a day, or less) is Aboriginal. See Canadian Centre for Justice Statistics *Juristat* vol. 21(5) (Ottawa: Statistics Canada, 2001), D. Kwocha *supra* note 6. In New Zealand, by comparison, Maori are 12% of the general population, and 51% of the custodial population. See New Zealand Ministry of Justice *He Hinatore Ki Te Ao Maori, A Glimpse into the Maori World: Maori Perspectives on Justice* (Wellington: Ministry of Justice, 2001) Online: Government of New Zealand http://www.justice.govt.nz/pubs/reports/2001/maori_perspectives/index.html

philosophy with practices in a compelling way.²⁶ Authors such as McCold and Wachtel deliberately construct their theory as a modelling exercise that provides a framework for the evaluation and justification of restorative justice. This is very different than, for example, Braithwaite's Republican theory, which is rooted in a discourse similar to that used to describe and tout more traditional theories of correction and punishment.

3.3 Community

The shape that restorative justice can take involves, at its most fundamental level, an evaluation and determination of what is meant by "community." One has to distinguish between various Aboriginal communities; many are quite different from one another. One must also delineate the difference between community qua society and community qua representative. Community is highly problematic. Tyler challenges the "naive and unproblematic concept of community based organization as a reliable and stable vehicle for articulating policies of self-determination for indigenous peoples."²⁷ LaPrairie raises serious concerns about the almost flippant way that the concept is developed in restorative discourses. She discusses five issues central to Canadian Aboriginal concepts of community. They include definition, representation and participation. She questions the simplistic conclusion that involving (and invoking) community automatically solves

²⁶I wish to set this up as counterpoint to the discussion that follows, rather than embarking on an examination of the impact of academics on corrective practice. See L. McNamara, *Aboriginal Peoples, the Administration of Justice, and the Autonomy Agenda: An assessment of the Status of Criminal Justice Reform in Canada with Reference to the Prairie Region* (Winnipeg: Legal Research Institute of the University of Manitoba, 1992). McNamara asserts that Aboriginal justice is 'an exception' from the traditional split between academics and practitioners in the field of criminal justice (at 8).

²⁷W. Tyler, "Community-Based Strategies in Aboriginal Criminal Justice: the Northern Territory Experience" (1996) 28 *Austl. Crim. & N.Z.J.* 127 at 130.

the problems that the mainstream system presents for Aboriginal people.²⁸ The construction of 'community' in a way convenient to the constructor is, she says, a consequence of the concept being "terminally vague."²⁹

Community is often assumed to be wholly virtuous, something that should be worked toward, nurtured or established.... Community is often associated with order, stability and group solidarity. But there are other sides to communities. They can be exclusionary, defined by what they are not.... Communities are often portrayed as egalitarian. This obscures how some members of a community-by virtue of their age, sex, or religious or political affiliation will have greater power than others, which they may or may not use for the common good. The whole idea of a common good is also suspect. Communities may be composed of groups with different conceptions as to what constitutes inappropriate behaviour and what appropriate responses should be.³⁰

The eloquent rhetoric is destructive to the future of restorative justice for it legitimizes failures to empower communities sufficiently and makes failure more likely. It is unfair and unrealistic to expect disempowered communities to attain results with minimal funding that the massive, and expensive, mainstream justice system has failed to accomplish. This expectation is raised by constructions that uncritically imbue magical powers and then conclude, when the results are unequal to the rhetoric, that the *premise*, as opposed to the execution, of community justice is unworkable. LaPrairie puts it well in the context of reducing Aboriginal incarceration:

The issue which is most likely to spell success or failure of [restorative justice] initiatives to draw from the formal justice system to less formal and less punitive sanctions, is whether there are adequate resources in the community to support them. If the resources are not in place (either through dedicated allocation of

²⁸ LaPrairie *supra* note 19 at 65 ff.

²⁹ G. Ferguson, *Community Participation in Criminal Jury Trials and Restorative Justice Programs*, unpublished paper prepared for the Law Commission of Canada, July 2001, citing R. Cottrell, *Law's Community: Legal Theory in Sociological Perspective* (Oxford: Clarendon Press, 1995) at 18.

³⁰ D. Cooley, *From Restorative Justice to Transformative Justice* (Ottawa: Law Commission of Canada, 1999) at 42.

reallocation of moneys or resources) criminal justice responses, predicated on community involvement would seem doomed to failure.³¹

3.4 Historical constructions of community

A good first step, particularly in the indigenous context, is to avoid historical revision.

Much has been written weaving popular, romantic accounts of pre-settlement, pre-colonial community. As Tauri and Morris note,

A distinction must be drawn between a system, which attempts to re-establish the indigenous model of pre-European times and a system of justice, which is culturally appropriate. The New Zealand system is an attempt to establish the latter, not replicate the former. As such it seeks to incorporate many of the features apparent in whanau decision-making processes and seen in meetings on marae today, but it also contains elements quite alien to indigenous models.³²

Traditional justice was not all forgiving. Canadian Cree Indians used banishment.³³

Australian aborigines traditionally used what is known as “payback”, a formalized and potentially brutal form of revenge. Payback is still used in the form of “spearing” in which a spear is used to draw the blood of the wrongdoer.³⁴ In New Zealand, *utu* could be harsh,

[It is] not good pretending that Maori culture is all *aroha* (love). If you were to rape my daughter the first and only thing on my mind would be to kill you, to

³¹ LaPrairie *supra* note 3 at 148.

³² G. Maxwell and A. Morris, *Family, Victims and Culture: Youth Justice in New Zealand* (Wellington: Victoria University of Wellington, 1993) at 4.

³³ *R. v. Malbeouf* (1982) 4 W.W.R. 573. The more recent cases of *R. v. W. B. Taylor*, [1997] S.J. No. 826, (1998) 122 C.C.C. 3d 376, and *R. v. Maheu*, [1995] OJ No. 2312 (Prov. Ct.) provide useful surveys of current judicial attitudes to this sanction. Bayda, CJS notes in the *Taylor* case that the use of banishment was for rehabilitative rather than punitive purposes. The evidence before the Court on this point was “scarce.” Inuit people also used banishment. *R. v. Kingwatsiak*, [1992] NWTJ DRS 94-05037 at 140.

³⁴ Interestingly, in some cultures this has now become a symbolic gesture, with the touching of the blade to the leg of the perpetrator constituting a symbolic sanction. “Payback is not vendetta...in certain cases, which must be carefully delineated and clearly understood, [it] can be a healing process.” *R. v. Minor*, (1992) A. Crim. R. 227 at 228 per Asche J. (Northern Terr. C. A.)

have *utu* (revenge). Maori and marae justice was not all integration; it could also be punitive and unforgiving.³⁵

Similarly, it is oft asserted that the punitive and adversarial paradigm of modern Anglo-Canadian corrections is a relatively recent innovation; that it grew out of the move from private to public justice commencing in England between 1050 and 1150 with the arrival of William the Conqueror.³⁶ As noted in chapter two, retribution and punishment as responses to offending have their origins far earlier in history and can be traced to the Code of Hammurabi, and beyond. Less historical analyses have asserted that this is “myth making” on the part of restorative justice advocates. Kathleen Daly has written a number of papers attempting to debunk these myths.³⁷ By myth, she means primarily “partial-truths,” although she is receptive to Engel’s definitions of myth as origin stories, as creative devices that are used to transcend reality.³⁸ One myth is the claim that restorative justice uses indigenous justice practices and was the dominant form of justice in ancient and prehistoric times. Braithwaite grandly (and wrongly) concludes, after a broad historical survey, that restorative justice is,

...ground[ed] in traditions of justice from the ancient Arab, Greek and Roman civilizations that accepted a restorative approach even to homicide.... restorative justice has been the dominant model of criminal justice throughout most of human history for all of the world’s peoples.³⁹

³⁵ J. Tauri and A. Morris, “Re-forming Justice: The potential of Maori Processes” (1997) *Austl. Crim. & N.Z.J.* 149 at 153. In this part I am cognisant of my own non-indigenous biases, as formulated in chapter one.

³⁶ Llewelyn and Howse, *supra* note 11 at 4-7. Also see H. Zehr *Changing Lenses*, *supra* note 10, and H. Bianchi, *Justice as Sanctuary: Toward a System of Crime Control* (Bloomington: Indiana University Press, 1994)

³⁷ Daly, *supra* note 1.

³⁸ D. Engel, “Origin Myths: narratives of authority, resistance, disability and law” (1993) 27 *Law & Soc’y Rev.* 785ff.

³⁹ J. Braithwaite, “Restorative Justice: assessing optimistic and pessimistic accounts” in M. Tonry ed. 25 *Crime and Justice: a review of research* (Chicago: University of Chicago Press, 1999) at 1.

Daly argues, quite rightly, that extravagant claims of this nature are only what she terms origin myths. Further, "...by identifying current indigenous practices as restorative justice, advocates can claim a need to recover these practices from a history of 'takeover' by white colonial powers that instituted retributive justice."⁴⁰ She argues that this link comes from a standpoint assertion that all that is restorative is good, and all that is retributive, is bad.⁴¹ This perpetuates constructions of restorative methods, like conferencing, as indigenous justice. As Blagg has argued, this is an Orientalist appropriation. "Are we once again creaming off the cultural value of people simply to suit our own nostalgia in this age of pessimism and melancholia?"⁴² This is harmful because it undermines culturally sensitive and appropriate restorative justice by making what are really Eurocentric constructions *look like they reflect indigenous traditions*.

Whether it is intentional or not, the revision of history by myth-creation can be foundational to the perpetuation, rather than the deconstruction, of colonial norms. Ironically, this pernicious indigenisation is a product of advocacy. It finds its modern manifestations in the twin characteristics of what restorative justice has come to be; marginalisation and bureaucratisation. This is important, for restorative justice is

⁴⁰ Daly, *supra* note 1 at 15. As demonstrated in chapter two, assertions of this sort are not only myths, they are bad history.

⁴¹ This is also an inappropriate use of the term "retributivism." In much of the writing about restoration, it is constructed as being antithetical to retributivism. As seen in chapter two, the term is not proper shorthand for traditional, adversarial and punitive justice. See, generally, A. Duff, *Punishment*, (Aldershot: Dartmouth Press, 1993), A. Von Hirsch and A. Ashworth, eds., *Principled Sentencing: Readings on Theory and Policy* (Oxford: Hart Publishing, 1998). For a more intricate analysis, see J. A. Corlett, "Making Sense of Retributivism" (2001) 76 *Philosophy* at 77-110.

⁴² H. Blagg, "Restorative visions and restorative justice practices: conferencing, ceremony and reconciliation in Australia" 10(1) *Current Issues in Criminal Justice* 5 at 12.

fundamentally a practical discipline, and accordingly these misconstructions find their manifestation in practice.

3.5 Colonialism

Colonialism destroyed indigenous systems of justice.⁴³ Any definition of community in the wider restoration discourse must be keenly cognizant of the change to traditional self-definition that colonialism has wrought. The Royal Commission on Aboriginal People noted, “[o]ne of the tragedies of western history is that the culture-specific nature of western systems of law has blinded it to the existence of law in other societies.”⁴⁴

Resistance to indigenous, rather than indigenized, justice is a function of the colonial reluctance to empower indigenous people by providing them with a land and economic base. Colonial jurisdiction and territorial sovereignty were asserted on very little more than the assumption of the invader and certainly without any basis in law.⁴⁵ Now that the land is (largely) no longer in Aboriginal hands, there is significant resistance to returning

⁴³ Tauri and Morris, *supra* note 35 at 150. Also see Commission on First Nations and Métis People and Justice Reform, *Final Report* (Regina, 2004) (The Littlechild Report) and in particular the FSIN submission thereto online: <http://www.justicereformcomm.sk.ca/volume2/07section4.pdf>

⁴⁴ Royal Commission on Aboriginal Peoples *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (Ottawa: Minister of Supply and Services, 1996) at 12, (hereinafter *RCAP*).

⁴⁵ A.C. Hamilton, C. M. Sinclair, *The Justice System and Aboriginal People: Report of the Aboriginal Justice Inquiry of Manitoba* (Winnipeg: Queen’s Printer, 1991) 130-135. This is also the case in other colonial situations such as Australia. The Australian *Native Title Act 1993* (Cth.), like the Canadian Supreme Court in *Delgamuukw v. B.C.* [1997] 3 S.C.R. 1010 at 1081-1085 assumes the legitimacy of this assertion. As Bruce Reyburn noted in his September 1994 Submission to M. Dodson, Aboriginal and Torres Strait Islander Social Justice Commissioner on the said *Act*,

“We are told that Crown issued titles mystically extinguish the original relationships by the curious workings of some superior force. This law is better viewed as a purely European arrangement which seeks to incorporate a market-place mentality into the relationships between peoples.”
Online: <http://nativenet.uthscsa.edu/archive/nl/9409/0158.html>

it.⁴⁶ However, the legal norms of colonisation go far beyond removals of indigenous peoples from their lands. As Williams notes,

...a readily identifiable set of themes and assumptions deployed by Englishmen on both sides of the Atlantic regarding the tribal Indian's perceived difference emerged within a few short decades of the English invasion of America.⁴⁷

Furthermore, "...the narrative tradition of tribalism's incompatibility with white civilization generated a rich corpus of texts and legal arguments for dispossessing the Indians."⁴⁸ The ability to define norms is foundational to colonisation.

A legal tradition is hence part and parcel of a complex normative world. The tradition includes not only a *corpus juris*, but also a language and a mythos-narratives in which the *corpus juris* is located by those whose wills act upon it. These myths establish the paradigms for behaviour. They build relationships between the normative and the material universe, between the constraints of reality and the demands of an ethic.⁴⁹

This is the antithesis of an ethic that would provide for the development of indigenous sovereignty and self-determination. In defining indigenous people as the Orientalist "other," colonialism has made manifest the separation of these peoples not only from their lands, but also from their values.⁵⁰

This approach was given new force in the 1997 "Wik" amendments to the *Native Title Act 1993*. Generally see P. Butt, R. Eagleson & P. Lane, *Mabo, Wik and Native Title* (Annandale NSW: Federation Press, 2001)

⁴⁶ The issue of land entitlement, and the redress of past land swindles, is an objective of the Canadian Treaty Land Entitlement process. Public reaction in Saskatchewan to this and other aspects of the treaties has been negative, with a significant majority of people recently surveyed supporting the proposition that "it is better to do away with *Aboriginal* treaty rights (my emphasis)." "Doing away with treaties would be a two-way street" *Saskatoon Star Phoenix* (December 5 2003) A-15, "Treaty critics ignoring facts" *Saskatoon Star Phoenix* (December 8 2003) A-6.

⁴⁷ R. A. Williams, "Documents of Barbarism: the Contemporary Legacy of European Racism and Colonialism in the Narrative Traditions of Federal Indian Law" (1989) 31 *Arizona L. R.* 237 at 249.

⁴⁸ *Ibid.*

⁴⁹ R. Cover, "Nomos and Narrative" (1983) 97 *Harvard Law Rev.* 4 at 9.

⁵⁰ The construction of indigenous peoples in this way is dealt with in a remarkable way in Edward Said's seminal work, *Orientalism*, (Vintage: New York, 1979)

European hegemony was secured, not just by terror and repression alone but by the formation of systems of knowledge which denuded and essentialised indigenous cultures and represented them within a series of stereotypes.⁵¹

Furthermore, the legacy of this oppression is a lack of connection with either their own heritage or the economic resources of the colonizer.

[I]t became glaringly apparent [when considering Aboriginal incarceration] that a major contributing factor was the lack of a meaningful economic base in the majority of the communities that the prisoners come from. This is not a phenomenon unique to the Native people of Canada, but one that persists throughout the world where one segment of a society has a colonial relationship with another. As a supposedly conquered people we have been denied and effectively kept out of the institutions and frameworks that would be considered as having a positive effect on the national fabric.⁵²

Economic disparity and consequent segregation⁵³ are the essence of marginalisation.

Economic power is the font of political power.

Accompanying the economic imperialism of colonialism is the Eurocentric imperative to go forth to discover everything and bring it to heel.⁵⁴ This universality,

...creates cultural and cognitive imperialism, which establishes a dominant group's knowledge, culture and language as the universal norm.... The assumed normality of the dominators' values and identity constructs the differences of the dominated as inferior and savage.⁵⁵

⁵¹ Blagg, *supra* note 42 at 5.

⁵² Native Council of Canada, *Report of the Métis and Non-status Indian Crime and Justice Commission*, (1977) introduction, reproduced in Royal Commission on Aboriginal Peoples *Soliloquy and Dialogue*, vol. 1 at 210.

⁵³ In this, I include the long-term policies of reserve formation and residential schools in Canada and their counterparts in other settler-dominated societies. The FSIN submission to the Littlechild Commission makes this point firmly. *Supra* note 43.

⁵⁴ Sakej Henderson asserts that this is a worldview that can be traced back to the ancient Greeks. See Henderson, J. Y., Benson, M. L. and Findlay, I. M., *Aboriginal Tenure in the Constitution of Canada* (Scarborough: Thompson Canada, 2000) at 270.

⁵⁵ *Ibid.* at 271.

This type of thinking is reflected in case law. The example used by *RCAP* is that of Chief Justice McEachern of the Supreme Court of British Columbia in the trial decision in *Delgamuukw*. *RCAP* stated,

in response to the assertions by the hereditary chiefs that they “govern themselves according to their laws, maintain their institutions and exercise their authority over the territory through those institutions” [the Chief Justice said], ‘...I do not accept the ancestors on the ground’ behaved as they did because of ‘institutions’. Rather I find they more likely acted as they did because of survival instincts which varied from village to village.⁵⁶

The definition of norms of behaviour was accomplished in other than strictly legal ways, although law was a handmaid of the process. For example, the process of assimilation was both legal and extra-legal. In Canada, Aboriginal survivors of residential schools have commenced litigation against churches and governments for *inter alia*, the tort of cultural genocide.⁵⁷ They argue that the schools were mandated to defile and debride Aboriginal languages and cultures with a view to eliminating them. Official assimilationism took a modern face in the Chretien White Paper of 1969.⁵⁸ In Australia, the Commonwealth had an official immigration policy known as the White Australia policy in force until 1975. In the context of Aboriginal people, states such as Western Australia, through the auspices of churches, had policies that required that children of mixed race be taken from their families and taken to facilities where they were taught to be less Aboriginal. The objective was that lighter coloured people could inter-marry and

⁵⁶ *RCAP*, *supra* note 44 at 17, citing the trial decision in *R. v. Delgamuukw*, [1991] 3 W.W.R. 97 at 372-373.

⁵⁷ Excellent links are available at the Turtle Island website, online:

<http://www.turtleisland.org/front/front.htm> and through the University of Saskatchewan's Native Law Centre online: University of Saskatchewan <http://www.usask.ca/nativeLaw/rs.html>

⁵⁸ Government of Canada, *Statement of the Government of Canada on Indian Policy 1969* (Queen's Printer: Ottawa, 1969). The language of the policy is, of course, soothing. For example, it talks about “positive

in due course become white. Aborigines were felt to be so inferior that their race would simply die out on its own.⁵⁹

Settlers' assertion of sovereignty over Aboriginal land is a *fait accompli* as a matter of colonial international law. The need for modern states to have stable borders dictates that the injustices of the past be subject to,

...a normative trend within international legal process toward *stability through pragmatism* over instability, even at the expense of traditional principle.... If international law were to fully embrace ethnic autonomy claims on the basis of the historical sovereignty approach, the number of potential challenges to existing state boundaries, along with the likely uncertainties of having to assess competing sovereignty claims over time, could bring the international system into a condition of legal flux and make international law an agent of instability rather than stability.⁶⁰

3.6 Classification

The trichotomy of religious, commercial and Aboriginal outlined below emphasizes the difficulty in attempting to explain the practice of restorative justice by grouping it. There is no consensus about taxonomy. There are a variety of origins, of philosophies, and of

recognition by everyone of the unique contribution of Indian culture to Canadian life." (at 6) It is, in any event, a very clear statement of the history of the Canadian government's Aboriginal policy.

⁵⁹ The fact that aborigines had successfully occupied the continent for tens of thousands of years did not seem to penetrate the consciousness of Australian officialdom. See generally Q. Beresford & P. Omaji, *Our State of Mind: racial planning and the stolen generations* (Fremantle Arts Centre Press: Fremantle, 1998). Also see Human Rights and Equal Opportunity Commission, *Bringing Them Home* (Human Rights and Equal Opportunity Commission: Sydney, 1997). The full report of the National Inquiry into the separation of Aboriginal and Torres Strait Islanders from their families, as tabled in the Australian Commonwealth Parliament, May 26, 1997, can be found online: AustLII

<http://www.austlii.edu.au/au/special/rsiproject/rsjlibrary/hreoc/stolen> The Australian Government has refused to acknowledge that genocide took place and will not apologise. C. Cunneen, "Genocide and the Forced Removal of Indigenous Children from their Families" (1999) 32 *Austl. Crim. & N.Z.J.* 124. For Canadian church and state apologies see online: http://www.ainc-inac.gc.ca/gs/schl_e.html http://www.wanglican.ca/acip/apology_ft.html <http://www.ucan.org/HFApology.htm> <http://www.indigenouspeople.org/natlit/apologyv.htm>

types of practices. They do not line up neatly with one another. The Canadian Law Commission describes three main types of restorative programmes.⁶¹ The first, Victim Offender Reconciliation (VORP) would seem to include Victim-Offender mediation and constitutes the earliest (formal and modern) form of the practice, having emerged in Kitchener, Ontario in 1975. The second type, really a later variant of the first, is the Family or Community Group Conference. These larger gatherings combine VORP with family and community reintegration. They are also the locus for “reintegrative shaming” in Braithwaite’s model.⁶² The third type is sentencing circles, a purported adaptation of Canadian Aboriginal tradition to criminal sentencing. These are largely driven by justice system stakeholders.⁶³ One might include healing circles in this category for while they may deal with matters inappropriate for a sentencing circle *per se* they are nevertheless very much a creature of the formal justice system.⁶⁴ To these should be added Youth

⁶⁰ S. J. Anaya, “The Capacity of International Law to Advance Ethnic or Nationality Rights Claims” 75 Iowa L. Rev. 837 at 840.

⁶¹ Ferguson, *supra* note 29 at 15

⁶² J. Braithwaite, *Crime, Shame and Reintegration* (Cambridge: Cambridge University Press, 1989)

⁶³ Indeed, without having these stakeholders pushing the process, they seem to fall into disuse. This is largely the situation in Northern Saskatchewan. This may be contrasted with northern Manitoba where the MKO/ First Nations justice strategy is in full operation. It was surveyed by the Commission on First Nation and Métis People and Justice Reform (Littlechild Commission) in its November 20th, 2003 interim report online: Justice Reform Commission http://www.justicereformcomm.sk.ca/final/jrc_11_20_03.pdf at 38. That initiative arose more than partly at the behest of local Crown prosecutors who were motivated to provide the discretionary element to make the process possible. (Personal communication, Thompson Crown prosecutor, Winnipeg Restorative Justice Conference, September 2001).

⁶⁴ An example is *R. v. Joseyounen* (1996), 1 C.N.L.R. 182. While the case has been noted for Fafard J.’s formulation of sentencing circle guidelines, it is also useful for the judicial recognition of community input into the matter and the need for healing. Bob Joseyounen severely injured his brother by hitting him in the head with a fireplace poker. The victim is still disabled. The pre-sentence report recommended a circle be held and contains an acknowledgement by all that the accused would be going to jail. Fafard J. felt he had no choice but to send Joseyounen to the penitentiary and so no community sentence was possible. Nevertheless, the circle was held to provide for a post release plan and to engender community and family healing. Healing circles have also come to encompass the proceedings of extra-judicial bodies, like First Nations justice committees, who hold circles without the court party being present, in order to arrive at restorative recommendations for sentencing. These are generally less serious matters and, except for the sentencing element, are really family/community conferences. A circle of this nature may handle both matters totally diverted and those returning to court. A current example is the Stanley Mission Justice committee.

sentence and disposition reviews⁶⁵, parole eligibility decision-making, and post-release programme planning.

This classification does not include advocacy, such as prisoner's rights, which are very much a product of the civil rights perspective from which restorative justice has emerged.

This three part classification scheme based on type of programme is not particularly useful, for the distinction between the first two categories is one of degree, rather than type. The latter type is distinct, for it is part of a justice system process. However, it can be argued that the distinction is only a matter of the degree to which the decision-making process is removed from the justice system and put into the hands of non-system actors.

Scheme-based typologies suffer for being attempts to draw artificial lines on the vast landscape of ideas about how to do Restorative Justice. Origin, or model typologies, are more useful.

3.7 Bureaucratization

A theme that is becoming more apparent, and which will eventually render the religious/indigenous distinction moot, is the expansion of political interest and the consequent growth of a bureaucratic model of restoration. As noted below (at note 129), changes in government in New Zealand mark various points in the growth of justice system-based restoration in that country. More generally, ideas that began in the religious, commercial and indigenous spheres are now being taken over by mainstream justice as accepted *modii*

⁶⁵ For example, the Saskatoon Youth Court case of *R. v. T. D.* (unreported, 2001), before Whelan PCJ, involved having a circle consider a *Young Offenders Act* disposition review for a boy in a treatment centre

operandi.⁶⁶ The difficult reconciliation of the language of restoration with “tough on crime” and fear of crime rhetoric is well under way. Resistance has faded in the recognition, after scores of reports and identical recommendations, that Aboriginal contact with the justice system is a serious problem.⁶⁷ In the meantime, the expansion of interest, and popularization of practice has significantly advanced the cause. However, there is a downside to the conversion from a small-scale operation run by dedicated enthusiasts into a production line system controlled by bureaucrats and treasury officials. Resourcing may reduce volunteer burnout, but in exchange one will experience an increasing formalization of processes. One may illustrate the issue by referring briefly to the debate over criteria for sentencing circles. Let us assume, without arguing the point, that circles are indeed indigenous,⁶⁸ rather than an indigenisation. There are two quite different approaches. One, responding to sentiments like those emanating from

under a custodial disposition.

⁶⁶ The interest being demonstrated by the Canadian government is demonstrated by the recent profusion of sponsored writing on the topic. Five years ago, the federal Department of Justice was (through the Aboriginal Justice Learning Network) publishing papers like B. Stuart *Building Community Justice Partnerships: Community Peacemaking Circles* (Ottawa: Minister of Public Works and Government Services Canada, 1997). Since then, writing has become more mainstream. The Department, the Law Commission and the Federal /Provincial/Territorial Roundtable on Restorative Justice papers have published on Restorative Justice over the last five years. Topics include not only how-to materials, but also theoretical analyses, frameworks, meta-analyses of efficacy, and so on. The explosion in government interest is mirrored in antipodean writing as well.

⁶⁷ Kwochka *supra* note 6 at 156 observes in this “an awareness that earlier recommendations were not effective or that current strategies are not effective.” He cites the *Report of the Task Force on the Criminal Justice System and its Impact on the Indian and Métis People of Alberta- Justice on Trial* (Edmonton: Government of Alberta, 1991) Vol. 3 at 4-4 (hereinafter the Cawsey Report); The material on Aboriginals in contact with the criminal justice system is voluminous. In addition to scores of government reports, see, for example, R. Gosse, J. Y. Henderson and R. Carter *Continuing Poundmaker and Reil's Quest* (Saskatoon: Purich Publishing, 1994), T. Quigley “Are we doing anything about the Disproportionate Jailing of Aboriginal People?” 42 C.L.Q. at 129. Interestingly, this discourse is largely absent from the Archambault Report that preceded Bill C-41: Canadian Sentencing Commission, *Sentencing Reform: a Canadian Approach* (Ottawa: Supply and Services Canada, 1987). This is not to say that Canadians are becoming less punitive. Indeed, as crime touches the lives of middle class people more, they have become less inclined to support penal welfarism. See C. Cesaroni & A. Doob, “The Decline in Support for Penal Welfarism,” (2003) 43 Brit. J. Crim. 434.

⁶⁸ For example, the Cree participants in the circle in *Taylor* (*supra* note 33) were not impressed with the trial Court's use of a Peigan (Blackfoot) rather than a Cree format for the circle.

conservative judges like those on the Yukon Court of Appeal,⁶⁹ is disposed to set out formal requirements that resonate with Eurocentric notions of predictability, fairness and quintessential liberal equality before the law. An example is the seven-fold test promulgated by Fafard, PCJ in *Joseyounen*.⁷⁰ In the alternative, Bayda J. in dissent in *Morin* would have applied a flexible test that has as its primary determinant the willingness of a community to play a major role in restoring an offender.⁷¹ McNamara believes this rigidity and consequent appellate supervision to be one of the reasons for the demise of circle sentencing in Northern Saskatchewan.⁷² In other arenas, the chilling effect of appellate review has been more apparent. The Kitchener Victim-Offender project, the first of its kind, was severely curtailed by an adverse ruling by the Ontario Court of Appeal.⁷³

Restorative justice could not be called a success if it simply substituted one “monopoly of professionals” (to use Stuart J’s term) for another.⁷⁴ It would indeed be ironic if courts and lawmakers constructed it, in the process of making it mainstream, as politically acceptable because it is really either nothing different, or simply a different way of doing the same thing.⁷⁵

⁶⁹ *R. v. Johnson* (1994), 31 C.R. (4th) 262 per McEachern CJ at 296, per Cumming JA at 278, *R. v. Johns*, [1996] 1 C.N.L.R. 172 at 78 per Prowse, JA.

⁷⁰ *Supra* at note 61.

⁷¹ *R. v. Morin* (1995), 101 C.C.C. 3d 124, [1995] 4 C.N.L.R. 37 at 69 (C.N.L.R.). Lower courts in the Yukon have shied away from fettering themselves as suggested by their own Court of Appeal.

⁷² McNamara *supra* note 4 at 238. There are a number of other reasons, including community burnout, lack of legal aid resources, and a profound judicial scepticism regarding northern communities’ abilities to handle anything other than trivial matters. (personal observation 1995-2003)

⁷³ *R. v. Hudson*, unreported oral judgement, January 7th, 1982 cited in Llewellyn and Howse, *supra* note 11 at 64-65.

⁷⁴ *R. v. Moses*, [1992] 3 C.N.L.R. 116, 71 C.C.C. (3d) 347 at part 2(i).

⁷⁵ The Supreme Court’s struggle with the language of 718.2(e) of the Criminal Code in *R. v. Gladue supra* note 8 is an example of the tension between the paradigms being played out in a judicial setting. Judge

Accordingly, and to bring together a few themes, taking existing practices of dominant colonizer cultures, renaming them “restorative” and then applying them to indigenous people in the guise of restoration, is a deceptive and dangerous practice. It is appropriate for a culture, with a given value-set, to define its restorative justice in whatever way reflects that culture, be it religious, commercial, bureaucratic or something else. For example, since July 1992 the Western Australian Ministry of Justice has operated a specialist Victim-offender mediation unit. Two modalities are used; both of which are victim-oriented adjuncts to the justice system. They are “protective mediation,” (a process “which enables victims [primarily of domestic violence] and offenders to reach agreement about the level and nature of contact (if any) which will occur between them”⁷⁶ after their abusers are released from prison) and Reparative mediation. It follows the classic VORP model to allow the victims of convicted criminal offenders to receive some sort of compensation, monetary or otherwise, prior to sentence. Judges and magistrates “may” consider any mediation that has occurred when passing sentence.⁷⁷ In contrast, outside the Victim-Offender unit, the Ministry of Justice exemplified restorative justice as prison work performed outside of the prison gates, “coupled with loss of liberty and rehabilitation as key components of an offender’s sentence.”⁷⁸ A photograph of this

Turpel-Lafond of the Saskatchewan Provincial Court raised this point in the planning of the Saskatchewan Cree Court. See the discussion of the Cree Court in chapter five.

⁷⁶ Wauchope, M. “Protective mediation as a contributing process in the prevention of domestic violence” *West Australian Social Worker*, (August 1998) 12

⁷⁷ West Australia Ministry of Justice *Victim-offender mediation unit, Information for the community* (MOJ: Perth, January 1998) Judicial scepticism (and occasional obstruction), are well noted by D. Clairmont and R. Linden. *Making it work: Planning and evaluating community corrections & healing projects in Aboriginal communities* (Ottawa: Solicitor General Canada, 1998) online: Government of Canada <http://www.sgc.gc.ca/epub/Abocore/e199805b/e199805b.htm>

⁷⁸ West Australia Ministry of Justice *WA Justice*, (Perth: Ministry of Justice, January 1998) at 8.

“restoration” shows a white guard with straw hat and sunglasses directing the digging of two Aboriginal prisoners. This is unlikely to provide the subjects with an appreciation of their offence, help them empathize with the victim, understand their motives in offending, feel remorse for having hurt others, resolve their inner tensions or rebuild their relationship with their community. In this example, the punitive values of the dominant society are relabelled and applied to Aboriginal people.

Braithwaite argues that there is nothing anti-restorative about giving effect to the punitiveness of punitive people. It is an acceptable empowerment.⁷⁹ What is not acceptable, he suggests, is the disempowerment caused by stigmatization and humiliation.⁸⁰ I would take this a step further and suggest that it is the re-branding that is the most pernicious revision.

Bureaucratisation brings with it a culture of accountability. Recidivism-reduction is an attractive measure. Usage is, however, problematic.

Although there is a lack of good research to conclusively establish the superiority of informal responses to reducing youth crime in terms of reducing recidivism, it is clear that for a significant range of cases informal responses are no worse than formal court-based responses for achieving accountability and protecting society, and there is the prospect that these approaches may increase the engagement of victims and offenders in the justice system and perhaps even reduce recidivism.⁸¹

⁷⁹ Indeed, he argues that restorative processes are an effective mechanism for reducing people's punitiveness. See Braithwaite, J. *Restorative Justice and Responsive Regulation* (New York, Oxford University Press, 2002) at ch. 3.

⁸⁰ His oft-used example is that of the youth whose 'restorative' conference in Canberra felt an appropriate disposition to be that the offender be required to wear a shirt with the logo "I am a thief", upon it. See Braithwaite, J. "Principles of Restorative Justice" in Von Hirsch, A. et. al. eds. *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms* (Oxford: Hart Publishing, 2003) at 3-5.

⁸¹ N. Bala, "Diversion, Conferencing and Extrajudicial Measures" (2003) 40 *Alta. L. R.* 991 at 993.

Bala goes on to point out that the only Canadian evaluation was some twenty years ago and did not find a reduction in recidivism as a result of a diversionary process.⁸² That work was based on a cohort of youths diverted in 1977 for largely property related matters. The research was sufficiently funded to allow for a large number of researchers and some quite complex and comprehensive data gathering. The authors noted that, “This is basically a single case study of one diversion program and drawing strong policy implications from one program and study is hazardous at best.”⁸³ They found that while court ordered dispositions were significantly more serious than those that resulted from the diversion committee, the impact on the juveniles in the areas of recidivism and sense of stigma were the same for diverted and non-diverted matters.⁸⁴ Overseas,

There have recently been a few studies from Australia and New Zealand which report that *some* types of diversion programs may actually reduce recidivism, and in particular that programs that involve victims and offenders and have some “restorative justice” components may have lower recidivism rates than court – based responses for comparable groups of young offenders.⁸⁵

The paucity of data is indubitably a function of the cost of gathering it. Process evaluation is far cheaper than outcome evaluation. It is, of course, perfectly valid if one

⁸² M. E. Morton, W. G. West, “An experiment in diversion by a citizen committee” in R. Corrado, M. LeBlanc & J. Trépanier, *Current Issues in Juvenile Justice* (Toronto: Butterworths, 1983)

⁸³ *Ibid.* at 206.

⁸⁴ Interestingly, the authors did not see this as a positive. At the time, their focus seems to have been on labelling, rather than sanction and accordingly the attraction of parsimony seems to have escaped them. Twenty years ago, significant criminological discourse was directed to the oppositional theories of deterrence and labelling. The former held that punitive corrections would deter, the latter that they would simply put a label on a person who would then act in accordance with it.

⁸⁵ Bala, *supra* note 81 at 995. Bala cites two papers, one by New Zealand criminologists A. Morris and G. Maxwell, (“Restorative Conferencing” in G. Bazemore and M. Schiff, eds. *Restoring Community Justice: Repairing Harm and Transforming Communities* (Cincinnati: Anderson, 2001) the other by Queensland criminologist K. Daly (“Conferencing in Australia and New Zealand: Variations, Research Findings and Prospects” in A. Morris and G. Maxwell, eds. *Restorative Justice for Juveniles: Conferencing, Mediation and Circles* (Oxford: Hart Publishing, 2001). To these should be added the five-year Reintegrative Shaming Experiment (RISE) discussed briefly *infra* at note 107 and thereafter. See L. W. Sherman, H.

accepts, either *a priori* that the process will deliver the result if followed, or if the process is the objective. Arguably, if the process returns power over justice to communities, then the fact of its operation is significant. If an evaluation of the programme reveals that it is theoretically and operationally consonant with, for example modern Aboriginal concepts of justice, and works in a decolonising way, then its viability is surely supportable even if the motivation for it (and the funding available for evaluating it) have been done on the cheap and preclude proper outcome evaluation. What one notes in all of the studies cited (and particularly in the RISE evaluation), is that defensibility of methodology is expensive indeed.

Of course, recidivism reduction is not the only standard applied to corrections. If it were, there would be no jails. A recent meta-analysis of 41 components of published programme evaluation studies measured victim satisfaction and offender opinions of fairness. Some of the components were fully restorative (11 conferencing based programmes), some partly (13 victim-offender mediation based programmes) and the balance non-restorative in a number of ways. It concluded that, using these measures, fully restorative programmes were significantly more satisfactory.⁸⁶

3.8 A Theoretical Basis

Strand & D. Woods, *Recidivism patterns in the Canberra Reintegrative Shaming Experiment*, online: Australian Institute of Criminology <http://www.aic.gov.au/rjustice/rise/recidivism/>

⁸⁶ McCold & Wachtel *supra* note 17.

There have been a number of attempts to provide a theoretical basis for restorative justice.⁸⁷ Braithwaite and Pettit's *Not Just Deserts: A Republican Theory of Criminal Justice*⁸⁸ in 1990, was not so intended. However it, and Braithwaite's *Crime, Shame and Reintegration*⁸⁹, published the previous year, do just that. They are unique, and canvassed here in some depth, because they not only attempt to locate restorative justice within criminal justice theory generally but in addition, their interrelated practical prescriptions have been highly persuasive at the level of practice. They later argued⁹⁰ that the setting of a theoretical base for restorative justice is critical to legitimize its place in not only the realm of sentencing theory, but also more generally in the design of legal institutions.⁹¹ In *Not Just Deserts*, they argue that one should approach theorizing on criminal justice in a holistic way. Because the various areas of action are so interrelated and intertwined, actions in one area directed at a specific objective, may have ramifications in another that are counter-productive to the whole. If one wishes a particular result in one area of the system, it may be inefficient to focus on that area and neglect another. Action in an area outside the focus area may be a more effective way of

⁸⁷ See for example, W. Cragg *The Practice of Punishment: toward a theory of restorative justice* (London: Routledge, 1992) and C.G. Brunk, "Restorative Justice and the Philosophical theories of Criminal Punishment" in M. Hadley, *The Spiritual Roots of Restorative Justice*, (Albany: State University of New York Press, 2001). Howard Zehr was so taken with Brunk's argument that retribution has a place in restoration that he totally changed his belief that the two are incompatible. See H. Zehr, Book Review of *The Spiritual Roots of Restorative Justice* by M. Hadley (2003) 43(3) Brit. J. Crim. 653. Also see generally the papers in E. G. Weitekamp & H-J. Kerner *supra* note 17.

⁸⁸ J. Braithwaite & P. Pettit, *Not Just Deserts: a Republican Theory of Criminal Justice* (Oxford: Oxford University Press, 1990)

⁸⁹ *Supra* note 62.

⁹⁰ J. Braithwaite and P. Pettit, "Restorative Justice and the Republican theory of Criminal Justice: an Explanatory and Normative Connection" in H. Strang and Braithwaite, J. eds. *Restorative Justice: Philosophy to Practice* (Ashgate: Sydney, 2000)

⁹¹ Braithwaite & Pettit *ibid.* is an interesting and ambitious expansion of restorative justice. He extends the theoretical roots into international human rights documents and concurrently, the impetus of restoration into such diverse social elements as the women's movement, indigenous self-determination, and the democratisation of family life. "Family, school, workplace, tribe, community and international relations all

achieving the desired result. Similarly, action in one area may have undesirable and counter-productive consequences in another. A comprehensive normative theory will be complete, coherent, and systemic.⁹² It should be teleological, and consequentialist rather than deontological.

The strength of the deontological is its lack of concern with uncertainty: its weakness is that it does not deal well with uncertainty that arises. It gives axiomatic status to a set of constraints and then evaluates the system on how well it makes choices that epitomize these axiomatic constraints. For example, in criminal justice retributivism as a deontological approach may find a place in sentencing, in just deserts. However it is generally restricted to that final step for it “would be bedevilled by the uncertainties associated with the actions of police or prosecutors” further upstream.⁹³

The formulation of a deontological theory, they argue, inherently involves significantly more complexity in practice than the construction of a consequentialist one. Accordingly, one should resort to constraint-based theory only when one cannot rationally make the consequentialist one work.⁹⁴ Can a consequentialist theory, based on the construction of

seem sites of restorative justice of comparable importance to law.” (at 19). This is perfectly consistent with the thesis espoused here; that the disassociation of the *locus* of justice from community is destructive.

⁹² An example given is that of truth in sentencing or determinacy in the sentencing process. The result, according to the authors, is not a change in the fact that discretion is exercised, but rather a displacement of the discretionary act to a different person in the system, for example, the prosecutor. This, they argue, is counterproductive because of the position of the prosecutor, as opposed to that of the judge, in the criminal justice system. All of this reflects a certainty of inertia. By this I mean that the system will, despite dabbling in its structure (by a reallocation of discretion, in this example) continue to do things in a way that achieve the same results as before, albeit by a different route. In this case, the conservative reforms are thwarted as a result of systemic inertia. Inertia does not play favourites.

⁹³ Braithwaite & Pettit, *supra* note 88 at 28.

⁹⁴ I think that what they are really arguing is that deontological theory has its limits at the level of its own structure, whereas consequentialists get into trouble at the level of justification.

consequentialist targets, work? To do so it must satisfy three practical considerations. It must be uncontroversial in the milieu of the justice system, it must provide for a stable distribution of legal rights which that legal system values, and it must not incite demands of the system that could never be met. Crime preventionism justifies punishing the innocent, and so it fails. Utilitarianism is too imprecise and expensive.⁹⁵

The solution is a system based on a republican ideal of personal freedom, the maximization of the dominion of individual people. This is more than the negative right not to be interfered with. Republicanism puts this in a social context. There are others in society and they do not interfere with one. One is fully enfranchised as a citizen of one's society. This type of dominion exists only in, and is exemplified by, society as opposed to the liberty of classic liberals, which can exist in, and be exemplified by, an asocial context. This sort of liberty is measured by how one fares in society compared with how fully others are exempted from restraint. One knows, and most others in one's society know, that one "enjoys no less a prospect of liberty than the best that is compatible with the same prospects for others."⁹⁶ This goal, they argue, is uncontroversial, distributes the good in a stable way, and is attainable.⁹⁷ Many types of crime invade one's dominion and the dominion of others in society. Unlike simpler harm reduction targets, dominion-seeking deals with the secondary effect of crime (collateral damage, if you will) as well as the issue of punishing the innocent, from the point of view of the effect on the dominion of bystanders. These bystanders's dominion will be lessened because they know coercive

⁹⁵ What is happiness, after all?

⁹⁶ *Supra* note 88 at 65.

⁹⁷ *Ibid.* at 59.

power threatens them. This power can be that of the criminal, or that of the state being used illegitimately. In either case, there is a reduction in the dominion of the bystander.

Republicanism dovetails into restorative justice. It emphasizes four key features. They are parsimony, due process to check arbitrary or capricious abuses of criminal justice powers, reprobation, and reintegration. In their 2000 work, Braithwaite and Pettit argue that a republican theory of justice provides a theoretical foundation for each element that can be evaluated and justified from both a normative and an explanatory standpoint. By the former, they mean that, on reflection, most people would accept the “plausible normative ideal” and find it “significantly attractive.”⁹⁸ The latter means that the theory must be effective in explaining what actually might and should happen. To take one of these features as an example, let us look at the author’s evaluation of reprobation and reintegration, two salient features of restoration. They derive straightforwardly from the “republican ideal of non-domination,”⁹⁹ because,

Restorative justice conferences offer the best prospect of achieving a process, and an agreed outcome, that will communicate the reason why the offence is objectionable. They also promise the best chance of reintegration ...They are designed to maximize social support for both offenders and victims...¹⁰⁰

The absence of coercion is apparent in the desired outcome: the offender comes to share the values of others in her society. “In fact, most protection of dominion is secured by

⁹⁸ *Supra* note 90 at 145.

⁹⁹ *Ibid.* at 159.

¹⁰⁰ *Ibid.* at 160.

informal social control in the community, a type of social control the criminal justice system should seek to foster rather than supplant.”¹⁰¹

This explains the translation of the foundation into actuality. It is right to give an offender the freedom to choose to do the right thing, to understand that what she has done is wrong, and to make amends accordingly. The empirical agency at work was thought to be “reintegrative shaming.”¹⁰² The idea is simple and is offered to provide a “practical basis for a principled reform of criminal justice practices.”¹⁰³ Disapproval of a bad act is communicated (and accepted by the perpetrator) while sustaining the identity of the actor as good. From the victim’s side of the conference comes shame. From the offender’s comes reintegration into the offender’s community once suitable redress and apology have been made.¹⁰⁴ Shame alone is destructive of relationships, it is an element of a “degradation ceremony,”¹⁰⁵ but in combination with reintegration, the result is a powerful healing force. The process puts “identities in a social crucible” and re-forges them.¹⁰⁶ The ceremony is adaptable to the circumstances then extant and is culturally plural. So says the theory.

These assertions are somewhat problematic, particularly in an indigenous context. Most restoration schemes do not employ shaming techniques.¹⁰⁷ One that is premised on it is the Reintegrative Shaming Experiment (RISE) recently completed in the Australian

¹⁰¹ *Supra* note 88 at 118.

¹⁰² Braithwaite, *supra* note 62.

¹⁰³ J. Braithwaite & S. Mugford, “Conditions of Successful Reintegration Ceremonies,” (1994) 34 *Brit. J. Crim.* 139 at 140.

¹⁰⁴ *Ibid.* Also see Braithwaite, *supra* note 39 at 323.

¹⁰⁵ H. Garfinkel “Conditions of Successful Degradation Ceremonies,” 61 *Am. J. Sociology* (1956) at 420.

¹⁰⁶ Braithwaite and Mugford, *supra* note 103 at 159.

Capital Territory. It involved a 90-minute conference facilitated, notably, by a police officer. The process focuses on the offender's act, the harm caused, and an agreement between the police and the offender as to reparation.¹⁰⁸ The process' "procedural minimalism" is a way of making the experience "culturally meaningful."¹⁰⁹ This has been criticized as what Blagg calls a continuation of the "elimination of considerations of social issues from judicial calculus."¹¹⁰ If the "aim of restorative justice is restoration of the relationship to one of social equality"¹¹¹ then how can the one-off, police-run (or gate-kept), act-focussed shaming event possibly be any more than another colonial experience? Blagg also notes the restriction of restorative justice practices to "hegemonically defined criminality," wrongs defined by the dominant epistemology. The structure of criminal justice as imposed on indigenous peoples is a colonial invention. Why would any Aboriginal person wish to be restored into an alien vision? Worse, what attraction, what legitimacy could the process have when the outcome is alienating (and alienation)?¹¹²

The reintegrative aspect of shaming is predicated on the meeting of certain preconditions that are fundamental to the legitimacy of the process. The participants must share a commonality of values and beliefs including mutual trust. The office of the facilitator-

¹⁰⁷ Von Hirsch and Ashworth, *supra* note 41 at 309.

¹⁰⁸ Braithwaite was very much involved in the development of the project. For the final report see L. Sherman et al., *supra* note 85. For an interesting interim report see L. W. Sherman et al. (1998) *Experiments In Restorative Policing, A Progress Report to the National Police Research Unit on the Canberra Reintegrative Shaming Experiments (RISE)* online: Australian Institute of Criminology <http://www.aic.gov.au/rjustice/rise/progress/1998.html>

¹⁰⁹ Data from Hong Kong, a society with high levels of communitarianism where people have a high stake in conformity, shows that reintegration, as a corollary to shaming, did not follow from this social structure. See J. Vagg, *Delinquency and Shame, Data from Hong Kong* (1998) 38 *Brit. J. Crim.* 247. *Contra* with respect to Japan, see D.T. Johnson, *The Japanese way of Justice: Prosecuting Crime in Japan*, (New York: Oxford University Press, 2002)

¹¹⁰ Blagg, *supra* note 42 at 10.

¹¹¹ Llewellyn & Howse, *supra* note 11 at 44.

mediator must be respected in that community.¹¹³ This is highly problematic in the context of police-run conferencing. Can the police culture be transformed by conferencing to the point that there is sufficient commonality?¹¹⁴ It would certainly be a departure from the culture of reactive policing.¹¹⁵ Can the collective experience of Aboriginal people be changed? It is unrealistic to expect Aboriginal youth to embrace the police driven model of conferencing. In Australia, a survey of 171 Aboriginal youth in custody indicates that 85% of respondents reported having been “hit” by the police. 81% had been subject to racist abuse. 63% had been hit by objects such as flashlights and batons.¹¹⁶ Aboriginal young women have been subject to additional forms of abuse by being punched in the head, hit by a baton and referred to as “black sluts”, “black bitches” and “black moles.”¹¹⁷ In Canada tales of ‘starlight cruises’ and over policing of minor offences are common.¹¹⁸

Accordingly, the efficacy of shaming generally is unproven.¹¹⁹ The final evaluation of RISE does not bear out the theory in *toto*. It establishes that conferencing of this sort is

¹¹² Blagg, *supra* note 42 at 6.

¹¹³ M. Sauve, “Mediation: toward an Aboriginal Conceptualization” (1996) 3(80) *Aboriginal Law Bulletin* 1996 at 10

¹¹⁴ One of the positive features of the police-run conferences at Wagga was a transformation of police attitudes toward youthful offenders. T. O’Connell, *From Wagga Wagga to Minnesota* (Paper presented to the First North American Conference on Conferencing, Minneapolis, August 8, 1998) online: Restorative Practices Website http://www.iirp.org/library/nacc/nacc_oco.html

¹¹⁵ Examples just of Saskatchewan responses are the Littlechild Commission, the Stonechild inquiry and the Federation of Saskatchewan Indian Nation’s investigative unit.

¹¹⁶ C. Cunneen, *A Study of Aboriginal Juveniles and Police Violence* (Sydney: Human Rights Australia, 1990)

¹¹⁷ C. Cunneen, “Community Conferencing and the Fiction of Indigenous Control” (1997) 30 *Austl. Crim. & N.Z.J.* 292

¹¹⁸ RCAP, *supra* note 44 at 39. Also see FSIN submission *supra* note 43.

¹¹⁹ Perhaps it is better to say that its effectiveness is a matter of some debate. Some, like Judge Bria Huculak of the Saskatchewan Provincial Court, are skeptical that it works. (Personal communications 2000-2003). Others point out the effectiveness in societies like Japan of “inducing guilt”. See Johnson *supra*

effective in reducing recidivism for violent youth offenders, but has little effect on other types of offending compared with court.¹²⁰

Blagg argues that shame is culturally relative. He decries “food-hall” justice that posits that shame in Aboriginal justice ceremonies is a constant.¹²¹ “The presumed applicability of reintegrative shaming and its expression in a conferencing model grossly simplifies Indigenous cultures...”¹²² One only has to consider an initiative which attempts to graft Wagga shaming onto the Ojibwa techniques of non-confrontational correction described by Ross, to see the irreconcilability.¹²³

3.9 The three origins

3.9.1 Religious

The VORP model of restoration draws heavily on religious roots.¹²⁴ It began in 1974, in Kitchener, Ontario when two Mennonite men arranged Victim–offender reconciliation in the case of two young men from Elmira, Ontario who had pled guilty to vandalizing 22 properties. Zehr writes that,

note 109. The RISE experiment establishes that offender perceptions of reintegration are certainly higher after conferencing than after court. Sherman *et al*, *supra* note 108. By comparison, the Nova Scotia Restorative Justice programme (currently being evaluated by Dr. D. Clairmont of Dalhousie) is showing “modest” added value in comparison to the simple alternative measures programme that it succeeds. The sticking point is the application of restorative principles to more serious cases. D. Moulton, “Restorative Justice program spans Nova Scotia system” (2004) 24(2) *Lawyers Weekly* at 17.

¹²⁰ Sherman *et al*. *supra* note 108.

¹²¹ See Blagg *supra* note 42 and H. Blagg, “A Just Measure of Shame? Aboriginal Youth and Conferencing in Australia” (1997) 37 *Brit. J. Crim.* 481.

¹²² Cunneen, *supra* note 117 at 300-301.

¹²³ Ross, *Dances supra* note 4.

¹²⁴ It is often asserted that “restoration was the primary focus of biblical justice systems.” New Zealand Catholic Bishop’s Conference, “Creating New Hearts: Moving from Retributive to Restorative Justice” in

The VORP [victim offender reconciliation] movement desperately needs the church if it is to survive in a form that matters.... The church can provide the kind of independent value base and independent institutional base which is necessary to carry the vision. Motivated by a biblical vision of justice as restoration, perhaps the church can continue to plant plots which will experiment and demonstrate another way.¹²⁵

A typical example of the religious approach is the restorative justice programme at the Center for Peacemaking and Conflict Studies, Fresno Pacific College that emphasises VORP. It rejects the “myth of redemptive violence” as a product of our society’s preferred response, vengeance.¹²⁶ The emphasis is forgiveness and reconciliation. In Canada, Prof. Michael Hadley of the University of Victoria recently stated that, “[t]he language of restorative justice is heavily theological, whatever your faith tradition... Faith traditions have a very important role to play in restorative justice.... When the spiritual element is abandoned, things get off track.”¹²⁷

New Zealand’s adult experience is a good example of how restorative justice can become a political matter and how it can move from religious roots to policy. In 1998, the conservative government, “...decided not to fund any new initiatives in the area of restorative justice at this time.”¹²⁸ Three years later a labour-led coalition announced new sentencing legislation that requires judges to consider restorative processes that have been

H. Bowen and J. Considine, eds. *Restorative Justice: Contemporary Themes and Practice* (Lyttelton: Ploughshares Publications, 1999) at 161. Also see H. Zehr, *Changing Lenses*, *supra* note 10.

¹²⁵ Zehr *supra* note 10 at 174.

¹²⁶ Claassen’s work is available online: <http://www.fresno.edu/pacs/rjprinc.html>

¹²⁷ M. Hadley, “Reconciliation, Forgiveness, Peace” (Lecture presented to “Restorative Justice 2001” Sept. 25th, 2001, Winnipeg, Manitoba) *The Prairie Messenger* (October 3, 2001) 8.

¹²⁸ New Zealand Ministry of Justice *Restorative Justice: the Public Submissions* (Wellington: Ministry of Justice, 1998) online: Government of New Zealand

http://www.justice.govt.nz/pubs/reports/1998/restorative_justice/index.html at 6.

entered into.¹²⁹ A restorative justice manual has been prepared along with a comprehensive conferencing manual.¹³⁰ Prior to this, adult restorative processes were religion-based.¹³¹ The only programme in Auckland, for example, was a pastor led religious group called Te Oritenga and its offshoot Justice Alternatives Inc., which dealt with 90 or so adult matters over the period 1994-1998 using mediation conferences.¹³² Te Oritenga worked with sympathetic judges to refer matters and implement its arrangements.¹³³ On marae sessions were an option for Maori participants but the programme orientation was religious rather than indigenous.¹³⁴ The *Sentencing Act 2002* introduced significant reforms into adult sentencing. In addition to reformulating sentencing principles in a way similar, at least in intent, to Canadian Bill C-41, it also

¹²⁹ *Sentencing Act 2002* (NZ) 2002/9. The announcement was made July 11th 2001. The legislation received Royal Assent May 5th, 2002. The political agenda is rarely made as clear as in this government-to-government comparison. The chronology is important. The seminal *Children, Young Persons and their Families Act 1989* (NZ) 1989/24 was passed by the Labour government of David Lange in power from 1984 to 1990. It was replaced by a more conservative government of Jim Bolger (and later Jenny Shipley) from 1990 to 2000, when Labour was returned to power. Funding for the new Labour-sponsored scheme is not considered adequate; it still relies on volunteers. (Personal communication with Michael Hanley, Auckland Restorative conference facilitator, January 13th, 2002.) In the United States, indigenous people face the same battle with entrenched law and order forces. See J.W. Zion, "The Dynamics of Navajo Peacemaking" 14 *Journal of Contemporary Criminal Justice* 58.

¹³⁰ A. Hayden, *Restorative Conferencing Manual of Aotearoa New Zealand: He Taonga no a Tatou Kete*, (Wellington: Department of Courts, 2001)

¹³¹ Diversion for first time adult minor offenders was rarely used. Of 144,575 cases prosecuted in New Zealand in 1994, 2637 were diverted by the police and dealt with by them. New Zealand Ministry of Justice, *Restorative Justice: a discussion paper* (Wellington: Ministry of Justice, 1996) at 30.

¹³² Its approach was described as a criminal version of Alternate Dispute Resolution. One may compare this with the Canadian Law Commission's groundbreaking work on the expansion of restoration *out* of the criminal justice arena. Cooley, *supra* note 30.

¹³³ Personal communication Judge Stan Thorburn, Auckland District Court, June 1998. The two bodies have achieved success sufficiently notable to lead to successful crown appeals. The Appellate Court was notably less receptive to a restorative approach in *R. v. Clotworthy* (1998) 15 C.R.N.Z. 651 (CA) than the Saskatchewan and Yukon courts have been to sentencing circle results. See McNamara *supra* note 4. Although the New Zealand Court endorsed restoration, it sent Mr. Clotworthy to jail for three years. The contrast between the rhetoric and the action is striking. The Court held that general deterrence and the preservation of public safety, in combination with a statutory requirement that violent matters be treated seriously, mandated a lengthy sentence.

¹³⁴ Personal communication, Pastor Mansill, June 16th, 1998. Although Marae justice was available, it was not the sort of Maori run programme envisioned by more political Maori such as Tauri *infra* note 161-163.

specifically directed sentencing courts to consider restorative efforts. Section 8(j) states that courts,

(j)...must take into account any outcomes of restorative justice processes that have occurred, or that the court is satisfied are likely to occur, in relation to the particular case (including, without limitation, anything referred to in section 10).¹³⁵

Section 10 requires that the Court take into account a range of restorative measures including realistic and sincere offers of amends, apologies, agreements and any action tendered by the offender to make good the harm done. The Court must also consider the response of the offender, his or her family and extended family group (whanau). Two further points are of note. First, these matters are to be taken into account in the Court's decision not only as to sentence, but also in the decision as to whether or not to sentence at all.¹³⁶ Second, the victim's acceptance of the measure is significant.¹³⁷ It remains to be seen how formal justice-system recognition of restoration will manifest itself in programmes. There is no doubt that it is making an impact.¹³⁸

¹³⁵ *Sentencing Act 2002* (NZ) 2002/9.

¹³⁶ S. 10(3) states, "if a court determines that, despite an offer, agreement, response, measure, or action referred to in subsection 1, it is appropriate to impose a sentence, it must take that offer, agreement, response, measure, or action into account when determining the appropriate sentence for the offender." Among the option is a discharge without conviction. It is deemed an acquittal (s.106(2)). The Court may also discharge after entering a conviction under s. 108 or defer the passing of sentence unless the offender is called by the Court to appear before it for sentencing. The latter provision would seem to be specifically directed at giving offenders the opportunity to live up to agreements to pay compensation to victims (s. 110). S. 25(1) authorises the Court to adjourn matters specifically (b) so that a restorative justice process can occur, or (c) to enable a restorative justice agreement to be fulfilled.

¹³⁷ S. 10(2)(b).

¹³⁸ Mansill became unhappy with the bureaucratization of restoration and parted company with Te Oritenga's successors because of a loss of spiritual base. Some Maori resent the structure of the youth system as an indigenisation and so one can fairly anticipate a similar reaction to adult conferencing. This debate to refine the restorative process for Aboriginal peoples is cited in notes 161-163 *infra*. The Ministry of Justice publishes a restorative justice newsletter called Te Ara Whakatika, a recent issue of which trumpets the successes of court-referred restorative justice with Maori. Online: Government of New Zealand <http://www.justice.govt.nz/pubs/courts/tearawhakatika18.pdf>

Four District Courts are piloting a government funded pre-sentence restorative justice process. There is also a range of other programmes (including those funded through the Crime Prevention Unit and those that receive funding from private sources) operating around New Zealand.¹³⁹

An interesting comparison can be drawn to the *Children, Young Persons and their Families Act 1989*.¹⁴⁰ It created an indigenously based system for youth in that the

statute's extensive use of family group conferencing supposedly reflected Maori values.

These conferences, and more particularly the requirement that they be held for almost all youthful offenders, put New Zealand in the forefront of restorative justice. One notes the

contrast between the structures of the two New Zealand schemes. For youth, conferences are determinative; for adults, they are merely influential. Neither invokes the police

gatekeeper function that I argue to be odious. Nevertheless, the retention of an

overarching judicial power for adults is analogous to Canadian sentencing circle practice

in that consideration of restorative measures remains the hierarchical prerogative of a

powerful judicial actor, rather than the right of the accused or the aggrieved. I submit that

this is an example of structural disempowerment.

3.9.2 Commercial

Although most restorative schemes are run on very small budgets, one should be aware of the possibility of co-option by commercial interests. Two brief references should suffice.

REAL JUSTICE is an American organisation operated by two not-for-profit

organizations that provide education, counselling and residential services for troubled

youth in Pennsylvania. Its purpose and philosophy is to run a,

¹³⁹ New Zealand Ministry of Justice, Discussion Paper: Draft Principles of Best Practice for Restorative Justice Processes in the Criminal Court. (Wellington: Ministry of Justice, 2003) Online: Government of New Zealand http://www.justice.govt.nz/pubs/reports/2003/restorative-justice/RJ_Discussion_Paper.pdf

program dedicated to fostering the spread of "conferencing," a process that can revolutionize how we respond to wrongdoing in our criminal justice system, schools, workplaces and communities... [it] brings together offenders, victims and their respective families and friends to provide a victim-sensitive forum for people who have been affected by an incident to express their feelings and have a say in how to address the wrongdoing and repair the harm.¹⁴¹

Over 2000 facilitators have been trained. Two-day training conferences are offered at a cost of \$250.00 USD per person, per conference. Real Justice has a complete (and costly) line of video and print material for sale. Real Justice's genealogy owes little to either the Aboriginal experience or religious victim-offender mediation. It has come from the police. Terry O'Connell, an Australian policeman from Wagga Wagga, and co-writer of its training manual, writes that, without having ever experienced a family group conference, and with no knowledge of John Braithwaite's theory of reintegrative shaming, he and a group of police officers in Wagga Wagga, Australia decided to try an experiment to improve police practices. He says that, "[w]hen our Police Community Consultative Committee looked at family group conferencing, our focus was largely about improving police processes. Conferencing seemed to offer an uncomplicated way to do that, and it was."¹⁴² Notions of reintegrative shaming were added after the fact. Control of these conferences was subsequently taken away from the police and given to youth workers.¹⁴³

How ironic that the Wagga Wagga model no longer operates in its original form in New South Wales. The very police organization that pioneered scripted

¹⁴⁰ *Children, Young Persons and their Families Act 1989 (NZ) 1989/24.*

¹⁴¹ Real Justice conference papers are available online: <http://www.realjustice.org/pages/nacc>.

¹⁴² T. O'Connell, *supra* note 114 at ¶ 4.

¹⁴³ O'Connell says that there was "not a shred of evidence" to support claims that police non-independence gave poor results. See P. Power, *An Evaluation of Community Youth Conferencing in New South Wales*. A report to the New South Wales Attorney General. 1996.

conferencing and the first police-run conferences, now being emulated around the world, has been precluded from further conferencing.¹⁴⁴

A product with franchise-like uniformity is far more saleable than a set of principles. The convergence of police and commercial interest in a tightly scripted process is significant.

A second example was Transformative Justice Australia. It was a private company in the business of selling conference training and materials in many parts of the world including Canada. It claimed to be rooted in a 1990 “dialogue circle” in which,

...a group of physicists and First Nations Elders came together in North America for a series of conversations about possible commonalities in their cosmologies [and agreed] that nothing is as it first appears and everything is in a state of transformation.¹⁴⁵

The product, however, was tightly scripted conferencing and drew little on anything remotely Aboriginal. The organisation is now known as Proactive Resolutions Inc.¹⁴⁶ It has backed entirely away from any involvement in restorative justice. It is in the business of selling workforce training and other conference and facilitation material for the resolution of workplace conflict. The fact of the transformation underscores the efficacy of this model of conferencing in commercial circumstances. I would argue, indeed, that these two examples demonstrate that properly adapted restorative processes can (and do) operate successfully where the operation of the structure fits well the task it is asked to perform. These are commercial enterprises in a commercial context. The point is not to

¹⁴⁴ O’Connell, *supra* note 114 at ¶ 27. Another evaluation may be found at D. Moore & L. Forsythe, *A new approach to Juvenile Justice: an evaluation of Family Conferencing in Wagga Wagga. A report to the Criminology Research Council* (Wagga Wagga: Centre for Rural Social Research at Charles Sturt University, 1996)

¹⁴⁵ J. M. McDonald, *Justice by Restoration or Justice by Transformation*, (Paper presented to Restorative Justice 2001 Conference, Winnipeg, Manitoba, September 23rd, 2001) [unpublished].

¹⁴⁶ Its materials may be accessed online: Proactive Resolutions Inc. <http://www.proactive-resolutions.com>.

denigrate this fit, but to identify it specifically as a necessary condition for the success of *any* restorative initiative. Context (and understanding of context) is everything.

3.9.3 Indigenous (or Indigenized) Origins

Writings on what constitutes traditional Aboriginal justice generally, and Aboriginal “corrections” in particular, are scarce.¹⁴⁷ What is evident is that popular and homogenised constructions of Aboriginal justice have penetrated judicial thinking with little critical analysis. Modern constructions of traditional Aboriginal models should be viewed critically because of generalization, of romanticism, Eurocentrism and because of a lack of good historical evidence.¹⁴⁸ Even systems proposed by Aboriginal people as recreations of the traditional, and based on sophisticated historical work, may not be correct.¹⁴⁹ Kwochka asserts, “that Aboriginal people seek a system that is “holistic, therapeutic, conciliatory and rehabilitative.”¹⁵⁰ Coyle notes that sources on traditional

¹⁴⁷ *R. v. Taylor*, *supra* note 33 per Bayda CJS.

¹⁴⁸ M. Coyle, “Traditional Indian Justice in Ontario: A Role for the Present?” (1986) 24 *Osgoode Hall Law Journal* 603 at 613. This may be contrasted with the massive evidence that has been made available to courts considering land claims. Judge David Arnot of the Office of the Treaty Commissioner has travelled Saskatchewan extensively over the last five years gathering stories of the elders. However, collations of traditional social practices, which might enable one to draw specific conclusions, particularly about Dene people, have not appeared. More recent histories, such as the memoirs of Father Megret, have been written from a European perspective. See J. Megret, *Momento: Forty Years with the Dene* (La Ronge, Holland-Dalby Educational Consulting, 1995)

¹⁴⁹ E. J. Dickson-Gilmore, “Finding the ways of the Ancestors: Cultural Change and the Invention of Tradition in the Development of Separate Legal Systems” (1992) 34 *Can. J. Crim.* 479.

¹⁵⁰ Kwochka, *supra* note 6 at 160. This is not a universal view. Federation of Saskatchewan Indian Nations (FSIN) justice portfolio vice-chief Lawrence Joseph’s remarks with respect to two non-Aboriginal (ex) policemen convicted of unlawfully confining an Aboriginal man were, despite his denials of same, calls for vengeance. The charges laid were not serious enough, he said. The accused should have been fired on the laying of the charges, rather than upon conviction. His views, those of an elected policy maker, can be validly contrasted with the punitive anger of a person expressing their feelings in the course of a restorative process. See Le Moal, D., “Saskatchewan officers convicted in Night case” in *The First Perspective* online: http://collection.nlc-bnc.ca/1000/201/300/first_perspective/2001/10-16/story_2.html Also see *R. v. Munson*, [2001] S.J. No. 735, [2001] S.J. No. 714. Scheibel J. of the Saskatchewan Court of Queen’s Bench declined to hold a circle, holding that given the denials of wrongdoing by the accused, the application defied “both reason and logic” ([2001] S. J. No. 714 at ¶ 19). The Saskatchewan Court of Appeal upheld the lower court on this point. [2003] S.J. No. 161 at ¶ 71.

Cree-Ojibwa practices are few, but he manages to surmise from anthropology concerning Saulteaux Ojibwa people, and “from the fact that Cree and Ojibwa communities survived at all” that “...severe, codified punishments [were] unnecessary and impractical.”¹⁵¹

These are sweeping claims.

The important point, however, is that from the development of Aboriginal justice as a discipline, and because of the recognition of serious overrepresentation of Aboriginal people in the justice system, a collage of ‘Aboriginal’ values has been equated with restorative values. This has allowed the importation of these restorative values into policy and practice. As Stuart notes,

...the Yukon Community peacemaking and sentencing Circles draw heavily upon Aboriginal concepts of peacemaking and the practices typically found in mediation and consensus-building processes. Community circles are neither wholly western, nor Aboriginal, but combine principles and practices from both...¹⁵²

The drawback is that if one touts the concept as having promise because it reflects the values of particular communities, and then one imposes one-size-fits-all values on that community, logically the concept has no promise. Shaming is a good example. Coyle believes that among the methods “certainly” used by Ontario’s Indian people to prevent anti-social behaviour was the “use of ridicule or ostracism by the community at large to

¹⁵¹ *Supra* note 148 at 633. His Cree sourcing is thin. Rupert Ross relates that, in the Oji-Cree communities in which he has worked, indigenous people express amazement that anything *other* than healing justice would be pursued by a justice system. See Ross, *supra* note 11 at 10-13.

¹⁵² Stuart, *supra* note 66 at 4.

shame offenders and denounce particular wrongs”¹⁵³ in combination with elder teaching and community mediation.

The New Zealand situation is instructive. Mick Brown, former New Zealand principal Youth Court judge, says that reintegrative shaming is integral to their model.¹⁵⁴ He traces the influence of Maori values on the *Children, Young Persons and their Families Act, 1989*.¹⁵⁵ Family Group Conferencing under it is sensitive to cultural differences and victim concerns. There is a clear statutory intention to attempt to empower families and improve their own means of dealing with youthful offenders whilst disempowering the state. This, he says “nullif [ies] the excesses and inflexibility of crude State intervention” including the excessive influence of the police.¹⁵⁶ As noted above, a similar concept has now been applied to adult corrections. It has been more effective with youth than the “cautioning or court” system that preceded it.¹⁵⁷ As Moana Jackson described it in RCAP, “the system of behavioural constraints implied in the law was interwoven with the deep spiritual and religious underpinning of Maori society.”¹⁵⁸

¹⁵³ Coyle, *supra* note 148 at 625.

¹⁵⁴ Michael J. A. Brown, “Background paper on New Zealand Youth Justice Process” (Paper presented at International Bar Association Judges’ Section Edinburgh, 10-13 June 1995) [unpublished]. As noted at page 121 above, the effectiveness of reintegrative shaming is a matter of some debate.

¹⁵⁵ *Supra* note 140.

¹⁵⁶ Brown, *supra* note 154.

¹⁵⁷ A. Morris & G. Maxwell, “Re-forming Juvenile Justice: the New Zealand Experiment” (1997) 77 *Prison Jo.* 125. These New Zealand criminologists had the advantage of the historical circumstance of the 1989 enactment that enabled before and after study. The difficulty of obtaining reliable and meaningful data on the efficacy of Restorative Justice is clear. See L. Presser, and P. Van Voorhis, “Values and Evaluation: Assessing Processes and Outcomes of Restorative Justice Programs” 48 *Crime and Delinquency* (2002). 162. The most reliable data comes from a) schemes designed from the ground up to be analyzed, such as the RISE programme and the SAJJ (Daly *et al.*, *supra* note 5) and b) meta-analyses such as J. Latimer and C. Dowden, *The Effectiveness of Restorative Justice Practices: a meta-analysis* (Ottawa: Department of Justice Canada, 2001) and McCold and Wachtel *supra* note 17. These studies establish that restorative justice processes are effective.

¹⁵⁸ RCAP *supra* note 44 at 18.

Canadian and New Zealand discourse has critically examined the issues raised by the grafting-on of restoration. Nowhere in the colonized world is the system entirely indigenous.¹⁵⁹

Recent attempts to 'splice' justice forms in certain South Pacific jurisdictions reveal the danger of cultural abstraction, and the potential to compromise the essential contextual elements of criminal justice resolution mechanisms.¹⁶⁰

Tauri and others Maori such as Judge James Rota have been critical of the divorce of Maori justice from the *marae* and from purely Maori processes such as *hui* (meetings) held specifically to reform young offenders.¹⁶¹ Rota applauds the use of trained Maori "spotters" in youth court to take Maori youth out of court and back to their *marae* to be dealt with by their *whanau*. Tauri believes that Family Group conferencing is institutional indigenisation, "...the recruitment of indigenous people to enforce the laws of the colonial power," which has been done on the sly, as opposed to Canadian indigenisation, which became "concrete policy."¹⁶² He lists three criticisms of Canadian indigenisation. First, it allows the government to be seen to be "doing something" about indigenous crime, whilst doing nothing. Second, as in New Zealand, it is a co-option of indigenous justice philosophies and practices within *fora* that are controlled by the state. Third, it continues the colonial process by "furthering the judicial disempowerment" of

¹⁵⁹ Tauri & Morris *supra* note 35.

¹⁶⁰ M. Findlay, "Decolonising Restoration and Justice" (1998) 10 *Current Issues in Criminal Justice* 85.

¹⁶¹ Personal communication with Judge Rota, regional liaison judge for the youth court, West Auckland, New Zealand, September 26th, 2001 at Winnipeg. See Tauri & Morris, *supra* note 35 for a critical analysis of Maori response to this cultural mixture. Also see J. Tauri, "Explaining Recent Innovations in New Zealand's Criminal Justice System: Empowering Maori or Biculturalising the State?" (1999) 32 *Austl. Crim. & N.Z.J.* at 153. A *marae* is a combination meeting house, religious/cultural center, and school.

indigenes and furthering the state's control of Aboriginal people's use of "culturally appropriate justice mechanisms." Any discussion of the development of restorative justice here must be cognizant not only of this analysis, but also of the antipodean experience, which makes manifest the pervasiveness, and invisibility, of the problem.¹⁶³

All of this said, the concept underlying the practice, the emphasis on healing of communities and individuals in the context of relationships, distinguishes the Aboriginal model from the other two. Family group conferencing, the Canadian experiences at Alkali Lake and Hollow Water¹⁶⁴ and the We-Ali programme of Aboriginal healing developed in Queensland Australia demonstrates the identity between Aboriginal justice and Aboriginal healing. Indigenous healing is inclusive and exhorts the participants to examine the perhaps painful¹⁶⁵ social conditions that are the background to the offence.¹⁶⁶

It is the interface of healing and settler justice that is problematic.

¹⁶² J. Tauri "Family Group Conferencing: the Myth of Indigenous Empowerment in New Zealand" *Justice as Healing* (Saskatoon: Native Law Centre, 1999) online: Native Law Centre, University of Saskatchewan http://www.usask.ca/nativelaw/jah_tauri.html

¹⁶³ J. Tauri, *supra* note 161 at 161. He cites a number of excellent Canadian sources, in particular H. Finkler "The Political Framework of Aboriginal Criminal Justice in Northern Canada" (1990) *Law and Anthropology* at 113-119. Also see M. R. Leonardy, *First Nations Criminal Jurisdiction in Canada* (Saskatoon: Native Law Centre, 1998) who argues that Aboriginal people's right to assert jurisdiction has never been extinguished, at 150-151.

¹⁶⁴ M. Hodgson, "Body, Mind and Spirit" in K. Hazlehurst ed., *Popular Justice and Community Reintegration-Pathways of Indigenous Reform* (Westport, Conn.: Praeger, 1995) and Solicitor General Canada) *Four Circles of Hollow Water* (Ottawa: Supply and Services Canada, 1997)

¹⁶⁵ Atkinson J. "A nation is not conquered," (1996) 3 *Aboriginal law Bulletin* (Australia) 1 at 9.

¹⁶⁶ Gestation of this type of programme is long and difficult. Its effectiveness and victim friendliness has been questioned. See *ibid.* and LaPrairie, *supra* note 19 at 61.

A theme of RCAP was recognition “that Aboriginal jurisdiction in relation to justice is the responsibility of each Aboriginal nation.”¹⁶⁷ An important incident of Aboriginal sovereignty and self-governance is the ability to control mechanisms of social interaction such as justice.¹⁶⁸ One of the major areas of development in the treaty negotiation process is in the area of justice. For example, part of the Nisga’a treaty in British Columbia is the ability to self-regulate incidents of justice as the First Nation feels ready.¹⁶⁹

Community control has been a key justice platform of Aboriginal political and service bodies who claim that greater Aboriginal control over justice is the only way to effectively reduce Aboriginal prison populations.¹⁷⁰

The obvious, and primary difference between simply indigenising the delivery of the same programme, and providing a community basis for the development and implementation of Aboriginal norms in justice, is that the former is not bound up with Aboriginal self-determination, whereas the latter is.

Canadian judges have responded. For example,¹⁷¹ in considering “particular attention to the circumstances of Aboriginal offenders” in s. 718.2 (e) of the *Criminal Code*, Reilly J. of the Alberta Provincial Court referred extensively to the Cawsey Report.¹⁷² He drew the conclusion that “justice and dispute resolution in traditional Aboriginal societies can be illustrated by a restorative model of justice” which promotes peaceful co-existence

¹⁶⁷ LaPrairie, *ibid.* at 77. The FSIN firmly believes that healing is a key element of Aboriginal justice, see *supra* note 43.

¹⁶⁸ This conclusion was cited with approval in *Bringing Them Home*, *supra* note 59. This is also the conclusion of the Aboriginal Justice Implementation Commission, *Final Report* (Winnipeg: Aboriginal Justice Implementation Commission, 2001) at 20-26.

¹⁶⁹ Nisga’a Final Agreement Treaty online: Indian and Northern Affairs Canada http://www.aicn-inac.gc.ca/pr/agr/nsga/nisdex9_e.pdf Chapter 12 is particularly germane.

¹⁷⁰ La Prairie “Reflections,” *supra* note 3 at 142.

¹⁷¹ *R. v. Hunter* [1997] A.J. No. 1215

elimination of "bad feelings" and the restoring of friendship and harmony.¹⁷³ He also quotes from a justice proposal prepared in 1989 by the Ontario Sandy Lake First Nation.

Ross cites the latter as saying,

Probably one of the most serious gaps in the system is the different perception of wrongdoing and how best to treat it. In the non-Indian community, committing a crime seems to mean that the individual is a bad person and therefore must be punished...The Indian Communities view a wrongdoing as a misbehaviour which requires teaching or an illness which requires healing.¹⁷⁴

Ross was writing of Ojibwa norms that have been applied, without a lot of critical

thought, as general Aboriginal principles. Kwochka, following Ross, asserts that

Aboriginals would want sentencings to proceed based on "Aboriginal goals of restoration and rehabilitation" and from this equates Aboriginal with restorative principles.¹⁷⁵ The

Supreme Court in *Gladue* stated,

"...most traditional Aboriginal conceptions of sentencing place a *primary* emphasis upon the ideals of restorative justice."¹⁷⁶ It then went on to adopt the simplistic construction set out above.¹⁷⁷

3.10 The way forward

In 1998 the Minister of Indian Affairs stated that RCAP had "transformed [her] ideas and understanding" and that the government was "committed to changing the nature of the

¹⁷² The Cawsey Report, *supra* note 67.

¹⁷³ *Hunter supra* note 171 at 9, includes a lengthy comparison of Aboriginal and non-Aboriginal beliefs, based upon this supposition.

¹⁷⁴ *Ibid.* at 7. This teaching-healing expression bears a remarkable similarity to the corrective philosophy of Plato, albeit without the Socratic state-centred imperative.

¹⁷⁵ Kwochka *supra* note 6 at 159-161.

¹⁷⁶ *Supra* note 8 at ¶ 70.

relationship between Aboriginal and non-Aboriginal people in Canada.” She announced a commitment to work out government-to-government relationships with First Nations consistent with the treaties and the inherent right of self-government.¹⁷⁸

In my submission, Macklem is correct in his suggestion that the Canadian Constitution provides a space in which the sovereignty necessary for pluralistic justice may be exercised.

The value of sovereignty lies in the legal space it establishes for a community to construct, protect and transform its collective identity. Sovereignty, simply speaking, permits the legal expression of collective difference.¹⁷⁹

He argues that the protection of interests consequent upon indigenous difference should be accomplished constitutionally in the legal space made by the application of a ‘legally plural notion of law in which state law is only one of many levels, without privileged centrality.’¹⁸⁰ The point is that while Canadian sovereign authority may currently be based upon a colonisation project which assumed (and, I would argue, continues to assume) Aboriginal inferiority, the means of amelioration are not only available, but their use dictated by, the unique circumstances of Aboriginal difference. By this, he means that Aboriginal people enjoy a unique constitutional relationship with Canada.¹⁸¹

Macklem argues that four “social facts” comprising indigenous difference, (cultural

¹⁷⁷ The Court retrenched somewhat, noting that not all Aboriginals “share an identical understanding of appropriate sentences for particular offences and offenders.” (at ¶ 73) This is very different from being cognisant of the danger of imposing settler philosophies through indigenisation of sentencing processes.

¹⁷⁸ Generally, see “Gathering Strength: Canada’s Aboriginal Action Plan” online: Government of Canada website http://www.ainc-inac.gc.ca/gs/chg_e.html

¹⁷⁹ P. Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001) at 111.

¹⁸⁰ *Ibid.* at 122, citing S. E. Merry, “Resistance and the Cultural Power of Law” (1995) 29 *Law and Soc. Rev.* 11 at 23.

¹⁸¹ *Ibid.* at 13.

difference, Aboriginal prior occupancy, Aboriginal prior occupancy, and Aboriginal participation in the treaty process), impose a positive obligation on the Canadian state. This obligation is a fiduciary duty that requires the distribution of social and economic rights to Aboriginal peoples in a way that will undo colonisation and ameliorate Aboriginal socioeconomic disadvantage.¹⁸² It is a maxim of distributive justice that if a state is going to marshal its resources to prosecute and punish someone, to exercise state power in social intervention, it must do so “properly,” that is in accordance with fundamental justice.¹⁸³

Furthermore, the existence of a right triggers positive and negative obligations in states, one of which is the positive obligation to take steps toward the fulfillment of the right.¹⁸⁴ Accordingly, the decolonial project has a constitutional element which, I suggest, mandates the advancement of Aboriginal justice as an incident of the Canadian Constitution. As *RCAP* stated,

A country cannot be built on a living lie. We know now, if the original settlers did not, that this country was not *terra nullius* at the time of contact and the newcomers did not “discover” it in any meaningful sense. We also know that the peoples who lived here had their own systems of law and governance, their own customs, languages and cultures....They had a different view of the world and their place in it and a different set of norms and values to live by.¹⁸⁵

Macklem states that rights are nugatory if actors are too disempowered to avail themselves of them. An example is the right to free speech for illiterate people. This is a

¹⁸² *Ibid.* at 246.

¹⁸³ *Ibid.* at 241.

¹⁸⁴ *Ibid.* at 263, citing H. Shue, *Basic Rights: Subsistence, Affluence and U. S. Foreign Policy* (Princeton: Princeton University Press, 1980)

¹⁸⁵ *Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship (Part One)* (Ottawa: Supply and Services, 1996) vol. 1 at 1.

powerful corollary to the oft intoned “a right without a remedy is a hollow thing.”¹⁸⁶ In the context of restorative justice, governments must recognise their obligation to mitigate and reverse colonisation and act to provide substantive equality (and equity) through rectification of economic disadvantage, and the provision of substantial justice/community resourcing for this purpose. The imperative is not to regurgitate long gone systems, but to facilitate the development of appropriate integrations of the customary and the Anglo-Canadian. The recognition of the destruction of traditional justice carries within it the Constitutional requirement of action. In other words,

[a] commitment to substantive equality suggests that the state should attempt to remedy the oppression that Aboriginal people experience in their daily lives; acknowledging that Aboriginal sovereignty is an interest worthy of constitutional protection would allow Aboriginal people to obtain greater control over their individual and collective identities. It would mandate removal of alien forms of economic, social, political and legal organisation that have been imposed on Aboriginal people.¹⁸⁷

Monture-Angus suggests that the remedy to the evil of the “living lie” may be found in a focus on independence of First Nations arising out of the fiduciary status that is integral to the relationship between First Nations and other nations.

The fiduciary relationship may force courts to think beyond powers, authority, jurisdiction and other concepts with which they are more comfortable. It may

¹⁸⁶ He does not ignore this aspect; rather (at 262) he discusses the work done internationally, which he claims has the result of making s. 35 Constitution Act-based claims justiciable. His thesis is directed more generally to an averment of a substantial basis for indigenous sovereignty and self-determination. I have gone from the general to the specific in my argument.

¹⁸⁷ Macklem, *supra* note 179 at 127. The appalling consequences of legal structure that works to deprive Aboriginal peoples of constitutional rights to assert sovereignty are manifest in current Australian Aboriginal Title jurisprudence. The recent decisions of the High Court in *Yorta Yorta Aboriginal Community v. Victoria* [2002] HCA 58 and *Ward v. Western Australia* [2002] HCA 28 combine to make Aboriginal title claims almost impossible to make successful. See R. Bartlett, “An Obsession with Traditional Laws and Customs Creates Difficulty Establishing Native Title Claims in the South: *Yorta Yorta*, (2003) 31(1) UWAL Rev 35.

focus resolution on the connections that must be maintained in good relationships rather than on adversarial patterns that distance.¹⁸⁸

She rejects as counter productive [Aboriginal rights] “litigation from within the rights paradigm,”¹⁸⁹ for it simply entrenches colonial norms. I would argue that the current place of restoration within criminal justice is the same as that accorded the limited derivative powers of First Nations in governance. Both are based on the presupposition and acceptance of inequality and dependence. In this model, there are only two ways that power can devolve; powers are either carved out of the dominant party’s fiefdom, or given as largesse for which the dominated must be thankful. The alternative model, and one which has special vigour at the intersection of Aboriginal law and restorative justice, is a *sui generis* independence based upon respect for the *modii vivendi* of all of the stakeholders in criminal justice.

The Canadian and New Zealand experiences establish that indigenous sovereignty and self-determination are instrumental in the facilitation of Aboriginal forms of justice.

Rhetoric about the empowerment of community is wasted if the political will to empower is not present or if it is simply blown in the punitive wind of popular opinion. The result is that reform, and funding for reform, is the minimum that will suffice, leaving the public with the mistaken impression that something is being done and providing government and public opinion ready scapegoats when the accomplishments do not match the advertising. Justice must, therefore, be preceded by Aboriginal political and economic empowerment

¹⁸⁸ P. Monture-Angus, “The experience of Fiduciary Relationships: Canada’s First Nations and the Crown” in *In Whom We Trust: a forum on fiduciary relationships* (Ottawa: Law Commission of Canada, 2002) at 153.

¹⁸⁹ *Ibid.* at 156.

to sustain restoration in the face of reaction. Article 31 of the draft United Nations Declaration on the Rights of Indigenous Peoples makes specific reference to “ways and means for financing th[e] autonomous functions” of self-government. In the context of restorative justice, this ensures that not only the individual participants in the process have something to lose or gain; but also the society in which the ceremony is conducted is *capable* of being transformed. It must be sufficiently empowered to be capable of being a part of the social equity that is so fundamental to restorative justice. Unless this is done, the adoption of restorative processes will be simply a part of the indigenisation of social controls, “a process whereby elements of indigenous tradition are constructed to increase neo-colonial forms of control.”¹⁹⁰

3.11 Conclusion

Without sympathetic sustenance, both political and economic, reforming visions will be in danger of being derailed by established, retributive institutions. These pressures can be instrumental in the marginalisation of restorative processes, that is their restriction to minor or trivial matters for which there was little chance of incarceration.¹⁹¹ LaPrairie decries the failure of “Reparative” justice in Canada in the 1970s and 1980s. She cites Weitekamp’s view to the effect that this failure resulted from a myriad of factors including the fact that admission to alternatives was solely at the discretion of police and

¹⁹⁰ Blagg, *A Just Measure?* *Supra* note 121 at 490.

¹⁹¹ Zehr, *Changing Lenses*, *supra* note 10 at 232. One notes as well the continuing Navajo struggle to develop a separate system based on indigenous peacemaking. See Zion *supra* note 114.

prosecutors as it is now. Minorities and adults were excluded.¹⁹² Chapter five will look at the Cree Court and at Alternative measures in Saskatchewan and analyse whether this has changed.

¹⁹² LaPrairie, *The New Justice*, *supra* note 19 at 62 referring to E. Weitekamp, "Toward a Victim Oriented System" 1 *European Journal on Criminal Policy and Research* at 70.

4.1 Introduction

This chapter will consider, at some length, the principles of the legislation that defines how the criminal law deals with the disposition of offenders. The interest here is not the substantive business of sentencing for youths and adults, but the legislative intent as revealed both by explicit statements of principle, and by less explicit, but enlightening, usages of language.

A pivotal theme that we will begin with is the overrepresentation of Aboriginal people in gaols and in the justice system generally. The consciousness of this fact has been a driving force in developing Canadian sentencing principles for many years. One cannot look at restorative justice in isolation. It is a part of a larger initiative driven by the imperative to try to make the criminal justice system fair to Aboriginal people; people whose very place in Canadian society is historically and presently inequitable. I submit that the in-depth critique that follows makes it clear *why* it is that restorative justice has been so ineffective from an examination of *how* the system has developed and is currently set up.

4.2 Aboriginal Overrepresentation

It has been argued that the reasons for Aboriginal overrepresentation are primarily socio-economic and demographic, and have much less to do with the legislation and the consequent sentencing practices of judges.¹ There is very little that judges or restorative measures workers can do about these social issues. However, peacemaking is a power in

attaining community safety. It is wrong to say that because poverty and social disempowerment are over-present in offending cohorts,² that accordingly restorative justice is powerless to effect change. This argument would follow (albeit imprecisely) the path of the well-known logical fallacy which confuses necessary and sufficient conditions. Because many offenders are poor, it says, *ergo* poverty causes crime. Poverty, like Aboriginality, is tragically concurrent with criminality. One should not be diverted by this nihilistic averment from debating the efficacy of various forms of dispute resolution. The more important and useful inquiry is into systemic capabilities, the big picture. This inquiry is informed by definition of objective. If one defines the objective as public safety, one must admit that judges can do little to effect it. They cannot reduce poverty nor heal the effect of an unspeakable life on an offender. They will defend, of course, the ability to protect society in the short term through incapacitation and in the longer by the normative exercise of denunciation of undesirable behaviour. What they cannot defend is the demonstrated and uncontroverted lack of efficacy of what they do in poor and Aboriginal populations. Consequently, one should then ask the pivotal question, what should a justice system contain, and be able to do to accomplish the goal?

Does this assist the argument that the means of amelioration of over-representation are in diversion and are not achievable in court at all? Arguably, yes, and not only because of the paucity of evidence that court originated measures are effective. The nature of the

¹ P. Stenning & J. Roberts, "Empty Promises: Parliament, the Supreme Court and the Sentencing of Aboriginal Offenders" (2001) 64 (1) Sask. L. Rev. 137

² See C. La Prairie, "Aboriginal over-representation in the criminal justice system: A tale of nine cities" (2002) Can. J. Crim. 181. Dr. La Prairie looks at urban Aboriginal and non-Aboriginal offending and concludes that the overrepresentation is demographic and socioeconomic, rather than correlated with race. This is an analysis that would at first blush de-emphasise the influence of colonization. However, when

'trouble with the Aboriginals' originates in the communities. The communities give effect to the socio-economic and demographic factors noted. To put this another way, crime is a community function. Sometimes offending occurs in the absence of others, but in the reality of Aboriginal community, crime does not often happen unless there are people around to be victims, witnesses and perpetrators; people with connections to, and relationships with, one another. Perforce it makes little sense to suggest that one can impose values and processes from without and expect them to do any good. From this flows the notion of restoration and development of community relationships, which is so fundamental to restorative theory in the Aboriginal context.

A second approach to the issue of socio-economics in offending arises from the nature of Aboriginal difference, its formulation as a colonial artefact. It is a fact that Aboriginals in Canada offend proportionately more than non-Aboriginals. It is also a fact that their demographics are skewed toward younger people. Criminal career criminologists will tell the inquiring that this cohort offends significantly more than others do. However, I would argue that the situation is the same as that faced by Maori in Aotearoa/New Zealand. Moana Jackson rejects the socio-economic approach, insisting that the "difficulty of the Maori poor emanate from specific historic and cultural forces that overlay the purely economic."³ The effect of colonialism was to destroy the threads that

viewed more thoughtfully, the approach would only debunk the unsophisticated, standpoint argument (to borrow a term from first wave feminism) that colonization is responsible for everything bad.

³ Moana Jackson, *The Maori and the Criminal Justice System, He Whaipanga Hou-A New Perspective. Part Two* (Wellington: New Zealand Department of Justice, 1988) at 44-45. Maori are significantly overrepresented in the New Zealand correctional system but not to the degree present in Canada and more particularly on the prairies. The most stunning levels of overrepresentation I have encountered are for Aboriginal youths under 14 in Western Australia. In 1995, the non-Aboriginal youth incarceration rate was 32 per hundred thousand; for Aboriginal youth it was 734 per hundred thousand. See Q. Beresford & P.

bound people to patterns of behaviour true to their culture and ancestors threads that have “now been rewoven into a new, confusing and often destructive pattern of existence.”⁴

This destruction is a common feature of colonized peoples,

It has happened all over the world where an indigenous people have had their language and their faith and their laws attacked. Their whole culture is in danger of disintegrating and with that comes crime and social upheaval.⁵

In 1992, Michael Jackson developed this theme in the Canadian context. He concluded that,

For the Maori the responses and initiatives that will effectively address both the causes and consequences reflected in Maori involvement in the criminal justice system are directed to the reaffirmation of their inherent right as Aboriginal peoples to self government.⁶

The pointless expenditure of time and money on trying to make Maori better (and wealthier) pakeha (non-indigenous New Zealanders) would continue to be futile in the absence of the will to rectify political under-empowerment. Accordingly, Michael Jackson asserts that,

The restoration to [Canadian] Aboriginal peoples of control over the essential elements of their lives is the critical pathway to their future as surely as the taking away of control has been the central force in creating the terrible legacies of the past reflected in the young men and women who continue to suffer the pains of imprisonment and the migration of wasted lives.⁷

Stenning and Roberts have argued recently that the overrepresentation of Aboriginal offenders is not the result of sentencing practices.⁸ They use work done by Carol La Prairie in 1996, which makes explicit reference to what is known in Australia as the

Omaji Our State of Mind: racial planning and the stolen generations (Fremantle: Fremantle Arts Press, 1998) at 221.

⁴ *Ibid.* at 100.

⁵ *Ibid.* at 45.

⁶ Michael Jackson, “In Search of the Pathways to Justice: Alternative Dispute Resolution in Aboriginal Communities” (1992) UBC L. R. 147 at 159.

⁷ *Ibid.* at 160.

Aborigine discount.⁹ It involved a controlled (for severity of offence) comparison of the duration of prison sentences for Aboriginal and non-Aboriginal offenders. La Prairie points out that whilst Aboriginal over-representation in gaols generally is the result of offences committed in cities¹⁰, crime rates on reserve are double those in urban and rural areas.¹¹ She suggests that because of the lack of structure in Aboriginal communities, community connections and the like, judges deal differently with crime on reserve. They are more likely to incarcerate Aboriginals, but when they do, they make the sentences shorter.¹² What the research has not examined is what actually happens on the reserve that led to this anomaly. Does the “Aboriginal discount” really exist in the cities? Perhaps Aboriginal offenders in the cities are simply being sentenced in a way commensurate with their sometimes-remarkable criminal histories whereas elsewhere different phenomena are occurring. There has been no research on the role of these systemic ameliorative measures in on-reserve responses to offending.¹³ An exploration of the role of diversion is needed. Is this resulting in shorter criminal records so that

⁸ *Supra* note 1.

⁹ Also see J.V. Roberts, “The evolution of conditional sentencing in Canada” [2002] 3 C.R. (6th) 267.

¹⁰ Her point is that cities with large and impoverished Aboriginal populations contribute disproportionately to gaol populations, while cities with smaller and more advantaged Aboriginal populations do not. See LaPrairie *supra* note 2.

¹¹ *Ibid.* at 189. Roberts and Melcher are sensitive to the reality that differential sentencing means that Aboriginals may be cycled through the system more often in a given period, simply because of less incapacitation. J. V. Roberts & R. Melchers, “The Incarceration of Aboriginal Offenders: Trends from 1978 to 2001” (2003) Can. Jo. Crim. & Justice 45(2) 211.

¹² C. LaPrairie, *Examining Aboriginal Corrections in Canada* (Ottawa: Supply and Services Canada, 1996) Also see LaPrairie, “Aboriginal over-representation...” *supra* note 2

¹³ The impact of community-based programs has been well described, but solid outcome analysis is scanty. A good example is the sexual abuse referral system set up at Hollow Water, Manitoba. It was, according to Ross Green, unique. Significantly, while the process resulted in a large number of abuse disclosures, the number of charges did not increase. Rather, the number of people referred to a demonstrably viable treatment center rose dramatically. See R. Green, *Justice in Aboriginal Communities: Sentencing Alternatives* (Saskatoon, Purich, 1998) at 86-95.

sentencing is less punitive? Are the existence of family and other non-colonizer resources (for example, white run treatment centres) significant?¹⁴

The effect of ameliorative legislation on incarceration of Aboriginals generally has been studied. None of the work that has been done over the last decade seems to have had any effect. Whilst incarceration of Aboriginals has decreased, so has that of non-Aboriginals, and to a greater extent.¹⁵

Accordingly, whilst total incarceration rates are nothing special compared with other ethnicities of similar economic disadvantage, there is real overrepresentation in urban populations and perhaps under-representation (relative to offending) on reserve. There is nothing in the cultural experience of other non-white Canadian that has even the slightest equivalence to the reserve.

Stenning and Roberts go on to note that sentencing disparity, the discount, persists despite the larger number of criminal records for the Aboriginal offenders studied. What is missing is consciousness of the value of approaching the question with a criminal career analysis. The methodology is snapshot; at the time that the sentencing decision is made, what circumstances are extant and what is the result? This fails to shed any light

¹⁴ A relatively recent meta-analysis explored the relationship between youth delinquency, family intervention treatment and recidivism. It found that family intervention treatment *seemed* to be effective. The author, however, doubted the veracity of his conclusion somewhat, noting that the greater the rigour with which the various studies in the meta-analysis were conducted, the less effect on recidivism the scheme had. See J. Latimer, "A meta-analytic examination of youth delinquency, family treatment, and recidivism" (2001) Can. J. Crim. 43(2) 237. The contrast between this and the promise of Aboriginal run programmes with avowedly restorative aims, such as Hollow Water is profound. See Green, *ibid* and Solicitor General of Canada, *The Four Circles of Hollow Water*, (Ottawa: Solicitor General, 1998) Online: Government of Canada http://www.sgc.gc.ca/abor_corrections/publications_e.asp

on how it is that Aboriginals end up with the records in question, before a court and undiverted. It is not enough to argue that the social conditions lead to over-representation in the ranks of offenders and, if anything, the current sentencing practices actually mitigate the problem.¹⁶ The focus on the incarceratory decision obscures a host of other justice system decisions that are cumulatively foundational to systemic racism. Only over-reactive policing is singled out as a possible suspect. I suggest that more than the actions of the justice system officials are, as Llewelyn suggests, Law itself. Quigley puts it well:

[s]ocioeconomic factors such as employment status, level of education, family situation, etc., appear on the surface as neutral criteria. They are considered as such by the legal system. Yet they can conceal an extremely strong bias in the sentencing process. Convicted persons with steady employment and stability in their lives, or at least prospects of the same, are much less likely to be sent to jail for offences that are borderline imprisonment offences. The unemployed, transients, the poorly educated are all better candidates for imprisonment. When the social, political and economic aspects of our society place Aboriginal people disproportionately within the ranks of the latter, our society literally sentences more of them to jail. This is systemic discrimination.¹⁷

In a very real sense, then, doing justice is best approached holistically. All of the tinkers, all of the critics and all of the justice analysts with their legions of constructive suggestions are fundamentally missing the target. They are trying to fix a system that is not designed to do the job now expected of it. It is my submission that decolonizing justice can *never* be done by coercive institutions; they are unsuited to the purpose.¹⁸

¹⁵ J. V. Roberts & R. Melchers, *supra* note 11.

¹⁶ Of course, it might, but it has not done so demonstrably. The impact of the "Gladue Court" in Toronto for Aboriginal offenders (discussed in chapter 5) has not been evaluated to see if it has reduced the incarceration of those processed through it. Otherwise, the legislative ameliorative measures seem to have increased the disproportionate gaoling of Aboriginal offenders. See Roberts & Melchers, *supra* note 16.

¹⁷ T. Quigley, "Some Issues in Sentencing of Aboriginal Offenders" in R. Gosse, J. Youngblood Henderson and R. Carter, *Continuing Poundmaker and Riel's Quest* (Saskatoon: Purich Publishing, 1994) at 275-276.

¹⁸ Occasionally there is wonderful (and unintended) irony. For example, the Supreme Court of Canada noted that conditional sentences "will generally be more effective than incarceration at achieving the restorative objectives." See *R.v. Proulx*, [2001] 1S.C.R. 61, 30 CR (5th) 1.

Accordingly, it is away from court and to Community Justice that one must look.¹⁹ As

Ross Green put it rather presciently a few years ago:

[i]t is unrealistic to expect changes in sentencing practice alone to achieve a significant reduction in the incarceration rate of Aboriginal offenders; however, exploring sentencing alternatives for Aboriginal offenders is one way that the rate of incarceration for Aboriginal offenders in Canada might be reduced, and the diversion of offenders from the court system to community mediation committees is another.²⁰

I argue in chapter two that retribution as a fundamental principle of Canadian sentencing law has a pervasive and pernicious effect and that it is anti-restorative. I submit that non-community law is *structurally* unrestorative based as it is on retributive principles. It most certainly is the law, but it cannot ever be Justice in any post-colonial sense.

Let us now turn to an examination of the legislation to canvass the uneasy relationship between community and non-community justice. Currently, adults are dealt with by the *Criminal Code*, youths under the *Youth Criminal Justice Act (YCJA)*.²¹ This chapter will look at some of the emerging commentary and jurisprudence under the *YCJA*. The focus will be on the operative principles of the *Code* and the *Act* as they relate to sentencing and Extra-judicial/Alternative measures. The philosophies of the enactments, as made manifest in sentencing as well as diversionary principles, shed significant light on the operation of the *Act* and are, accordingly, germane to an exposition of the place of Restorative justice within it (if any). Similarly, comparisons will be drawn to the *Young*

¹⁹ Roberts and Melcher take a similar position. Since court-based measures have not worked, they suggest that one should go further upstream. Their analysis is fascinating in its comparison of the political/legal cultures of Alberta and Saskatchewan. From it comes the clear and unsurprising lesson that a more punitive culture means resistance to anti-incarceratory encouragements. *Supra* note 11.

²⁰ R.G. Green, *Justice in Aboriginal Communities: Sentencing Alternatives* (Saskatoon: Purich, 1998) at 17.

²¹ S. C. 2001, c. 1 Royal Assent February 19th, 2002, in force April 1, 2003.

Offenders Act.²² This is useful because of the *YCJA*'s newness and because the new *Act* is very much a response to criticisms made of the old. The reader should be aware throughout of an important structural difference between the *Code* and the *YCJA*. In the latter, diversion and its counterparts are ostensibly integral to the scheme. For this reason, the *YCJA*'s principles are canvassed at length. There is no such integration in the *Code*, and consequently the approach is different.

4.3 Community Justice

4.3.1 Young Offender's Act

The term Alternative Measures, which is the focus of this report, refers to formalized programs other than judicial proceedings which may be at the pre or post-charge stage, and that are designed to balance society's right to protection with the needs of youth and adults in conflict with the law.²³

Accordingly, Alternative Measures was a species of diversion. It differed from pure diversion in that in that the consequence of the diversion was formalized. Under the *Young Offenders Act* (hereinafter the *YOA*) the police had the discretion and the mandate to deal with matters that may have warranted a charge, without so charging. Section 3(1)(d) of the *YOA* directed that,

(d) where it is not inconsistent with the protection of society, taking no measures or taking measures other than judicial proceedings under the *Act* should be considered for dealing with young persons who have committed offences;

Thus, the police were directed to consider actions such as ignoring the act, cautioning the youth, speaking to the youth's parents or caregivers and so on. Alternative measures were defined in section 2 of the *YOA* as, "measures other than judicial proceedings under this *Act* used to deal with a young person alleged to have committed an offence."

²² *Young Offenders Act*, R.S.C. 1985, c. Y-1, as amended.

The implementation of the principle, therefore, required that the police move from less intrusive to more intrusive interventions only when they must. This was consistent with the operational philosophy of the *YOA* as stated in section 4(f),

(f) in the application of this Act, the rights and freedoms of young persons include a right to the least possible interference with freedom that is consistent with the protection of society; having regard to the needs of young persons and the interests of their families;

and with the regime of dispositions under section 20 of the same *Act* which moved from less to more intrusive.²⁴

For youth, the second option available to the police, that of referral to a formal programme, was delineated by section 4 of the *YOA*. It read:

4. (1) Alternative measures may be used to deal with a young person alleged to have committed an offence instead of judicial proceedings under this *Act* only if
- (a) the measures are part of a program of alternative measures authorized by the Attorney General or his delegate or authorized by a person, or a person within a class of persons, designated by the Lieutenant Governor in Council of a province;
 - (b) the person who is considering whether to use such measures is satisfied that they would be appropriate, having regard to the needs of the young person and the interests of society;
 - (c) the young person, having been informed of the alternative measures, fully and freely consents to participate therein;
 - (d) the young person has, before consenting to participate in the alternative measures, been advised of his right to be represented by counsel and been given a reasonable opportunity to consult with counsel;
 - (e) the young person accepts responsibility for the act or the omission that forms the basis of the offence that he is alleged to have committed;

²³ B. McKillop, *Alternative Measures in Canada 1998* (Ottawa: Minister of Industry & Canadian Center for Justice Statistics, 1999) at 1.

²⁴ Indeed, this general orientation toward parsimony in interference finds reflection in numerous other procedures and sanctions in the criminal law. Two examples are the arrest and release provisions in s. 495 ff. of the *Criminal Code* and the sentencing principles found in ss. 718.2 (d and e) of the *Code*. The latter state, for example,

- (d) an offender shall not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and
- (e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.”

- (f) there is, in the opinion of the Attorney General or his agent, sufficient evidence to proceed with the prosecution of the offence; and
- (g) the prosecution of the offence is not in any way barred at law.

(2) Alternative measures shall not be used to deal with a young person alleged to have committed an offence if the young person

- (a) denies his participation or involvement in the commission of the offence; or
- (b) expresses his wish to have any charge against him dealt with by the youth court.

The balance of section 4 dealt with the substantially without prejudice nature of the measures (subsection 3), the requirement that successful completion result in dismissal of the charge(s) in the case of post –charge referral, the power of the court to dismiss in the case of substantial completion (subsection 4) and a provision that the existence of the section (except insofar as it results in subsection 4 dismissals), does not otherwise affect the operation of the *Act*.

4.3.2 *Youth Criminal Justice Act*

This part examines the principles on which the *YCJA* is based. The chapter later enters into a critical comparison of elements relevant to restorative approaches. The *YCJA* has three statements of principle within it. Section 3 is a general Declaration of Principles that is to guide implementation and interpretation of the entire Act. Section 4 sets out a statement of guidelines for the use of Extra-judicial Measures (EJM). Section 38 sets out the purpose and principles of sentencing under the *Act*.²⁵

The *YCJA*'s Declaration of Principle is, unlike its *YOA* counterpart, (and like section 718 of the *Criminal Code*) structured to give priority to one overriding set of principles, called an *intention* in section 3(1)(a).

3(1) The following principles apply in this Act:

- (a) the youth criminal justice system is intended to
 - (i) prevent crime by addressing the circumstances underlying a young person's offending behaviour,
 - (ii) rehabilitating young persons who commit offences and reintegrating them into society, and
 - (iii) ensure that a young person is subject to meaningful consequences for his or her offence in order to promote the long term protection of the public;

This prioritisation is, arguably, ineffective in alleviating the confusion and lack of direction caused by the disparate and contradictory principles guiding use of the *YOA*.

[The section] makes it appear as if it gives more direction to decision makers, the fundamental purpose section contains the often-times conflicting policies of youth accountability and rehabilitation. Thus, decision makers are given little guidance by section 3 of the *YCJA*.²⁶

The earlier draft was, if anything, clearer in placing public protection above all. The “conflicting policies” were quasi-operational. Now the entire Declaration of Principles is subject to the same caveat as before. It remains to be seen what effect the elevation of rehabilitation and rehabilitation to a position equal to that of crime prevention and punishment will have. If courts interpret the “intention” as being a coherent whole, rather than three disparate aims, the effect will be that both crime prevention and punishment will be effected in a way consistent with rehabilitation and reintegration. This would, however, run contrary to the usual judicial practice of picking particular principles to emphasise at the expense of others. It would be fascinating indeed for a Court of Appeal, instead of castigating a sentencing judge for emphasising the wrong principle, to change a sentence on the basis that the Court below failed to blend all of the relevant principles together.

²⁵ It remains to be seen whether the shift from the use of the term “disposition” in the *YOA* to the term “sentence” in the *YCJA* is anything more than semantics directed at appeasing public opinion.

²⁶ S.S. Anand, “The Good, the Bad, and the Unaltered: An Analysis of Bill C-68, the Youth Criminal Justice Act” (1999) 4 Can. Crim. L. Rev. 249 at 252.

This statement of intention applies to all decisions made under the *YCJA*, including references to conferencing and to Extra-judicial Measures.

Section 38 of the *YCJA* gives guidance in sentencing. It introduces concepts and language that reveal the underlying operative philosophy of the *YCJA*. Their presence in the context of sentencing is instructive in evaluating the points in the youth justice process where potentially restorative decisions might be made. They bring to the *YCJA* the same *modus operandi* that I criticise below as being colonialistic in the adult system.

Section 38 rejects any notion of deterrence, either general or specific.²⁷ A prime consequentialist justification is simply absent from the statement of principle. It also eschews denunciation and incapacitation and forbids sentencing youths to prison “as a substitute for appropriate child protection, mental health, or other social measures.”²⁸

Proportionality, on the other hand, is paramount.²⁹ Disparity under the *YOA* in youth

²⁷ This is a complete about face from the *dicta* of the Supreme Court in *R. v. M. (J.J.)*, [1993] 2 S.C.R. 421, 81 C.C.C. (3d) 487 at ¶ 30.

²⁸ S. 39(5) *YCJA*. Bala suggests (at ¶ 25-26) that this is an express rejection of the Supreme Court’s view in *R. v. M. (J.J.)* that the *YOA* could be used to “provide the young offender with the necessary guidance and assistance that he or she might not be getting at home.” Accordingly, says Bala, “concerns about rehabilitation and welfare may be considered to mitigate the rigours of a proportionality based sentence or to shape the nature of a non-custodial sentence, but they cannot be used to justify a longer sentence in custody than the nature and circumstances of the offence would justify.” See N. Bala, *Youth Criminal Justice Law* (Toronto: Irwin Law, 2003) at 101. The *YCJA* does not prohibit sending children to gaol.

²⁹ This analysis is in direct conflict with the *dicta* of the Quebec Court of Appeal in *Reference re: Bill C-7 respecting the Criminal Justice System for young persons*, [2003] QJ No. 2850, 175 C.C.C. (3d) 321. That Court specifically held that the proportionality rule is a principle of sentencing that does not override the general principles set out in sections 3 and 4 of the *YCJA* (¶ 145-148). It says that section 38 is “not very clear” and hence allows competing interpretations (at ¶ 144). With all due respect, the *Act* is clear when it states that all sentencing principles, save one, are “subject to” provisions requiring proportionality (to use the very first words of s. 38(2)(e)). This directly contradicts the Court’s assertion that the sections direct sentencing courts to “find a balance” between protection of the public and the needs of youthful offenders. Only the narrow aspect of parsimony in the use of custody (as distinguished from the subordinate general principle of parsimony in s. 38(2)(e)(i)), is on an equal plane to proportionality. It, in turn, applies only if the court considers submissions as to whether alternatives are available and, significantly, whether those alternatives are proportionate to other judges’ responses to similar circumstances (s. 39(3)).

sentencing has been empirically (and exhaustively) linked to the various statements of principle in section 3 of the *YOA*.³⁰ Section 38 (2) of the *YCJA* applies the principles in section 3 of the *YCJA* to the sentencing process. It, in turn, must be taken in the context of section 38(1), which sets out an overriding purpose of sentencing. One notes, at this point, a structural comparison between this and the relationship of sections 718 and 718.1 of the *Criminal Code*.³¹ The purpose is stated first, (section 38(1) *YCJA*, 718 *Code*) then a fundamental principle, (section 3 *YCJA*, section 718.1 *Code*) followed thereafter by subsidiary principles (section 38(2) *YCJA*, section 718.2 *Code*).

Section 38(1) states,

38. (1) The purpose of sentencing under section 42 (youth sentences) is to hold a young person accountable through the imposition of just sanctions that have meaningful consequences for the young person and that promote his or her rehabilitation and reintegration into society, thereby contributing to the long-term protection of the public.

What follows are the sentencing principles which,

...clarify the factors that determine fair and proportional sentences and, within those limits, that encourage rehabilitation. The principles set out clearly the values that should inform youth sentencing.³²

³⁰ S. Anand, *supra* note 26 at 256. Anand refers the reader to A. N. Doob and L.A. Belieu, "Variation in the Exercise of Judicial discretion with Young Offenders" (1992) 34 Can. J. Crim. 35.

³¹ S. 50 of the *YCJA* provides that none of the purposes and principles of sentencing for adults apply to youth with the exception of s.718.2 (e), which requires that special attention be paid to the circumstances of Aboriginality in the sentencing of Aboriginal offenders. Various procedural aspects of adult sentencing, such as the rules respecting Victim Impact Statements in s. 722 of the *Code*, do apply. One wonders why it was necessary to include a reference to s. 718.2(e) in s. 50 of the *YCJA* given that s. 38(2)(d) of the *YCJA* specifically requires consideration of Aboriginality in a way that mirrors s. 718.2 (e) of the *Code*. The only difference is that the *Code* refers to "offenders" and "Aboriginal offenders" whereas the *YCJA* makes reference to "young persons" and "Aboriginal young persons." The only way to make the difference meaningful would be to assert that it was the intention of the drafters that the *YCJA* apply to young persons who are not offenders. The definition of "young person" in s. 2 of the *YCJA* includes, *but is not limited to*, charged and convicted youth. The wording is puzzling.

³² Department of Justice Canada, *YCJA: Resource Manual for Defence Counsel* (Department of Justice: Ottawa, 2003) at 4-4.

Sentencing is to be proportional in a number of different and complimentary ways. It must be proportional to adults committing similar offences (s. 38(2)(a)), to youth in the same circumstance, and “proportionate to the seriousness of the offence and the degree of responsibility of the young person for that offence” to use the words of section 38(2)(c). The principles of parsimony, rehabilitation and reintegration, and restoration are firmly subordinate to the latter, which is set out in terms similar to the Fundamental Principle of adult sentencing.

The Declaration of Principles with respect to Extra-judicial measures is set out in section 4 of the *YCJA*:

4. The following principles apply in this Part in addition to the principles set out in section 3:

- (a) extrajudicial measures are often the most appropriate and effective way to address youth crime;
- (b) extrajudicial measures allow for effective and timely interventions focused on correcting offending behaviour;
- (c) extrajudicial measures are presumed to be adequate to hold a young person accountable for his or her offending behaviour if the young person has committed a non-violent offence and has not previously been found guilty of an offence; and
- (d) extrajudicial measures should be used if they are adequate to hold a young person accountable for his or her offending behaviour and, if the use of extrajudicial measures is consistent with the principles set out in this section, nothing in the *Act* precludes their use in respect of a young person who
 - (i) has previously been dealt with by the use of extrajudicial measures, or
 - (ii) has previously been found guilty of an offence.

The *Act* goes on to set out “Objectives” in section 5 that delineate some of the restorative aspects of the scheme. As such, they are significant for our enquiry, as they detail the subordinate intention of the scheme, the operative principles.

5. Extrajudicial measures should be designed to

- (a) provide an effective and timely response to offending behaviour outside the bounds of judicial measures;
- (b) encourage young persons to acknowledge and repair the harm caused to the victim and the community;
- (c) encourage families of young persons-including extended families where appropriate-and the community to become involved in the design and implementation of those measures;
- (d) provide an opportunity for victims to participate in decisions related to the measures selected and to receive reparation; and
- (e) respect the rights and freedoms of young persons and be proportionate to the seriousness of the offence.

4.3.3 Adult Provisions

As noted, Bill C-41 implemented legislative authorisation for the execution of an

Alternative measure schemes.³³ Section 717 of the *Code* reads:

717. (1) Alternative measures may be used to deal with a person alleged to have committed an offence only if it is not inconsistent with the protection of society and the following conditions are met:

- (a) the measures are part of a program of alternative measures authorized by the Attorney General or the Attorney General's delegate or authorized by a person, or a person within a class of persons, designated by the Lieutenant Governor in Council of a province;
- (b) the person who is considering whether to use the measures is satisfied that they would be appropriate, having regard to the needs of the person alleged to have committed the offence and the interests of society and of the victim;
- (c) the person, having been informed of alternative measures, fully and freely consents to participate therein;
- (d) the person has, before consenting to participate in alternative measures, been advised of the right to be represented by counsel;
- (e) the person accepts responsibility for the act or omission that forms the basis of the offence that the person is alleged to have committed;
- (f) there is, in the opinion of the Attorney General or the Attorney General's agent, sufficient evidence to proceed with the prosecution of the offence; and
- (g) the prosecution of the offence is not in any way barred at law.

(2) Alternative measures shall not be used to deal with a person alleged to have committed an offence if the person

³³ Bill C-41 was enacted as *An Act to amend the Criminal Code (sentencing) and other acts in consequence thereof*, 42-34-44 Eliz. II C. 22 s. 6. Assented to July 13th, 1995, in force September 4th 1996.

- (a) denies participation or involvement in the commission of the offence;
or
- (b) expresses the wish to have any charge against the person dealt with by the court.

(3) No admission, confession or statement accepting responsibility for a given act or omission made by a person alleged to have committed an offence as a condition of the person being dealt with by alternative measures is admissible in evidence against that person in any civil or criminal proceedings.

The use of alternative measures in respect of a person alleged to have committed an offence is not a bar to proceedings against the person under this Act, but, if a charge is laid against that person in respect of that offence,

- (a) where the court is satisfied on a balance of probabilities that the person has totally complied with the terms and conditions of the alternative measures, the court shall dismiss the charge; and
 - (b) where the court is satisfied on a balance of probabilities that the person has partially complied with the terms and conditions of the alternative measures, the court may dismiss the charge if, in the opinion of the court, the prosecution of the charge would be unfair, having regard to the circumstances and that person's performance with respect to the alternative measures.
- (5) Subject to subsection (4), nothing in this section shall be construed as preventing any person from laying and information, obtaining the issue of confirmation of any process, or proceeding with the prosecution of an offence, in accordance with law.

“Alternative Measures” is defined under section 716 as, “measures other than judicial proceedings under this *Act* used to deal with a person who is eighteen years of age or over and alleged to have committed an offence.”

4.4 A comparison

It has been asserted that adult alternative measures is legislatively and operationally similar to its youth counterpart.³⁴ This is not altogether true, as shall be seen, although there are operational similarities. As noted, there is a distinct principle running through

³⁴ For example, *Martin's Annual Criminal Code* 2001 (Aurora: Canada Law Book, 2001) at 1208 advised counsel that the two provisions are similar. McKillop asserts, “most adult alternative measures

youth justice.³⁵ The Quebec Court of Appeal has recently stated that the “courageous attempt” at balancing objectives in section 3 of the *YOA* is the same in section 3 of the *YCJA* although somewhat differently formulated.

For adults, alternative measures are not subject to the statement of the purpose and principles of sentencing set out in section 718. Both of the adult sections recounted above are in Part XXIII- Sentencing of the *Code*. The *Code* defines sentence in section 673, the part that deals with appeal from indictable offences. The definition does not include diversion. A sentence is what a court does; an alternative measure is accessed differently. It is true that courts are given the power to adjudicate whether an alternative measures referral has been completed. In addition to a mandatory direction to dismiss where substantial compliance with the programme is found, courts are also given a discretionary power to dismiss charges where an alternative measures programme has been embarked on but not completed.³⁶ However, these provisions do not change the nature of the referral into a ‘sentence’, as the residual authority is to dismiss, not to impose. If a matter is returned from a diversionary stream, the defendant or accused is not then subject to the court’s sentencing jurisdiction, rather he is subject to the ordinary criminal jurisdiction of the court. Accordingly, section 717 of the *Code* differs from section 4 of the *YOA* and its counterpart in the *YCJA* in lacking a statutory guiding principle.

programmes have been developed based on the existing alternative measures programmes for youth.”
Supra note 23 at 14. These remarks were made during the time that the *YOA* was in force.

³⁵ *Reference*, *supra* note 29 at ¶ 18

³⁶ S. 717 (4)(a) and (b)).

Section 718(2)(e) directs that “all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders.” The restraint in sentencing that is codified in this subsection (and implicit in the wording of a number of the other subsections of section 718)³⁷ applies only to the sanction imposed by a court as a sentence. It does not apply to the decision to divert a matter. The subsection also requires that this restraint in sentencing apply with particular vigour to the circumstances of Aboriginal offenders.³⁸ The same observation may therefore also be made: not only is the matter of restraint in disposition for adults not directed to the decision to divert, the special direction with respect to Aboriginal offenders is similarly absent.

This can be contrasted with the *YCJA* and *YOA* in a number of ways. First, section 3(d) of the *YOA* required that, if “not inconsistent” with the protection of society taking no action, or alternative action “should be considered.” This was followed by a direction in section 3(f) to interfere with the freedom of the young person as little as possible. These provisions are not included in the *YCJA*. Both youth statutes required that the respective Acts be construed liberally and in accordance with the statement of principle.³⁹ The difficulty is that principle itself is not directly enforceable. This is discussed below under the heading of prosecutorial discretion.

³⁷ The intervener’s factum of the Attorney General of Canada in *R. v. Gladue*, [1999] 1 S.C.R. 688, 133 C.C.C. (3d) 385 argued that the special measure in 718.2(e) must be viewed in the context of the “broader principle of restraint that applies to all offenders.” See D. Daubney, “Nine Words: A Response to “Empty Promises: Parliament, the Supreme Court, and the Sentencing of Aboriginal Offenders”, 65 *Sask. L. Rev.* 34 at 36-37 The author details the ways in which part XXIII codifies restraint in sentencing.

³⁸ See generally on the impact of latter part of this subsection, *R. v. Gladue*, *ibid.*, and the large body of academic work that has evaluated it, such as M. E. Turpel-Lafond, “Sentencing within a Restorative Justice Paradigm: Procedural Implications of *R. v. Gladue*” (2000) 43 *Crim. L. Q.* 34. Also see subsequent Supreme Court decisions such as *R. v. Proulx*, [2000] 1 S.C.R. 61, 182 D.L.R. (4th) 1, and *R. v. Wells*, [2000] 1 S.C.R. 207, 182 D.L. R. (4th) 257.

³⁹ S. 3(2) *YOA* and *YCJA*,

Second, section 3(c) (iv) of the *YCJA* requires that measures taken against (note the confrontational term) young persons who commit offences shall “respect gender, ethnic, cultural and linguistic differences and respond to the needs of Aboriginal young persons and of young persons with special requirements.” Extrajudicial measures includes extrajudicial sanctions and includes measures “other than judicial proceedings under this Act.” The contrast between the structure of the adult and youth provisions is quite stark in the request to decision-makers to consider Aboriginality in decision-making.

Third, the youth provisions are responsive to a major complaint made in the 1998 *Strategy for the Renewal of Youth Justice* that, “[l]ong delays between the time when an offence is committed and the time when formal sentences are imposed and make the sentences seem less meaningful for youth, victims and the community.”⁴⁰

Not only is “timely intervention” required to respond to this concern for youth (section 3(1)(b)(iv)), but speed is required to cope with young person’s differing perceptions of time (section 3(1)(b)(v)). Extrajudicial measures, too, are to be timely (section 4(b)).

Adult measures, like youth measures, are subject to the overriding requirement in section 11(b) of the *Canadian Charter of Rights and Freedoms*⁴¹ but otherwise statutory requirement that matters proceed expeditiously for adults are rare.⁴² One argument long

⁴⁰ *A Strategy for the renewal of Youth Justice* (Department of Justice Canada: Ottawa) 1998.

⁴¹ Part 1 of the *Constitution Act, 1982* enacted by the *Canada Act 1982* (U.K.) c. 11. As at the date of preparation, the writer was unable to find any reported decisions where the timeliness directives were accepted in support of a delay argument under s. 11(b). It is certain to be raised. When it is, reference will be had to the Ontario Court of Appeal decision in *R. v. M. (G.C.)* (1991), 65 C.C.C. (3d) 232 that set a delay guideline for youths of five to six months to trial after the “neutral intake period.”

⁴² There are two notable exceptions, the treatment of which illuminates the field. When Bill C-41 introduced conditional sentencing it required that hearings considering alleged breaches of conditional

raised in support of diversion is that it provides a more timely response to offending.⁴³

This article of faith is without empirical foundation. In northern Saskatchewan, in any event, the experience is overwhelmingly that post-charge matters diverted are adjourned for much longer periods than those dealt with judicially.⁴⁴

This having been said, these factors evidence a plain legislative intention that youth be treated differently from adults.

4.5 Accountability

This part and the one that follows will analyse facets of the language used in the above noted sections using the same analytical critique that is now familiar to the reader. Accountability is pivotal, and so we begin there. The *YCJA* uses the term “accountable” in combination with “consequences.” It is a new term. Its genesis is instructive as to the inner workings of the *Act*, and accordingly this Part will look at this in some detail. Although the word’s origins are, logically, in Commerce, it does resonate in Law. Accounting is defined as, *inter alia*, “rendition of an account, either voluntarily or by court order.”⁴⁵ An account is a “detailed statement of the debits and credits between parties to a contract or to a fiduciary relationship; a reckoning of monetary dealings. To

sentences be held within 30 days of the prisoner’s arrest or the issuance of a summons to the prisoner in respect of the breach (s. 742.6(3) *Criminal Code*). When this generated significant case law, much of which held the Crown to the time limit, the subsection was amended to alleviate the burden on the Crown. Secondly, one notes the decision of the Saskatchewan Court of Appeal in *R. v. Billy Taylor* (1995), 104 C.C.C. (3d) 346 in which the attempt of the Queen’s Bench, *per* Milliken J. to effect a restorative end by delaying sentence, was met with a successful Crown appeal. The Court of Appeal ruled that, while allowing time for pre-sentence reports and the like was acceptable, delaying sentencing significantly for other purposes was not permissible and contravened s. 720 of the *Code*.

⁴³ Bala asserts that this is reason for supporting diversion even if it is not proven effective in reducing recidivism. See *supra* note 28 at 274. A similar justification was made twenty years ago. See M. E. Morton, W. G. West, “An experiment in diversion by a citizen committee” in R. Corrado, M. LeBlanc & J. Trépanier, *Current Issues in Juvenile Justice* (Toronto: Butterworths, 1983).

⁴⁴ Personal experience, 1993-2005.

“account for” is “to answer for (conduct)” and to “render a reckoning of.” Being accountable is simply “subject to giving an account.”⁴⁶

The term does not appear in either the *YOA* or the *Code* nor does it have a place in traditional sentencing theory. It finds concrete manifestation in the 1987 Canadian Sentencing Commission’s recognition that a primary purpose of legal response to offending is to maintain public confidence in the system. If offenders enjoy impunity, for law-abiding individuals there would be two consequences,

They would become demoralised, and this demoralization would lead to deviancy. Or, the alternate and more predictable scenario is that the majority of law-abiding people would become outraged and vengeful. This would sound a return to private justice and vigilantism, thus signifying a breakdown of law and order as it is known in our society.... *What is imperative is that [the public] should not be demoralized by their perception that there is not accountability for seriously blameworthy behaviour....* The notion of potential sanctions and accountability are essentially the same.⁴⁷

From this, the Commission recommended that the secondary principle of sentencing be,

Second, the emphasis being on the accountability of the offender rather than punishment, a sentence should be the least onerous sanction appropriate in the circumstance and the maximum penalty prescribed for an offence should be imposed only in the most serious of cases.⁴⁸

This did not become part of the changes included in Bill C-41.

The usage of the term by the Commission is not consistent with the dictionary meanings.

The latter import strong notions of totting up a bill and then paying it. The ordinary

⁴⁵ *Black’s Law Dictionary*, 7th ed., s.v. “accounting”.

⁴⁶ *Ibid.* I have taken the liberty of extracting these portions of the voluminous alternative definitions of the words noted. The balance of the alternative definitions are either duplicative or largely irrelevant.

⁴⁷ Canadian Sentencing Commission, *Sentencing Reform, A Canadian Approach*, (Ottawa: Ministry of Supply and Services Canada) 1987 at 150-151. Emphasis in original.

⁴⁸ *Ibid.* at 145.

meaning is, perforce, *talionic*. It appears that the Commission was strongly persuaded by criminological work that demonstrated a truism of that discipline; it is contact with the system, and the existence of sanctions, rather than the severity of sanctions, that effects crime control.⁴⁹ After all, the fundamental purpose of sentencing is to “preserve the authority of and promote respect for the law.” All of the above, combined with the fact that the term is used in a recommendation in combination with a call for parsimony in sentencing, leads one to conclude that the writers *meant* that accountability be that justice be seen to be done. The commission was keenly aware of just how ill-informed the public was in matters of sentencing.⁵⁰ Accordingly, accountability meant, in my submission, sufficient punishment to denounce the offence in the eyes of the community.

For youth, the term has a different genesis. On June 2nd, 1994, then Justice Minister Alan Rock wrote to the Hon. Warren Allmand, chair of the Commons Standing Committee on Justice and Legal Affairs. He advised that he was tabling legislation to amend the *YOA*⁵¹ and was requesting that the committee undertake a comprehensive review of youth justice in Canada.⁵² The Committee held (with the exception of Saskatchewan, Newfoundland and New Brunswick) Canada-wide consultations. It considered the report of the Federal-provincial-territorial Task Force on Youth Justice that was completed in August of 1996. The Committee tabled a report with fourteen recommendations on April 22nd, 1997.⁵³

⁴⁹ For example, see the discussion of the effect of sanctions on general and specific deterrence, *ibid.* at 136-137.

⁵⁰ See generally *ibid.* chapter four.

⁵¹ Bill C-37, *An Act to amend the Young Offender's Act and the Criminal Code* S.C. 1995 C. 19 assented to June 22nd, 1995, in force December 1, 1995.

⁵² Standing Committee on Justice and Legal Affairs, *Renewing Youth Justice* (Public Works and Government Services Canada: Ottawa) 1996 at Appendix A.

⁵³ The Report contained a dissent from two Bloc Québécois who felt that Quebec was not receiving sufficient funds for youth justice. Quebec had just completed two studies of its own into youth justice. See

The new justice minister, the Hon. Anne McLellan, responded with the “Strategy for the Renewal of Youth Justice” over a year later on May 12, 1998.

The Committee was urged to go beyond tinkering with the *YOA* and, in addition, promulgate a solid statement of principle.⁵⁴ It responded with a recommendation that the two subsections, 3(a) and (c.1), added to the *YOA*’s Declaration of Principle by Bill C-37 constitute the fundamental purpose of the youth criminal justice system. Primacy was to be given to the goal of protection of society which goal was to be attained through rehabilitation and crime prevention. The Committee declined to be more specific, but referred its readers to youth justice legislation in New Zealand, New South Wales and Ireland that is quite emphatic in directing that youth be kept out of the court system altogether unless that is impossible. Youth in the system are to be dealt with at all times in the least intrusive way possible, and only in the case of the most serious and non-responsive individuals is custody an option. Significantly, there is no mention of accountability or consequences, parity or proportionality.

The Government’s response proposed three “complementary strategies.” The first was “Prevention and Meaningful Alternatives.” By this was meant primary and secondary

Groupe de travail sur l'évaluation de la Loi sur la protection de la jeunesse, La protection de la jeunesse. Plus qu'une loi (Québec: ministère de la Santé et des Services sociaux and ministère de la Justice, 1992) and *Groupe de travail chargé d'étudier l'application de la Loi sur les jeunes contrevenants au Québec, Les jeunes contrevenants, au nom... et au-delà de la loi* (Québec: Ministère de la Santé et des Services sociaux and Ministère de la Justice, 1995).

⁵⁴ *Renewing*, *supra* note 52 at 8.

crime prevention programmes,⁵⁵ as well as alternative community justice strategies such as conferencing, diversion and cautioning that would,

...hold youth accountable for their behaviour, acknowledge and repair the harm caused to the victim and the community and help to instil or reinforce values such as responsibility and respect for others.⁵⁶

The second was "Meaningful Consequences for Youth Crime." It expanded the spectrum of accountability to matters to be dealt with within the system and dictated that,

Young people who commit crimes will be held accountable for their actions. The consequences for the crimes will depend on the seriousness of the offence and on the particular circumstances of the offender. Firm measures will be taken to protect the public from violent and repeat young offenders.⁵⁷

The third strategy was rehabilitation and reintegration. Sentences were to *inter alia*, "instil a sense of responsibility" in the offender.⁵⁸

A hint as to the reasons behind the significant swing in focus can be found in the report itself. In addition to the tabling of proposed amendments to the *Act* by the Federal-provincial-territorial Ministers of Justice at their December 1997 meeting, the Saskatchewan Minister of Justice called for amendments in February of 1998 to "deal more effectively with violent and serious young offenders."⁵⁹ The calls were clearly

⁵⁵ Chapter four of *Renewal* explains the concepts of primary, secondary and tertiary crime prevention at some length. To simplify the concepts perhaps too much, primary crime prevention is social work directed at alleviating known risk factors that foster crime in populations as a whole. Secondary prevention measures are targeted at at-risk people to "respond to behaviour that is known to be correlated with future criminal behaviour" (at 28).

⁵⁶ *Strategy*, *supra* note 40 at 13.

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

⁵⁹ *Ibid.* at 12. One notes that the 1987 Sentencing Report addressed public ignorance of the justice system and the effect that the gap between reality and perception has on public opinion. This unjustified (and politically driven) fear of crime stance has now, rather ironically, worked to pervert the good intentions of the Committee.

effective, and one can surmise from the “accountability” language of the current *Act*, that politics prevailed.⁶⁰

“Accountability” can be seen in action in the portion of the *YCJA* that requires youth facing an adult sentence to apply for an order that it not be imposed (section 63). The *Act* is quite specific. The youth must convince the court that a youth sentence is long enough to hold her accountable. Longer prison terms equate to more accountability.⁶¹

The change in language has significant repercussions for diversion. The development of the *YCJA* makes it very clear that community justice, diversion and non-judicial action were to be cornerstones. However, the privileging of principles inconsistent with restoration, with community-prioritized action, effectively leaves restoration as disempowered as before. The next part analyses the judicial referral terminology used, as it is part of the re-colonizing power identified in the third chapter, and develops that argument specifically in the context of alternative measures enabling legislation. It also considers some of the case law, which reinforces the critique and provides some basis for prognostication as to whether the legal system can be used to reshape diversion from within.

⁶⁰ The connection between political pressure as a function of public opinion, and the rise of “populist punitiveness” in five western countries has recently been extensively canvassed. See J. V. Roberts, L.J. Stalans, D. Indermaur and M. Hough, *Penal Populism and Public Opinion: Lessons from Five Countries* (New York: Oxford University Press, 2003). This change in the legislation implies “the notion of politicians tapping into, and using for their own purposes, what they perceive to be the public’s generally punitive stance.” A. Bottoms, “The philosophy and politics of punishment and sentencing” in C. Clarkson and R. Morgan, eds., *The Politics of Sentencing Reform* (Oxford: Clarendon Press, 1995) at 40.

⁶¹ The onus on the youth in this section (s. 72) is unconstitutional. See *Reference supra* note 29.

4.6 The language of marginalization

4.6.1 Public Safety

Both youth and adult provision contain language that requires that the referral be not inconsistent with the protection of society. This presumes that dealing with a matter through judicial proceedings is ultimately the best way of maximising public safety.

There can be only two reasons supporting this: either the *process* of running an accused through a judicial procedure is conducive to public safety, or alternately, the *sanctions* which are thought to be unique consequences of this process accomplish the same end, or a bit of each. Reservations concerning the efficacy of punishment are set out in some detail in chapter three. Despite doubts about the effectiveness of incarceration, the *YCJA* still privileges it. Extrajudicial measures are only presumed to be adequate for non-violent, first time offenders.⁶²

The youth and adult schemes approach the issue of public safety differently. Under the *YOA*, there was an overriding principle in section 3 (d) that extrajudicial procedures “should be considered” “where it is not inconsistent with the protection of society.”⁶³

This has changed profoundly. Under section 6 of the *YCJA*, police, although not the Crown, are required to consider warning, cautioning or referring youths to community

⁶² See s. 4(c) *YCJA*. As noted in chapter three, the results from the RISE experiment in Canberra established that diversionary referral in violent offences produced the most salubrious effect on recidivism.

⁶³ The double negative “not inconsistent,” whilst frequently used, has never been specifically interpreted. Applying standard canons of statutory interpretation, the term means “consistent.” This in turn has been interpreted to mean “compatible with” and “not contradictory of.” The notion of consistency has been interpreted in the context of evaluating whether or not statutory provisions are consistent with one another, particularly in the municipal and constitutional law areas. Inconsistency is a term of plain meaning, one involving a comparison of two actions, one of which excludes the other. See F. Bennion, *Statutory Interpretation*, 2nd ed. (London: Butterworths, 1992) at 321 ff and 589. Also see *Spraytech et al. v. Town of Hudson*, [2001] 2 S.C.R. 241, (2000) 200 D.L.R. (4th) 419, citing *Multiple Access v. McCutcheon*, [1982]

resources. Section 10(2)(b) of the *YCJA* requires that the referring agency, the decision maker under the *Act*, be satisfied that the referral is in the interest of society, the measures taken are “adequate to hold a young person accountable” (4(d)) and the referral is consistent with the overriding principles of the *Act*. This includes the notions of fair and proportionate accountability and consequence discussed above, as well as the requirement that it be “meaningful” to the offender such that long-term protection of the public is effected (section 3 *YCJA*). Under the *Code*, however, section 717 allows that alternative measures be used “only if [the use] is not inconsistent with the protection of society.”

This structure is significant for a number of reasons. Youth EJM is now, at first blush, part of a coherent and cohesive scheme. It dovetails into the larger principles. For adults, the provision is an add-on. It is something, like choosing to fine instead of gaol, which is a dispositional choice that justice system actors, those with power, have.⁶⁴ In this way, for adults, the business of referral to alternatives has maintained in it the coercive and punitive paradigm of colonialism. This is also evident in the availability of this diversion. For youth, the discretionary, “should be considered,” means that *mutatis mutandis* the option is given at least some status. For adults, this issue of public safety is a threshold; if the diversion is inconsistent, the option does not exist. Where this issue does not arise, diversion is an alternative that “may” be utilised. The difference in the two means that adults are treated differently. The significance of this is tied into the

2 S.C.R. 161. This type of contradiction has also been put in terms of situations where “compliance with one law involves breach of another.” See *R. v. Smith*, [1960] S.C.R. 776 at 800.

⁶⁴ These include not only the Crown and police who decide who is favoured, but also the government that designs the scheme to fit its various political and financial priorities.

“alternativeness” of the notion. The word more than implies that the schemes are not mainstream, that they are not ordinary or, worse, not normal. This label is a clear first order instruction to justice system actors to act in accordance with their bureaucratic, conservative inclinations and do what is normal, what is ordinary. At the second order is the instruction that for adults, parsimony effected by way of diversion is not worthy of principled declaration. This is a strong symbol. At the third order is the instruction that diversion referrals are a coercive option, which involves a choice not to punish. The collateral, adjunct status of the adult scheme is a powerful suggestion that a referral is a gift that may be bestowed by the munificence of the powerful on those beneath. Small wonder then, that as a result of a combination of this symbolism, alternative measures for adults may be conceived of as an appropriate way of favouring offenders who are ‘good’, who do not challenge the authority of those with the power to bestow such favours. I suggest that these structural features are incompatible with a concept of justice other than the rule of the sahib over the savage. Setting up a system, which has as its *modus operandi* favours bestowed, is counterproductive if the objective of the exercise is to engender confidence in the system in those whom it serves.

The mandated “protection of society” in the *YOA* provisions was repeated in a number of ways. For example, section 3(1)(b) of the *YOA* asserted that society must be afforded “the necessary protection from illegal behaviour.” Subsection (c.1) declared that the protection of society was a *primary objective* of the criminal law applicable to youth, albeit in the context of declaring that rehabilitation is the preferred route to that objective, whenever possible. As noted elsewhere, the principles set out in section 3 were not

merely a preamble to the *YOA*, but were to be given the force of substantive provisions.⁶⁵ The drafters of the *YCJA* demoted public safety from the top rank of principle but specifically required that consequences for offending promote long-term public protection. The application of *YOA* Alternative Measures was also subject (in subsection 4(1)(b)) to two factors, the needs of the youth and the interests of society. The *YCJA* incorporates this in section 10 (2)(b). The application of the latter factor in particular is problematic. The concept of the public interest is an extremely diffuse and discretionary one. Perhaps the most detailed examination of the concept in the context of the criminal law has been the Supreme Court's 1992 decision in *Morales*.⁶⁶ That case is instructive for two reasons. First, it holds that "public safety" may be used as a ground to justify the detention of accused on remand without infringing their rights under section 11(e) of the *Charter*. This would certainly be germane to the exercise of discretion by gatekeepers to the extrajudicial measures stream. It provides legitimacy to the denial of access, and a justification for continuing the status of the programmes as not mainstream, as alternative and unusual. In short, it privileges the incarceratory. Notably, these gatekeepers, unlike the judges who are bound by this branch of *Morales*, would not have to apply the balance of the test, that is, the court's finding that "public safety" includes the statutory elements which defining the threat as arising from potential interference with the administration of justice or the substantial likelihood of the commission of further offences. When considering the references to public safety in section 3 of the *YOA* and "protection of the public" it is important to be cognisant of this lack of explication.

⁶⁵ *R. v. T. (V.)* (1992), 71 C.C.C. (3d) 32 (S.C.C.) per L'Heureux-Dube J.

Second, *Morales* holds that the “public interest” component in the secondary ground for detention in custody (as it then read), violated the reasonable bail guarantee of section 11 (e) of the *Charter* because it “authorizes detention in terms which are vague and imprecise.”⁶⁷ The case goes on to state,

Nor would it be possible in my view to give the term “public interest” a constant or settled meaning. The term gives the courts unrestricted latitude. ...No amount of judicial interpretation of the term “public interest” would be capable of rendering it a provision which gives any guidance for legal debate.⁶⁸

Accordingly, the diversion referral agency not only has unlimited discretion, it may exercise it on the basis of at least one indefinable criterion. Given its meaninglessness, fallback to the overarching principle, long-term public protection, is inevitable, and with it, the (unsupported) fail-safe of custody.

4.7 *The new imperative of retribution*

⁶⁶ *R. v. Morales*, [1992] 3 S.C. R. 711, 77 C.C.C. (3d) 91. As is obvious, I have equated public interest and public safety, assuming that the latter is part of the former.

⁶⁷ Per Lamer J. at 99, C.C.C.. S. 11 (e) of the *Charter* states,

11. Any person charged with an offence has the right...

(e) not to be denied reasonable bail without just cause.”

At the time the case was argued the secondary ground read,

515 (10) For the purposes of this section, the detention of an accused in custody is justified only on either of the following grounds, ...

(b) on the secondary ground (the applicability of which shall be determined only in the event that and after it is determined that his detention is not justified on the primary ground referred to in paragraph (a) that his detention is necessary in the public interest or for the protection or safety of the public, having regard to all the circumstances including any substantial likelihood that the accused will, if released from custody, commit a criminal offence or interfere with the administration of justice.

After *Morales*, these subsections of the *Code* were amended by the *Criminal Law Improvement Act* 1996, S.C. 1997 c. 18 s. 59 (2) (in force June 16, 1997) with the current provisions that split the former secondary ground into two parts. The first part recodifies the constitutionally valid part of the former secondary ground as a new secondary ground. The second part, now the tertiary ground, is a major reworking of the “public interest” into “any other just cause being shown,” with a number of specific factors defining the applicability of the concept. It too has been challenged and found unconstitutional unless detention is necessary to maintain confidence in the administration of justice. See *R. v. Hall*, [2002] S.C.J. No. 65, 167 C.C.C. (3d) 449. Somehow, public confidence may be ascertained with more precision than “public interest.”

⁶⁸ At 103 C.C.C. per Lamer C.JC.

It is somewhat ironic that in attempting to mitigate the increased incarceration of children,⁶⁹ Parliament has enacted new pieces of law that, for the first time, expose the anti-restorative tensions that festered beneath the *YOA*, and continue to kneecap restoration in the operation of the adult system. Let me explain and, in so doing bring together a number of somewhat disparate but linked themes arising out of the arguments above. The *Juvenile Delinquents Act*, with its emphasis on welfarism and lack of due process was, it was believed, untenable in the face of the 1982 enactment of the *Canadian Charter of Rights and Freedoms*. Because it only had one offence, namely delinquency, disparity in sentencing was not only manifest, it was necessarily the *modus operandus* of the *Act*.⁷⁰ In distinction, “[t]here is general agreement that the *YOA* is somewhat more “offence” oriented than was the *JDA*.”⁷¹ Offence orientation was related to the “culpability of the offender in, and the degree of harm caused by...the offence for which the offender is being punished.”⁷² The *YCJA* takes the process a large step further, moving much closer to the adult scheme by ordering the principles and making proportionality and punishment paramount. The major distinguishing feature between the two formulations is that the youth scheme takes the retributivist philosophy back to its

⁶⁹ The *Strategy* (*supra* note 40) specifically notes: “Canadian youth incarceration rates are higher than those of other countries and higher than incarceration rates of adults” (at 6). Its forerunner, *Renewing Youth Justice* *supra* note 52 at 18 cites the 1994-95 *Juristat* to the effect that the youth system sentences people to custody at a rate *four times* that of the adult system. Docherty, G. and de Souza, P., “Youth Court Statistics 1994-95 Highlights” *Juristat* 16(4) (Canadian Centre for Justice Statistics: Ottawa, 1996).

⁷⁰ S. 38 of the *JDA* directed that the *Act* be construed liberally to put the state *in loco parentis* to the delinquent and “as far as practicable, every juvenile delinquent shall be treated, not as a criminal, but as a misdirected and misguided child, and one needing aid, encouragement, help and assistance.”

⁷¹ P. Carrington & S. Moyer, “Factors affecting custodial dispositions under the *Young Offenders Act*” (1995) 37 *Can. J. Crim.* 128, citing J. N. Doob & J. Meen, “An exploration of changes in dispositions for young offenders in Toronto” (1993) 35 *Can. J. Crim.* 19.

⁷² Carrington & Moyer, *ibid.* at 129. The work refers to the 1987 Report of the Canadian Sentencing Commission (at 133). At that point the authors of the latter work are not using the term “Offence-based” at all, but are engaged in a very useful discourse on the utility (if I may use the word) of retributivism in formulating coherent sentencing theory. In particular, the need for a clear, complete and consistent

roots by taking away, as noted, denunciatory⁷³ and deterrent aims, and substituting those of accountability and meaningful consequence. The adult imposition of “just sanctions” to achieve public safety in section 718 is the purpose. The way it is done is in the six divergent principles that follow the purpose. Youths, on the other hand, now face the purpose of sentencing, accountability and consequence to achieve public safety, which is in turn subject to operative principles. The language for youths invites (indeed requires) at least the same firmness of response by the judiciary (and all others who make decisions under the *YCJA*) as would be the case for adults. Arguably, the importation of accountability, consequence and proportion into the Declaration of Principle mandates a more punitive response for offending youths, at all stages of the decision making process.⁷⁴ The brakes on the punitive imperative are further downstream in, for example, the controls on (or, some would argue, the requirement of judicial justification for) the use of incarceration in section 39 of the *YCJA*.

The birth of the *YCJA* was opposed by conservative Senators such as R. Andreychuk, then chair of the Senate Committee on Youth Justice. Two reasons are significant for our purposes. The first is that the committee was concerned that lack of funding for the “front end” of the *YCJA*, whilst concurrently toughening up the punitive measures in the well-funded “back end” of the *Act*, would have a deleterious effect.⁷⁵ In view of the discussion above, this fear would seem to be well founded. Second, the government

rationale is noted, albeit one based on a “synthesis” of retributive and utilitarian principles. See Canadian Sentencing Commission *supra* note 47 at 127-156.

⁷³ Although accountability may be a species of public denunciation as argued, *supra* part 4.5.

⁷⁴ This argument was pursued unsuccessfully with respect to sentencing by Quebec in the *Reference supra* note 29.

⁷⁵ Address given to the College of Law, University of Saskatchewan, September 29th, 2003 and personal conversation with Senator Andreychuk, same time and place.

defeated an opposition motion to place an enabling provision in the *YCJA* that would require that it be interpreted in accordance with the international *Convention on the Rights of the Child*.⁷⁶ Courts have held that Federal law should be interpreted in accordance with treaties entered into by Canada,⁷⁷ particularly when considering whether a matter is sufficiently imperative to justify the infringement of *Charter* rights under section 1 of the *Charter*.⁷⁸ Parts of the *YCJA* are unconstitutional, but the principles, even trenching as they do on issues of child welfare (a provincial responsibility), are *intra vires* the Parliament of Canada.⁷⁹

4.8 Judicial Thinking about Alternative Measures

In this part, I wish to examine in some detail two facets of the judicial response to the enabling, and implementation of Alternative Measures diversion. The first is the court's response to an argument made that failure of the legislative and executive branches of government to implement, at a provincial level, the diversion scheme authorized by federal legislation, had the effect of violating the constitutional guarantee of equality across the land. The second was a response to an attack on the exercise of judicial discretion in charging a youth, rather than diverting or dealing with the matter in another way. These cases, and the arguments made in and around them, are useful in defining

⁷⁶ The *Convention on the rights of the Child* U.N.G.A. Doc. A/RE/44/25 (1989), [1992] Can. T.S. No. 3 was ratified by Canada with the support of all of the provinces and territories. The Quebec Court of Appeal gave significant weight to the fact that the *Convention* is referred to in one of the "whereas" clauses to the Bill in deciding that the *Convention* "may serve as an instrument" for interpreting children's fundamental rights under s. 7 of the *Charter*. See *Reference supra* note 29 at ¶115.

⁷⁷ *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, (1999) 174 DLR (4th) 193. Ambiguity in domestic law may be resolved by reference to Canada's international commitments. See *Reference supra* note 29 at ¶93.

⁷⁸ *Reference, supra* note 29. See *Slaight Communication v. Davidson*, [1989] S.C.J. No. 45, (1989) 59 DLR (4th) 416 at ¶ 24.

⁷⁹ The *YCJA* is also compatible with international conventions to which Canada is a party. *Reference, supra* note 29.

what it is that we are dealing with. They are the context of the operation of restorative justice in the non-judicial sense.

4.8.1 Variable geographical application

The Supreme Court in *S. (S.)*⁸⁰ considered whether the refusal of the Attorney-General or the Lieutenant Governor in Council of Ontario to implement the scheme of Alternative Measures authorized by *YOA* section 4(1) infringed a youth's rights under section 15 of the *Canadian Charter of Rights and Freedoms*. That provision states,

15 (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

The trial Court held, *inter alia* that section 3 (1)(d) of the *YOA* gave to the youth a positive right to the benefit of the programme and imposed on the executive branch a concomitant duty to implement a scheme to which the youth could be referred. The Ontario Court of Appeal directed itself specifically to whether the differential treatments of persons similarly situated constituted proscribed discrimination. It found that it did, concluding that,

In the final analysis we are concerned with *federal* legislation and the federal Attorney General has submitted a long list of arguments, which lead one to conclude that non-implementation by any province of the scheme set out in the Act, according to the principles declared, would be invidious or pejorative to the extent of being discriminatory... There is no way that a young person can be dealt with 'in accordance with the principles set out in [ss. 3(1)]' unless there are

⁸⁰ *R. v. S. (S.)*, [1990] 2 S.C.R. 254, 57 C.C.C. (3d) 115.

alternative measures programmes designated under s. 4(1) for which a young person can be considered.⁸¹

The Supreme Court (per Dickson C.J.C, as he then was) disagreed. The Court framed the question as being whether or not the legislation compelled the province to act. The provisions are not, on their face, mandatory; the province is under no duty. Nor did resort to the Principles set out in section 3 assist. The direction that non-judicial sanctions *should* be considered (section 3(1)(d)) constitutes only a “legal desire or request.” Accordingly, the statement of Principle “does not require the abandonment of the principles or statutory interpretation nor does it preclude resort to the ordinary meaning of words in interpreting a statute.”⁸² The Court also, by implication, rejects the important words of the Court below, that alternative measures are integral to youth justice. As a result, Parliament must have had within its contemplation that schemes would vary from place to place and that this diversity could include non-existence. “The non-exercise of discretion cannot be constitutionally attacked simply because it would create differences between provinces.”⁸³

Despite the fact that it had not been challenged, the Court went on in *obiter* to consider the constitutionality of section 4. The crux of the issue for our purposes is the Court’s treatment of the second branch of the test for breach of section 15 equality rights. The test was first set out in *Andrews*.⁸⁴ The distinction based on province of residence is not one which entails differentiation (intentional or not) based on a “personal characteristic.”

⁸¹ Emphasis in original, at 42 C.C.C. (3d) 41 at 69-70 and 73, per Tarnopolsky J.A.

⁸² *Supra* note 80 at 129 C.C.C. (SCC).

⁸³ *Ibid.* at 138 C.C.C. (SCC).

⁸⁴ *Andrews v. Law Society of British Columbia*, [1989] S.C.R. 143, 56 D.L.R. (4th) 1 held that discrimination against a “discrete and insular,” disadvantaged group (non-citizens) constituted

Furthermore, since section 4 of the *YOA* is empowering and delegatory, the valid use by a province of its legislative power is not subject to successful *Charter* attack, constituting as it does an exercise of the constitutional division of powers.⁸⁵ Even if the delegatory scheme itself is attacked, it survives unscathed. The earlier case of *Turpin* developed the principle that the criminal law⁸⁶ may well apply unequally across the land. Section 15 does not advance an attack on this differentiation in the absence of evidence that the disadvantaged group is a discrete and insular minority with *indicia* of discrimination such as stereotyping, historical disadvantage, or vulnerability to political and social prejudice. This interpretation of section 15 is highly purposive, rather than formal, and directed at “remedying or preventing discrimination against groups suffering social, legal or political disadvantage...”⁸⁷ Youth in Ontario are not so situated.

The case has significant consequences. First, it explicitly enables the furtherance of regional variation in the type and form of alternative measures schemes. Second, it reduces the impact of the statement of principle to being merely an influence on enshrined, positivistic principles of interpretation of what is most surely criminal law. Its most significant effect, in my submission, is on what has never been argued, and what is a fact of its everyday application: the conjunction of Aboriginality, youth and criminality. In accepting that the provinces have a right to put their own stamp on the delivery of the

discrimination that could not be justified under s. 1 of the *Charter*. The provincial law challenged concerned a prohibition on membership in the provincial law society by non-citizens of Canada.

⁸⁵ In an interesting historical footnote, the Saskatchewan Court of Appeal dismissed a *pre-charter* application to enforce s. 4 of the *YOA* in *Terry Wayne Carrier v. R.* (unreported oral decision April 7th, 1986 *per* Bayda C.J. S., Cameron and Sherstobitoff JJ. A.) The Court held that the section conferred a power on the Crown which, unlike a right, does not impose a corresponding duty.

⁸⁶ *R. v. Turpin*, [1989] 1 S.C.R. 1296, (1989), 48 C.C.C. (3d) 8. *S. (S.)* holds that the *YOA* is a valid Federal exercise of its criminal law jurisdiction and not in pith and substance child welfare legislation (at 131-136 C.C.C.).

service, the Court believed it was furthering the adaptability of schemes to the needs of the communities in which they operate.⁸⁸ What it has really done is decrease the ability of disadvantaged people to argue in litigation that the non-provision of comprehensive alternative measures programmes to their particular communities constitutes prohibited discrimination.

The judicial interpretation of the C-41 sentencing reforms in section 718.2 (e) has, at a fundamental level, accepted that a primary objective is the amelioration of overrepresentation of Aboriginal people in the justice system.⁸⁹ Prior to the *YCJA*, youth law lacked such direction, although concerned judges became quite creative in crafting solutions.⁹⁰ A resourcing argument for youth based on section 15 of the *Charter* would

⁸⁷ This is a paraphrase of Wilson J.'s dicta in *Turpin* at 35-36 C.C.C. with the exception of the directly quoted portion.

⁸⁸ Indeed, the Court cites Bala and Lilles, *The Young Offenders Act Annotated 1984*, which lauds the structure of the *YOA* as providing local flexibility.

⁸⁹ See *R. v. Gladue*, *supra* note 37 at paragraph 50. J. Rudin and K. Roach in "Broken Promises: a response to Stenning and Roberts' "Empty Promises" (2002) 65(1) Sask. L. Rev. 3 at 21 assert that it was the policy of the Minister of Justice in introducing the legislation to ameliorate Aboriginal overrepresentation in prison, rather than sentencing that discriminates against Aboriginal people. The latter was argued to be a primary objective by P. Stenning and J. Roberts in "Empty Promises: Parliament, the Supreme Court and the sentencing of Aboriginal Offenders", (2000) 64(1) Sask. L. Rev. 137.

⁹⁰ S. 20 (8) of the *YOA* stated that,

(8) Part XXIII of the *Criminal Code* does not apply in respect of proceedings under this *Act* except for s. 722, subsections 730 (2) and sections 748, 748.1 and 749, which provisions apply with such modifications as the circumstances require.

Despite this, Henning J. of the Saskatchewan Youth Court considered s. 718.2 (e) in passing disposition on a youth in *R. v. R. S.*, [1997] S. J. No. 203, (1997) 45 M.V.R. (3d) 148. Judge Turpel-Lafond of the same Court sitting at Saskatoon in the matter of *R. v. M.L.*, [2000] S. J. No. 17 held that s. 718 generally catalogues the "principles that are weighed in sentencing, and should be considered, along with those unique to young offenders." She noted:

[i]n *R. v. A.J. and A.M.J.* of May 14th, 1999 [unreported] the Youth Court decided that the objective of fostering restorative justice articulated in the Supreme Court of Canada decision in *R. v. Gladue*, [1999] S.C.R. 588 [*sic*, this cite is incorrect in the decision], apply to youth dispositions even though...excluded by operation of the *Young Offenders Act* (at ¶ 48 S. J.)

Her honour proceeded to deal with the matter of disposition for a youth affected by Foetal Alcohol Effect in a restorative way. The authority for the proposition is now to be found at *R. v. A.J.J.*, [1999] S.J. No. 917, another decision of Judge Turpel-Lafond's. There the Saskatchewan Youth Court held that while it is quite correct that s. 20(8) of the *YOA* excluded s. 718(2)(e) of the *Code*, s. 3 of the *YOA* required the incorporation of the reasoning of the Court in *Gladue* because "systemic discrimination and background factors is to be considered in every sentencing..." at ¶ 8.

have to be situated within the parameters of *Andrews* and *S. (S.)* with regard to the requirement of establishing discrimination, based on personal characteristics, against persons discrete and insular. The fact of differing residence (and unequal access to resources as a result) does not define a group as being “discrete and insular.” It is unfortunate that the Supreme Court in *S. (S.)*, in an effort to be purposive and remedial, set the stage for practical and irremediable discrimination. As a result, youthful offenders cannot force the system to allow them the principle of restraint in the sense of diversion; the provision has been gutted at the most basic level.

It is unlikely that the *YCJA* would make any difference if one used a section 15 approach. The language of discretion is almost identical. The Quebec Court of Appeal considered a number of arguments by the Quebec Attorney-general in *Reference re: Bill C-7*.⁹¹ Among them was the position that the powers granted to the federal government under the *YCJA* to effect extrajudicial measures infringed on provincial power to deal with child welfare. The Court followed *S. (S.)* and held that this federal right to distribute was not a federal “ploy” to legislate in a provincial field.⁹² The power to prevent crime is within federal authority. The *YCJA*’s diversionary, conferencing and citizen committee provisions are valid federal law. Whilst federal-provincial co-operation is desirable, the fact that federal priorities and principles may differ from a province’s does not affect its validity.⁹³ In so doing, the Court effectively adopted the language of *S. (S.)* with respect to discretion. Consequently, it is submitted that a failure or refusal to provide resources

⁹¹ *Supra* note 29.

⁹² *Ibid.* at ¶ 83.

⁹³ *Ibid.* In that case international law was unsuccessfully invoked to support an argument that the *YCJA* does not comply with international treaties to which Canada is a party. As a matter of Canadian Constitutional Law, the influence of international treaties on provincial implementation of alternative

or to divert will be unassailable. Accordingly, even if directory provisions such as section 3 (c)(iv) ask that “measures taken against young persons who commit offences should...(iv) respect gender, ethnic, cultural and linguistic differences and respond to the needs of Aboriginal young persons....” founding a section 15 cause of action thereon would be futile.⁹⁴

The *Reference* case went on to analyse whether the *YCJA*'s sentencing provisions violated youths' section 7 *Charter* rights to liberty and psychological security of the person in a way not in accordance with principles of fundamental justice. Quebec unsuccessfully argued that part four (Sentencing) gives excessive weight to public protection and suppression of crime at the expense of the best interests of children. The Court did find that the “presumption of the imposition of an adult sentence is not necessary to achieve the purpose of the *YCJA*” and struck it down.⁹⁵ The *Reference* did not analyse whether the provision of extrajudicial resources, and the prosecutorial will to use them, is vulnerable to attack as a matter of fundamental justice. One certainly could develop an argument that bringing youth into the judicial system is as much a violation of the constitutional right to psychological security as the overall scheme of sentencing (which includes non-incarceral measures) that the Court holds is a violation of this right.⁹⁶ The lack of judicial supervision over resourcing/referral decisions might deprive the Crown of the argument (used successfully in the *Reference*) that the fact that the

measures would be even more limited. See *Labour Convention Case*, [1937] A.C. 326, [1937] 1 D.L. R. 673.

⁹⁴ The Court specifically considered whether the purported (and rejected) privileging of proportionality in youth sentencing offended the human dignity of youth (ironically by treating them more like adults at ¶ 306) and hence discriminated inappropriately under the *Charter*. The Court applied *Andrews* and rejected this novel argument, holding that the legislation is proper in providing a distinct response to the needs of youth.

⁹⁵ *Reference supra* note 29 at ¶ 250 (emphasis added).

⁹⁶ *Ibid.* at ¶ 226.

sentencing court has a range of options means that the principles of fundamental justice are followed. Logically, the mandatory fundamental principle (the best interest of the child), requires not only the proper range of sentencing options be available, and that the sentencer have properly balanced principles to use when choosing, but also that the decision is made by a judge. None of these are present in the *YCJA*'s extrajudicial measures scheme. If one accepts that extrajudicial measures are essential to the operation of the *Act* (as is argued *infra* with respect to prosecutorial discretion), then perhaps an argument can be made that the discretionary character of the referral/resourcing decision infringes section 7 of the *Charter*.

The Saskatchewan Court of Appeal considered a resourcing argument under the *YOA* on non-charter grounds in *R. v. L.E.K.*⁹⁷ The sentencing Court had ordered that particular services be provided to a young offender. On appeal, the Court noted that the Supreme Court decisions in *T.(V.)* and *S. (S.)*,⁹⁸

...make it clear that the general principles of the *Act* do not confer or create jurisdiction on the youth court that has not specifically been conferred elsewhere...s. 3(1) [of the *YOA*] does not impose a mandatory duty on the director [of youth services] to create a specific type of program.... jurisdiction is limited not only by the terms of the statute which created it but also by fundamental constitutional principles relating to the separation of powers between the judiciary, whose role it is to impose sanctions, and the executive, whose role it is to administer the sanctions. Moreover, whilst s. 3(2) of the *Act* requires a liberal interpretation be given to the legislation, it is subject to the overriding principle that the normal principles of statutory interpretation apply.⁹⁹

⁹⁷ [2000] S.J. No. 844, (2000) 153 C.C.C. (3d) 250 on appeal from [2001] S.J. No. 434. According to Allbright J. in *T.L.K.*, *infra* note 102, the youth's counsel in *L. E.K.* actually gave constitutional notice and sought a remedy under ss. 7 and 15 (at ¶ 19 of *T.L.K.*) although the Appeal Court makes no mention of it.

⁹⁸ *R. v. S. (S.)*, [1990] 2 S.C.R. 254, 57 C.C.C. (3d) 115, *R. v. T.(V.)*, [1992] 1 S.C.R. 749, 71 C.C.C. (3d) 32, 12 C.R. (4th) 133 (SCC).

⁹⁹ *L.E.K.* *supra* note 97 at ¶ 20. This principle has been followed to like effect in British Columbia. See *R. v. Gray*, [2002] BCJ No. 1989, *R. v. Creighton*, BCJ No. 1988. Also see *Auton (Guardian ad litem of) v. British Columbia (Attorney General)* 2004 S.C.C. 78 in which the Supreme Court denied a resourcing

In *T.L.K.*¹⁰⁰ the Queen's Bench denied an application under sections 7 and 15 of the *Charter*. The applicants sought an order that would afford constitutional protection to a judge's order that the Saskatchewan government provide services. The motion asked for the remedy on the basis that to do otherwise would be to infringe the youth's "right to liberty by denying her access to appropriate rehabilitative programming." Section 15 relief was also sought on the basis that denying or limiting the youth's access to rehabilitative programming based on her learning disability infringed her right to equality before the law. The Court held that it was bound by *L.E. K.* and dismissed the application.

In the New Brunswick Queen's Bench decision in *R. v. Desjardins*,¹⁰¹ an adult offender applied for a judicial stay on the ground that the alternative measures programme in New Brunswick was not implemented early enough in his area for him to take advantage of it. The government had chosen to stage implementation across the province. The trial Court agreed that the failure to provide the programme constituted discrimination and entered a stay. The Crown's appeal was allowed. The defendant did not assert that section 717 of the *Code* or the programme offended the *Charter* except insofar as its (non)implementation constituted section 15 discrimination.¹⁰² The summary conviction appeal Court did not refer to *S. (S.)* but reached the same result and for essentially the

claim by autistic people on the basis (inter alia) that there is no right, at law, to provision of no-core medical services such as a particular course of treatment for autism.

¹⁰⁰ *R. v. T.L.K.*, [2001] S. J. No. 184, (2001) 205 Sask. R. 71. This YOA-based case was noted up on July 29, 2004. No consideration or appeals were found. Allbright J. did not have the written decision in *L.E.K.* and assumed that the Court of Appeal had considered the *Charter*. A noted, the Court of Appeal in *L.E.K.* makes no mention of the *Charter* relief sought. This is very odd.

¹⁰¹ *R. v. Desjardins*, [1999] N.B.J. No. 70, (1999) 209 NBR (2d) 177.

same reasons. It acknowledged that the defendant did not receive the benefit under the law that others might but, following *Turpin*, held that this did not constitute discrimination because the group of which he was a member had no history of prejudice or social disadvantage.

4.8.2 Prosecutorial Discretion

This part will consider the judicial reaction to challenges to the actions of the gatekeepers. In so doing I will venture into the Canadian concept of prosecutorial discretion, and demonstrate the key place of judicial protection of this role in perpetuating marginalization of the scheme.¹⁰³

Two years after the decision in *S. (S.)*, the Supreme Court again had the opportunity to consider the influence of section 3 of the *YOA* on the operation of the *Act*. In *T. (V.)*,¹⁰⁴ the Court considered a conflict between section 3(1)(d) and long established principles of prosecutorial discretion. As in the earlier case, the Court spoke to the importance of the Principles set out in section 3, but refused to give them sufficient force for them to have any real effect. Madam Justice L'Heureux-Dubé considered whether section 3(1)(d) of the *YOA* had sufficient force to give a Youth Court judge the power to act in accordance with it when a prosecutor had not. The British Columbia Court of Appeal had held that,

¹⁰² This may be contrasted with *R. v. Okimow*, [2000] S.J. No. 499, [2001] 1 W.W.R. 662, (2000) 197 Sask. R. 22, discussed *infra*.

¹⁰³ "A public officer has discretion whenever the effective limits on his power leave him free to make a choice among possible courses of action or inaction." K.C. Davis, *Discretionary Justice: a Preliminary Inquiry* (Baton Rouge: Louisiana State, 1969) cited in *Baker supra* note 77 at ¶ 52. The exercise of discretion, far from being Dicey's "arbitrary, totalitarian foil to 'ordinary law' of general application upon which rests the concept of the rule of law itself," is integral to the operation of the criminal justice system. A.V. Dicey, *An Introduction to the Study of the Law of the Constitution* 10th ed. (London: Macmillan, 1959) as expostulated by M. Carter, "Prosecutorial Discretion as A Complement to Legislative Reform" in *Perspectives on Legislation: Essays from the 1999 Legal Dimensions Initiative* (Ottawa: Law Commission of Canada, 1999) online: Law Reform Commission <http://www.lcc.gc.ca/en/themes/gr/rl/ldi1999.pdf>

¹⁰⁴ *R. v. T. (V.)*, [1992] 1 S.C.R. 749, 71 C.C.C. (3d) 32, 12 C.R. (4th) 133 (SCC).

The prosecuting authorities are required before they lay charges against young persons to act under the guidance of section 3(1)(d). If they fail to do so the youth court judges, who have the ultimate responsibility for application of the *Young Offenders Act* are not, in my view, helplessly bound to convict every time all elements of an offence are proved.¹⁰⁵

According to the Supreme Court, interpreting the subsection in the way the Court of Appeal did, “would amount to a substantial alteration to normal criminal procedure and, in particular to the principle of prosecutorial discretion.”¹⁰⁶ It recognized that the Crown and its agents have wide discretion. The use of the mandatory “shall” in section 3(2) of the *YOA* (and, identically in the *YCJA*) was not held to change the “should” that lies behind the directions to leniency, into something more mandatory. Accordingly, whatever the principle might say, the fact that it is not complied with by decision-makers under the various *Acts* is not reviewable. If Parliament wishes to effect significant change, by modifying, for example, judicial power of review of prosecutorial discretion, it must do so explicitly. Someone has to make the decision of what, when, how and whom to prosecute. “Discretion is an essential feature of the criminal justice system. A system that attempted to eliminate discretion would be unworkably complex and rigid.”¹⁰⁷

Giving the judiciary the power to determine the charge to be laid would lead to chaos.¹⁰⁸

Barring flagrant impropriety, a judge may not review the conduct of the Crown. This is because such review is not within the “institutional competence” of the Court. The function of the prosecutor must not blur with that of the judge, lest the latter be perceived

¹⁰⁵ 64 C.C.C. (3d) 40 at 45 per Macdonald J. A. (C.A.)

¹⁰⁶ *Supra* note 104 at 38 (C.C.C.).

¹⁰⁷ *R. v. Beare*, [1988] 2 S.C.R. 387, 45 C.C.C. (3d) 57 at 76 C.C.C. per La Forest J. The case held that the wide discretion afforded the prosecution does not infringe the principles of fundamental justice guaranteed by s. 7 of the *Charter*.

¹⁰⁸ The Court cites McLennan, J. in *Re Harvey* (1957), 119 C.C.C. 124 to this effect.

as descending into the arena.¹⁰⁹ All of the factors that determine the nature and existence of a prosecution are ill-suited to judicial review, absent abuse of process¹¹⁰ and the violation of principles of fundamental justice and even then only in the clearest of cases.¹¹¹ The doctrine of abuse of process was significantly restricted by the Supreme Court in *R. v. O'Connor*.¹¹² The decision used the language of earlier cases such as *R. v. Keyowski*,¹¹³ but refused to uphold a stay in a strikingly egregious case of prosecutorial misconduct. Since justice system actors such as the Crown and police take their guidance from judicial acts, rather than judicial words, the potential effect was significant.

Did the wording of section 3 of the *YOA* manifest a clear intention to change the law?

The Court's treatment of this issue is revealing. The nature of prosecutorial discretion under Canadian law is so institutionally entrenched that it is worthy of determined protection. Accordingly, and because of the political compromises contained, the section lacked the "kind of clear, singular intention necessary to accept the type of radical change in the law of criminal procedure which is advocated by the Court of appeal..."¹¹⁴

¹⁰⁹ *T. (V.)*, *supra* note 104 at 40-41 C.C.C. Although it is not put in these terms, one senses in the Supreme Court's reasoning a concern for the appearance of judicial impartiality.

¹¹⁰ One might also suggest the doctrine of *de minimis non curat lex*. Bala argues (*supra* note 28 at 286) that *T. (V.)* ruled this out. The case makes no mention of the doctrine, but is specific that only abuse of process allows an exception to the general rule. One could argue that, in appropriate cases, *de minimis* is always a check on prosecutorial discretion, and that if the Supreme Court wished to exclude it and alter existing law, it would have done so explicitly.

¹¹¹ This policy is consistent throughout *Charter* remedy litigation. S. 24 (2) of the *Charter* requires that evidence obtained in a manner which infringes or denies an accused person's *Charter* rights be excluded only if to admit it would bring the administration of justice into disrepute. An example of the height of this threshold can be seen in the requirement that the disrepute caused by admission be balanced with the disrepute occasioned by *exclusion*. See *R. v. Simmons*, [1988] 2 S.C.R. 495, 45 C.C.C. (3d) 296 for an example of the threshold in a non-abuse of process situation.

¹¹² *R. v. O'Connor*, [1995] 4 S.C.R. 411, (1993) 103 C.C.C. (3d) 1. A suit for malicious prosecution remains as a check on Crown activity. See *D.K. v. Miazga et. al.*, [2003] S.J. No. 830, (2003) 234 DLR (4th) 612.

¹¹³ *R. v. Keyowski*, [1988] 1 S.C.R. 657, (1988) 40 C.C.C. (3d) 48,

¹¹⁴ *T. (V.)*, *supra* note 104 at 45 (C.C.C.).

First, notice where the onus lies. Anyone wishing to displace tradition faces an uphill battle. The field is firmly canted in favour of inertia. Second, one notes the characterization of the issue as being procedural. The implication is that the change that was urged upon the Court was properly only a change in the *modus operandi*, and did not affect substantive rights. Section 3 did not contain within it a positive obligation to do anything differently.¹¹⁵ Labelling the putative change ‘procedural’ provides an extra layer of insulation from whatever temptation the judiciary might have to be innovative or creative. It also left the crime control (and other incarceratory elements) of section 3 intact for judges to refer to whilst crafting dispositions. Purposive interpretation is insufficient to lift the principles up by their own bootstraps.

The decision to divert to restorative programmes in the *YCJA* is placed in the hands of the police and the Crown. The language being effectively the same as under the *YOA*, it is unlikely that one could successfully argue that the Statements of Principle in the *YCJA* open up new ground for a remedy that could be used to coerce decision makers to exercise their powers and divert a case out of the judicial system. One might try on the basis that (*T. V*) was decided as it was precisely because the *YOA*,

... does not have a single, simple underlying philosophy.... The weight to be attached to a particular principle will be determined in large measure by the nature of the decision being made.... there is a need to balance competing principles.... There is a fundamental tension in the *YOA*.¹¹⁶

The attempt to attain disparate goals through stated principle was “fatal” to the youth’s argument as its tensions manifested an ambiguity that “fails to reveal the kind of clear,

¹¹⁵ As the Saskatchewan Court of Appeal ably confirmed in *L.E.K. supra*, note 97.

¹¹⁶ N. Bala & M. Kirvan, “The statute: Its principles and provisions and their interpretation by the Courts” in *The Young Offender’s Act: A revolution in Canadian Juvenile Justice*, A.W. Lescheid, P.G. Jaffe, and

singular intention necessary to accept the kind of radical change in the law of criminal procedure”¹¹⁷ advocated by the youth.

Obviously, this is a significant hurdle for anyone who wishes to challenge paternalistic or simply arbitrary (but not capricious) refusals by Crown agents to divert matters out of the courts. Could *T.(V.)* be argued again under the *YCJA* on the basis that the declarations of principles therein are no longer ambiguous? The answer can be very simple, or very complex. The former would assert that the new legislation has as diverse a balance of conflicting objectives as the old.¹¹⁸ In particular, the language used is no more mandatory toward leniency than before.¹¹⁹ It is not until one gets to the sentencing principles that consideration of anti-incarceral factors, and the imperative not to incarcerate in the absence of defined aggravating circumstances, occurs. The contrast is marked, and definitive.

The more complex answer involves an evaluation of the development of the place of diversion in the *YOA* as it was constructed to deal with the concerns raised with regard to the *Juvenile Delinquents Act*,¹²⁰ and the similar role of diversion within the *YCJA*. By

W. Willis (Eds.) (University of Toronto Press: Toronto) 1991 at 80-81, cited by Justice L’Heureux-Dubé in *T.(V.) supra* note 104 (at 44-45 C.C.C.).

¹¹⁷ *T.(V.) ibid.* at 45 C.C.C.

¹¹⁸ The Quebec Court of Appeal noted in the *Reference* that the principles remain a complex balance with the same objectives in a “somewhat different formulation” *supra* note 29 at ¶ 19 and 37.

¹¹⁹ The 1997 Report of the Standing Committee on Justice and Legal Affairs cites Justice L’Heureux-Dubé’s finding, noting, “One of the problems with the present Declaration of Principles contained in section 3 of the *Young Offenders Act* is that it does not establish obligations to be fulfilled by the different components of the youth justice system.” *Renewing Youth Justice, supra* note 52. Quebec argued in the *Reference* that proportionality was now primary, and hence the new *Act* harder on kids. The Court disagreed. See *supra* note 29.

¹²⁰ See Hylton, J. “Get tough or get smart? Options for Canada’s justice system in the twenty-first century” (1995) *Canadian Journal of Criminology* at 229 ff. Also see West, W.G. *Young Offenders and the State: A Canadian Perspective of Delinquency* (Butterworths: Toronto) 1984.

this, I mean the privileging of diversion within the operative structure of the *YCJA* is an essential mitigation of what is otherwise an application of a crime control model to youth criminal justice. The new *Act* would not work as Parliament intended in the absence of an operative diversionary system. It is so integral to the scheme that Parliament must have intended that it not be marginalised. It is a decision of a different order than the normal prosecutorial function, and deserving of different considerations. If so, the opponent argues, why did not Parliament use clear and unambiguous language? Why did it not follow the New Zealand model and take discretion out of the hands of the Crown?¹²¹ Sections 6(2) and 10(2) of the *YCJA* are quite explicit in protecting gatekeeper discretion.¹²² One can only see this appropriation of the language of the Court in *T.V.* as being persuasive and conclude that the argument would fail. The only hope would be to incorporate the importance of Extra-judicial Measures to the *YCJA* into an argument developed along the constitutional lines of that used in the *Reference*.¹²³

Similarly, an attempt to use a conference under section 19 of the *YCJA* for this purpose would be doomed. That provision, new under the *YCJA*, directs that conferences be advisory, and that this advice be given to the person who has the right to make a decision under the *Act*. The Crown as gatekeeper would have nothing to fear if it declines to follow the well-considered advice of a conference to divert a matter.

¹²¹ See G. Maxwell and A. Morris, "Juvenile Crime and Justice in New Zealand" in N. Bala, J.P. Hornick and H. Snyder eds. *Juvenile Justice Systems: An International Comparison of Problems and Solutions* (Toronto: Thompson Educational Publishing, 2002)

¹²² Bala notes that the decision in *T. (V.)* overruled a number of earlier attempts by lower Courts to supervise referrals to alternative measures. See *supra* note 28 at 284 and the authorities there cited.

¹²³ *Supra* note 29. I will not repeat the argument developed some pages ago in part 4.8.1 in the context of controlling the government's resourcing discretion. I do ask the reader to bear in mind the structural importance of EJM to the *YCJA* when considering whether denial of this benefit to a youth violates that

Section 3 of the *YOA* acquired significantly more vigour in the area of sentencing/disposition. The contrast is instructive. The Supreme Court in *R. v. M. (J.J.)*¹²⁴ upheld the two-year open custodial disposition of a youth for a number of property offences. There were strong overtones of incarceration for the purpose of providing for the welfare of the child.¹²⁵ Justice Cory notes,

...there is a marked ambivalence in [s. 3 of the *YOA*'s] approach to the sentencing of young offenders. Yet that ambivalence should not be surprising when it is remembered that the *Act* reflects a courageous attempt to balance concepts and interests that are frequently conflicting.¹²⁶

After recognizing the political compromises enshrined in the section, his Lordship makes it clear that section 3 has normative force in sentencing. Specifically, he purports to follow the lead of Justice L'Heureux-Dubé in *T. (V.)* and holds that the statement of principle be "given the force normally attributed to substantive provisions." He uses this concept to justify departure from strict concepts of criminal law and situate young offender dispositional activity somewhere near the middle of a continuum with child

youths psychological security (by exposing her to the rigours of the system) and does so without the proper safeguards of fundamental justice.

¹²⁴ *R. v. M. (J.J.)* (1993), 81 C.C.C. (3d) 487

¹²⁵ The youth came from a significantly dysfunctional family. The Court's inclination to do what it felt it had to do to get the child away from this is apparent from its finding that concepts of proportionality or just deserts in sentencing may be subordinated to welfare concerns in formulating a disposition. The Court also is of the view that open custody dispositions are not really incarceral, but are an appropriate way of dealing with long-term welfare of the child concerns. Children so imprisoned might disagree.

¹²⁶ *Supra* note 124 at 491 C.C.C. Earlier articulations of this notion of ambivalence may be found in Justice L'Heureux-Dubé's reasons in *R. v. T. (V.) supra* note 104 at 44 C.C.C. There she cites N. Bala and Mary Anne Kirvan "The statute: Its principles and provision and their interpretation by the Courts" in A.W. Leschied *et al.*, *The Young Offenders Act: a revolution in Canadian Justice* (Toronto: University of Toronto Press, 1991) at 80-81 to the effect that Parliament's attempt to achieve disparate goals in dealing with youth reflects what the authors call "a level of social ambivalence in Canada about the appropriate response to young offenders."

welfare concerns at one end and the strict sentencing of the *Criminal Code* at the other.

He assumes that,

It is not unreasonable to expect that in many cases carefully crafted dispositions will result in the reform and rehabilitation of the young person... the disposition imposed on a young offender must seek to have a beneficial and significant effect on both the offender and the community.¹²⁷

The Court discusses the concept of proportionality in addressing the argument that a property crime of the sort at issue, if committed by an adult, would not have resulted in two years in custody. The Court's rejoinder is that very minor matters would not result in long sentences, even in the face of persuasive consequentialist and utilitarian arguments favouring lengthy detention for the good of the youth and the community. The fact that the crimes at issue were property related and the offender possessed of a minor record¹²⁸ do not seem to have influenced the Court. When the Court evaluates the fitness of the sentence imposed, the reference to restraint in section 3 is subordinated to coercive (if only for the child's own good) principles; the evaluation is also informed by the overarching belief in the efficacy of custody. The discussion of the factors to be considered before imposing custody¹²⁹ omits reference to section 3.

Taken as whole then, the primary justification for parsimony and restraint in disposition for youths is a concept that the judiciary says is, at least theoretically, the equivalent of a substantive section, but is not *functionally* significant. As one traces the jurisprudence through from *S. (S)* to *M. (J.J.)* the crippling lack of power is evident. It all springs from the philosophical and political compromises that are evident in the *YOA* and *YCJA*. At

¹²⁷ *R. v. M. (J.J.)*, *ibid* at 491-493 C.C.C.

¹²⁸ Justice Cory, in fact, characterizes the record as "significant." He had three priors for break, entry and commit theft, and two others of joyriding.

virtually every point in the youth *Acts* where public safety, hard justice and crime control matters are raised, courts are mandated to act in a coercive way.¹³⁰ On the other hand, direction with respect to welfarist concerns are either put in the soft language of modifiers such as “least possible” (subsection f), “should” (subsections a.1 and d) and “wherever possible” (subsection c.1), or are simply made subordinate to crime control objectives (subsection (a.1), (b), (c), and (f)). It becomes functionally irrelevant whether the principles have the force of substantive law or not; they are so replete with ‘weasel’ words as to be emasculated. It is not surprising then, that the directions in both youth *Acts* to interpret liberally are of little effect.

The recent Saskatchewan Queen’s Bench decision in *R. v. Okimow*¹³¹ is also instructive. In that case, Dielschnieder J. considered an application from an individual refused entry into an adult alternative measures programme. The application was for some sort of prerogative writ¹³² quashing the prosecutor’s decision and directing a Provincial Court judge to review the accused’s application to the programme. The matter was dismissed as being without merit. The Court followed the cases above, holding that the existence and structure of an Alternative Measures programme is a matter of non-reviewable discretion. His Lordship held the scheme to be constitutionally valid as *intra vires* the province. It did not infringe either the equality right in section 15 or the right to

¹²⁹ S. 24(1) of the *YOA* required consideration of three elements: Firstly, the protection of society, secondly, the seriousness of the offence, and thirdly, the needs and circumstances of the young person.

¹³⁰ For example, “crime prevention is essential” (ss. (a)), “society *must* be... afforded the necessary protection from illegal behaviour”, “young persons who commit offences *require* ...discipline” (ss. c) and so forth.

¹³¹ *R. v. Okimow*, [2000] S.J. No. 499, [2001] 1 W.W.R. 662, (2000) 197 Sask. R. 22.

¹³² This language is deliberate, as Dielschnieder J. also seemed baffled by the lack of cogency in the relief sought. He states (*ibid.* at 668 W.W.R.), “The Applicant’s argument bewilders me....I am reminded of Aesop’s fox.”

fundamental justice in section 7, of the *Charter*.¹³³ The exercise of prosecutorial discretion was held to be outside the purview of the Court.

As with the cases discussed above, the language used in dealing with the issues is interesting. To deal with the latter issue first, the matter of discretion is “of the same genre” as the standard functions of the prosecutor and is accordingly immune from review absent proof that it is “demonstrably flagrant or abusive.”¹³⁴ The prosecutor is the “person who is considering whether to use the measures” (in the words of section 717 (b) of the *Code* and section 10 (b) of the *YCJA*). This person is specifically charged with considering the public interest, and accordingly the section is phrased precisely in a way that undermines any argument attempting to distinguish this decision from any other sort of prosecutorial function.¹³⁵

The second and more interesting attempt to control the prosecution was through the noted constitutional argument. In dismissing the attack on the gatekeeper, his Lordship held, “[a]n alternative measures program into which everyone had the right of admission would be self-defeating and self-destructive. And, of course, totally unmanageable.”¹³⁶ To interfere would undermine the power given by section 717 to Attorneys General to set up schemes to ameliorate the over-incarceration of Aboriginal people.¹³⁷ It is proper not only that the administrators of the criminal justice system control the gates, but that they

¹³³ Citing *Beare*, *supra* note 107, in this context. To similar effect see *R. v. Boudreau*, [2002] NSJ No. 457, (2002) NSR (2d) 119 NSSC.

¹³⁴ *Okimow* *supra* note 131 at 666 W.W.R.

¹³⁵ The cases cited by the Supreme Court in *T. (V.)*, *supra* consistently imply the importance of the Crown’s role as protectors of the public interest. The Court considers the American case of *Wayte v. United States*, 470 U.S. 598 (1985), which emphasizes prosecutorial considerations such as general deterrence, the government’s overall enforcement priorities and so forth as elements of the equation. It can be argued that this is part of the Crown’s obligation to consider the public interest, which has been used to reign in prosecutorial zeal. See *Boucher v. The Queen*, [1955] S.C.R. 16, 110 C.C.C. 263.

have the non-reviewable right to design them as they see fit. Not only is this an article of misplaced faith in the colonial landscape, it is compounded by the fantastic justification that such omnipotence is good for the Aborigine. It is, again, a favour to be doled out to those who are worthy. In my respectful submission, this structural element is manifestly malignant. A case like *Okimow* is a rare thing. It reveals that the underlying judicial thinking supports and continues the traditional role of the Crown and police. Putting this structural inertia in terms of mandated anti-colonial change¹³⁸ is deliciously ironic.

This case, and the others noted, do not inhibit a *Charter* attack such as the one mooted earlier. *Charter* decisions of the Supreme Court have emphasized that it acts to restrain government. The Charter, "is intended to constrain governmental action inconsistent with those rights and freedoms [it enshrines]."¹³⁹ In the *Operation Dismantle* case, Wilson J. stated that the central concern of section 7 of the *Charter*, "is direct impingement by government upon the life, liberty and personal security of individual citizens."¹⁴⁰

Finally, as with the development of the legislation, one should note the interface of politics with prosecutorial discretion. Politics is "the process in society which produces an authoritative allocation of values."¹⁴¹ There are a variety of institutional prosecutorial

¹³⁶ *Okimow*, *supra* note 131 at 668 W.W.R.

¹³⁷ The Court, of course, draws on *R. v. Gladue*, *supra* note 37.

¹³⁸ If one accepts that this is one of the aims of the s. 718.2 (e) objectives.

¹³⁹ *Hunter v. Southam*, [1984] 2 S.C.R. 145 at 156.

¹⁴⁰ *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441 at 490. Under s.32 (1) thereof, the *Charter* applies to the governments of Canada and the provinces, and all matters within their legislative authority. S. 24 gives a court of competent jurisdiction the power to adjudicate the issue and grant an appropriate remedy.

¹⁴¹ D. Easton, *The Political System* (New York: Knopf, 1953)

structures, ranging from complete political hierarchical control¹⁴² to a complete separation of prosecutorial policy and electoral politics.¹⁴³ Intermediate versions may be found in the Commonwealth of Australia and Nova Scotia. The question is

[W]hich of these institutional arrangements seems best suited for a politically viable administration of criminal justice in a system where punitive and restorative justice paradigms vie for support and implementation. How can a government implement changes in prosecutorial policy without compromising the independence of the prosecution service?¹⁴⁴

Archibald details a host of political pitfalls, exacerbated by public punitive panic and the zeal of the media, which tempts prosecutors to “retreat to the protective covering of the traditional punitive cocoon, and ambitious restorative justice policy makers may have difficulty in persuading them to emerge.”¹⁴⁵ His view is that the intermediate approach, with an independent DPP taking guidance from, but not being controlled by, an AG in the political realm, holds the best promise. In this way, difficult operational decisions are divorced from politics, whilst the AG remains answerable to the legislature for criminal justice policy. This balancing of independence and accountability is, in my submission, demonstrably unsatisfactory. The extremely limited implementation of restorative justice demonstrates that the practice in Saskatchewan and elsewhere does not follow the rhetoric. Archibald’s model supposes that the line Crown’s instinct is to retreat to the cocoon only when forced to do so. The statistics¹⁴⁶ say otherwise. The reason for this is

¹⁴² This is the “...traditional hierarchical model which has its roots in the monarchical world view of the English common law and British parliamentary democracy.” B.P. Archibald, “The Politics of Prosecutorial Discretion: Institutional Structures and the Tensions between Punitive and Restorative Paradigms of Justice” (1998) 3 Can. Crim. L. R. 69 at 75.

¹⁴³ Archibald asserts that such systems have been put in place in Kenya, Singapore, Pakistan, Sri Lanka, Malta, Western Samoa, Botswana, the Seychelles, Ireland, Jamaica and Guyana. *Ibid.* at 94.

¹⁴⁴ *Ibid.* at 97. Archibald lauds the introduction of Restorative Justice measures in Bill C-41 as a “skilful political performance....[a] feat of political prowess” for what he sees as the Minister’s sleight of hand in burying restorative justice in an omnibus of “tough on crime” measures.

¹⁴⁵ *Ibid.* at 95-96.

¹⁴⁶ See generally chapter five.

that whilst the Saskatchewan Attorney General and his deput[ies] may decry Aboriginal overrepresentation, the prosecution service *does not have to do anything about it*. The result is that, case by case, matters are turned away from restoration for a multitude of reasons, all whilst the rhetoric of restoration is being intoned. Logically, if the structure were right, the outcome would be different. This is because the centralized and hierarchical nature of the Saskatchewan prosecution service means that structure and ideology are two parts of the same whole. The resulting dissonance is analogous to Duncan Kennedy's "bad faith" in the judicial sphere.¹⁴⁷ Prosecutors are, arguably even more than judges, in denial as to the "family secret", that their decision-making is ideologically and politically driven.¹⁴⁸ Baumgartner has argued that, empirically, there are discernable, predictable factors that govern the exercise of discretion. "The constraints which govern discretionary decision-making are not to be found primarily in statutes, but in the social context of legal cases."¹⁴⁹ She gives examples such as the intimacy of the parties, their moral respectability and social status along with the social background of the decision-makers themselves. The latter has led to significant work being done on the actor's understandings of their own decision-making, on "systems of values and beliefs which allow agents to make sense of, to impose explanations on, and

¹⁴⁷ D. Kennedy, *A critique of Adjudication: (fin de Siècle)* (Cambridge: Harvard Univ. Press, 1997)

¹⁴⁸ See Kennedy, *ibid.* at 191. Carter argues that this "family secret", the link between ideology and law more generally, is less striking in Canada because our legal culture has never denied (or been wilfully blind to) the link in the same way as in America. M. Carter, "Book Review, A Critique of Adjudication: (Fin de Siècle)", (1997) 35 Osgoode Hall L. J. 399. The classic statement of the nature of the independence of the Attorney-general is to be found in the 1951 statement of Lord Shawcross. He asserts that while the A-G would be a "fool" not to consult with his colleagues, any decisions remain his alone. He must stoutly resist any political pressure. See J. (S.) Y. Henderson, "Aboriginal Attorney General" (Paper presented to the IBA Spring Conference: "Specialized Tribunals and First Nations Legal Institutions," 29-31 May 2002) [unpublished, archived at Northern Legal Aid, La Ronge] at 8ff. This paper includes an excellent discussion of the constitutional status of prosecutorial discretion in Canada particularly in the context of constitutional protection of the guaranteed rights of Aboriginal peoples.

¹⁴⁹ M. P. Baumgartner, "The Myth of Discretion" in K. Hawkins, ed. *The Uses of Discretion* (Oxford: Clarendon, 1992)

to order events in the world in which they are operating.”¹⁵⁰ What is significantly lacking, in the Saskatchewan context, is any introspection as to the institutional ideologies of the Crown, or any interest in it. It was only when things went wrong that anything more than the regular bureaucratic reviews were conducted.¹⁵¹ The 1997 review (commissioned June 10th, 1996) of Saskatchewan’s Public Prosecutions Division was precipitated by the Martensville debacle as well as the Latimer- Kirkham affair.¹⁵² It reviewed the role of the prosecutor, and developed specific recommendations for ensuring their proficiency, but did not evaluate further.¹⁵³

4.9 The influence of section 717 on sentencing

Despite clear legislative intent that adult diversion and sentencing be separate, a number of decisions since 1996 indicate that section 717 may be a factor in promoting restraint in sentencing. The section is not, *per se*, relevant to sentencing.¹⁵⁴ Restraint, or the principle of the least drastic alternative, predates Bill C-41 and is firmly codified by it in,

¹⁵⁰ N. Lacey, “The Jurisprudence of Discretion” in Hawkins, *ibid.* at 364.

¹⁵¹ Saskatchewan Justice, like most organizations, is constantly engaged in ordinary businesses of planning and budgeting.

¹⁵² “Report to the Minister of Justice and the Attorney General of Saskatchewan; operational audit of the Public Prosecutions division of the Saskatchewan Department of Justice” (Regina: Sask. Justice, 1997) and the “Response to the Operational Review of Public Prosecutions” (Regina: Sask. Justice, 1997). The audit sought was a general one, rather than a specific enquiry and did not comment on those cases; rather it focussed on the service more generally. A popular account of the Martensville sexual abuse matters may be found at F. Harris, *Martensville, truth or justice?* (Toronto: Dundurn Press, 1998) That legal saga culminated with *R. v. Sterling* [1995] S.J. No. 612, (1995) 102 C.C.C. (3d) 481. Mr. Kirkham’s charges ended in acquittal. *R. v. Kirkham*, [1998] S.J. No. 458, (1998) 126 C.C.C. (3d) 397 (Sask. QB). Mr. Latimer was not so fortunate. *R. v. Latimer* [1998] S.J. No. 731, (1998) 131 C.C.C. (3d) 191, *affd.* [2001] SCJ No. 1, (2001) 150 C.C.C. (3d) 129.

¹⁵³ Interestingly, the government’s response to the Report’s recommendations was generally positive in so far as they dealt with resourcing, training, staffing and the like. In essence, the report supported giving the executive director the staff and resources he had long been asking for. However, the government retreated to the safety of “further review” in response to suggestions of organizational change, particularly those that would reduce the power of Head Office in Regina over the conduct of front-line Crowns.

¹⁵⁴ Indeed, the NWT Supreme Court on appeal specifically rejected an assertion that it was in *R. v. Berton*, [1998] NWTJ No. 89

inter alia, sections 718.2(d) and (e).¹⁵⁵ Restraint has a solid foundation in desert theory, and in particular with the talionic assertion of proportionality in punishment¹⁵⁶ explored in chapter two. Indeed, the Law Commission of Canada's brief to the 1987 Canadian Sentencing Commission recommended that sentencing be "anchored in a just deserts model and that drastic limitations be put on the use of incarceration."¹⁵⁷ This followed upon the Canadian Law Reform Commission's 1975 paper *Imprisonment and Release*, which describes the interplay of desert and utilitarian demands in sentencing in the following terms:

Justice requires that the sanction of imprisonment not be disproportionate to the offence, and humanity dictates that it must not be heavier than necessary to achieve its objective. This is strengthened by the principle of economy which aims at minimizing the burden to society, the penal system, the convicted offender, and his family.¹⁵⁸

The Chief Justice of the Nova Scotia Supreme Court (the trial Court of superior criminal jurisdiction in that province) applied section 717 in a rather bizarre sentencing in *R. v. Skerry*. An accused in a position of trust pled guilty to stealing monies from his hospital employer. His lordship noted,

¹⁵⁵ In Carol Fleishaker's view "overwhelmingly, courts of many different levels in all the provinces of Canada, have asserted that the purpose of [Bill C-41] is to use restraint in the imposing of institutional incarceration." C. Fleishaker, *Sentencing Legislation in Canada and the Conditional Sentence* (LL.M. Thesis, College of Law, University of Saskatchewan, 1999) [unpublished] at 49. The author's cases cited in support are exhaustive.

¹⁵⁶ Although it is well worth noting the observation of the Canadian Sentencing Commission that whilst proportionality underlies punishment for violence, public sentiment does not so follow in the case of property crimes. Simple return of the item stolen, for example, is no punishment at all for the wrongdoer. See Canadian Sentencing Commission *supra* note 47 at 106. Even in the situation of pure just deserts, the Commission insists, "It is not altogether certain that advocating principles of retribution... is consistent with preaching restraint..." (at 113). With respect, the essence of classical retributivism, and one of its great attractions, is that punishment is never to exceed that which is mandated by the antecedent crime. The Commission makes the mistake of equating restraint with non-carceral sanctions.

¹⁵⁷ *Ibid.*

¹⁵⁸ Law Reform Commission of Canada, *Imprisonment and Release* (Ottawa: Information Canada, 1975) at 10.

In Bill C-41 the government has talked about alternative measures for sentencing and they can be used to deal with a person alleged to have committed an offence only if it is not inconsistent with the protection of society and also certain other conditions have to be met.... Looking at the new sections dealing with alternative measures and with the submissions by counsel, it is my view that this is an appropriate case for the sections to apply.¹⁵⁹

He cited section 717(2) verbatim and imposed a community sentence of six months.¹⁶⁰

With respect, the decision is *per incuriam*. The Court purports to apply section 717 to impose an *alternative sentence*. This is not grounded in part XXIII of the *Code* at all.

In *R. v. Cromien*,¹⁶¹ a defrocked priest pled guilty to a series of historical sexual assaults upon an altar boy. The assaults had been disclosed 16 years prior to the modern prosecution. The accused at the time of the offence took full responsibility, resigned his office, undertook counselling and apologized in a most remorseful way. The prosecution elected at that time not to proceed but changed its mind 16 years later. The sentencing judge accepted that the matter had initially been dealt with as if by alternative measures under section 717, and gave the accused a significant discount for the "time served" awaiting the second prosecution. The Court of Appeal did not concur and sent Cromien to prison for twenty months. It was not impressed with the idea that taking steps to mend one's ways whilst living with the threat of a prosecution over one's head should in any way mitigate sentence.

¹⁵⁹ The Quicklaw report indicates that the judgement was oral but that "reasons" were delivered (over 3 years) later. One can only give the benefit of the doubt to the Judge and assume that his imprecision and grammatical and syntax errors are the result of the reasons being simply a verbatim transcript of the earlier pronouncement.

¹⁶⁰ This sentence is confusing. It is phrased as if it was to be a conditional sentence but what is actually imposed is a suspended sentence with probation. The sentencing follows quickly upon the introduction of conditional sentencing on September 3, 1996 and so the language may be the result of a certain lack of familiarity with the new provisions.

Similarly, in *R. v. Deen*¹⁶² the British Columbia Court of Appeal held that,

I infer, however, by the enactment of section 717 (Alternative measures) and sections 742-742.7 (conditional sentences) that Parliament is of the opinion that prison sentences are not necessarily the best way to deter crime and prevent recidivism.¹⁶³

Whilst the judicial reaction is reflective of an underlying receptiveness to direction from the existence of alternative measures, credit is rarely given.

4.10 Conclusion

At the legislative level, the picture is a grim one. All of the above suggests strongly that the measures taken in response to difficulties with the *YOA* have simply drawn it closer to the adult model. The new *Act* may give encouragement to diversion, but the influence of quite determined legislative and judicial “encouragement” in the adult sphere has had no demonstrable effect on the disadvantaged position of Aboriginal people in the criminal justice system.

The danger in giving effect to political pressure to “get tough” by maintaining Crown control of the gates is that it then appears that control is reverting to the community, when it is not. The fiction of devolution, of removal of hierarchies of control, is essential in constructing the indigenization of the power of courts over Aboriginal peoples so as to conceal reality. In the next chapter, we turn to focus on Aboriginal Courts, the Saskatchewan structure for diversionary programmes and thereafter the La Ronge

¹⁶¹ *R. v. Cromien*, [2001] O.J. No. 3790, (reversed [2002] O.J. No. 354, (2002) 155 O.A.C. 128)

¹⁶² *R. v. Deen*, [1997] BCJ No. 2657, (1997) 120 C.C.C. (3d) 482 (at ¶ 20).

¹⁶³ To like effect, see *R. v. Clay*, [1997] O.J. No. 3333, (1997) 9 CR (5th) 349 with respect to sentencing for possession of cannabis. This case was combined with *R. v. Malmo-Levine* for part of its tenure in the Supreme Court, but the cases were resolved separately. See *R. v. Malmo-Levine*; *R. v. Caine*, [2003] 3 S.C.R. 571, 179 C.C.C. (3d) 417, *R. v. Clay*, [2003] 3 S.C.R. 735, 179 C.C.C. (3d) 540.

programme itself. As shall be seen, whilst the pattern is firmly imposed from above, there is creativity being exercised at the grassroots.

5.1 Introduction

This chapter will examine two current manifestations of ameliorative intent in the area of Restorative Justice in Saskatchewan. The purpose of this enquiry is to bring the foregoing discussion into a practical context so that what is being assessed is not only the structures in which the schemes operate (be they social, historical, or legal) but the schemes themselves.

Even within Saskatchewan, Restorative Justice programmes are manifold and diverse.¹ I submit that a cataloguing is less useful for the critical purposes of this thesis than a close critique of two quite different initiatives.² The two exemplars I have chosen are the Cree Court, and Youth Alternative Measures/ Extra Judicial Measures (EJM) as currently practiced in La Ronge, Saskatchewan. For the sake of contrast, I will also take a brief look at Federal diversion policy.

5.2 Aboriginal Courts

Some people think because the judge and other members of the court party are of First Nations descent, they will get a lighter sentence. [Crown Prosecutor Don]

¹ There are currently 111 people working in Community Justice programmes delivered by Aboriginal organisations in Saskatchewan. 67 of 72 Saskatchewan First Nations are involved in some aspect of Community Justice delivery. These programmes may include matters other than alternative/ extrajudicial measures such as community justice workers, Aboriginal court workers, victim services and family violence schemes. See Online: <http://www.saskjustice.gov.sk.ca/Publications/2004-05justiceperf.pdf> The Saskatchewan Department of Justice claims that Saskatchewan is the only province in Canada to provide a comprehensive alternative measures scheme. Speaker from Saskatchewan Justice cited in Commission on First Nations and Métis People and Justice Reform, *Final Report* (Regina, 2004) (The Littlechild Report) online: <http://www.justicereformcomm.sk.ca/june21release.gov> at chapter six.

² This is not to say that a catalogue would not be of interest, however, service providers, schemes and philosophies change so regularly that the exercise would become quickly out of date. There are currently in excess of 25 adult alternative measures programmes, and scores more for youth. Saskatchewan Justice *Use of Adult Alternative Measures in Saskatchewan 1999-2000 and 2000-2001*, (Regina: Policy Planning and Evaluation, April 2003 at 1

Bird adds there is very little difference between what are perceived by some as First Nations laws and traditional written laws. "Sure, I am a Cree man," says Bird. "But I don't want anybody stealing my stuff or beating me up. It's the same law, but within a different language."³

The Cree Court suffers from the same philosophical incompatibility, and resulting tension, as Restorative Justice does with mainstream Canadian practice. The discussion below will illuminate this fundamental tension and, I hope, provide a useful analysis of the reasons why it must exist. I ask the reader to recall the structural critique developed in earlier chapters and keep it on hand as a sort of mental counterpoint.

A look at courts themselves is useful because so much of restorative discourse is based on out-of-court processes, such as diversion and elder's panels. I argued in chapter three that restorative sentencing is an oxymoron. These courts are attempts to link colonial court processes with the colonized peoples' justice norms. The interface is fascinating.

5.2.1 The Tsuu T'ina Court

There are currently three courts operating in Canada that may be defined as Aboriginal Courts.⁴ Each takes a different approach. Let us look briefly at the other two. The Tsuu T'ina Peacemaking Court has operated on the Tsuu T'ina First Nation near Calgary since October 2000. It is presided over by an Ojibwa judge and operates within the provincial court system. In the words of its creator, Judge Erb,

³ H. Polishcuk, "Cree Court bridges the gap" *The Star Phoenix* (April 20th, 2002) E 12.

⁴ See M. J. Ehman, "A People's Justice" (June/ July 2002) online: Canadian Bar Association <http://cba.org/CBA/National/Cover2002/justice.asp> I use the word 'defined' quite deliberately, for there are numerous courts that operate in Canada with largely or totally Aboriginal participation. Where the judge or other members of the court party are not able to speak the Aboriginal language used by other participants, translators are commonly used. This is an essential incident of s. 14 of the *Canadian Charter of Rights and Freedom*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (U.K.) 1982, c. 11. See *R. v. Tran*, [1994] 2 SCR 951, 92 CCC (3d) 218 in a non-Aboriginal context.

I got to draft a whole court system based on the Tsuu T'ina way. I spent four years drafting it and it had to be built within the provincial court system. If it would have been free-standing, they would have ended up with traffic court and nothing beyond.⁵

Unlike the Cree Court, it was set up by a tripartite agreement between the Nation and the governments of Alberta and Canada. It uses a combination of Court and community resources, as does the Cree Court. However, the Peacemaker Court relies upon the deliberate development of a specific and unique community resource. The Cree Court is grafted on to existing correctional, probationary and community resources. Peacemakers are community members who are willing to undertake the role and to undergo training developed by the nation itself. Every household in the community had input into determining which community members have the respect and reputation of fairness necessary to engender legitimacy.⁶ The elders of the community determined what type of matters may be referred and under what circumstances. The decision as to whether a matter may be diverted is made by the Peacemaker Coordinator.⁷

This view of the project, written by the judge in charge of it, would seem to place the critical gatekeeper function squarely (and solely) in the hands of someone other than the Crown. This is not totally so. The author notes,

In court, the Peacemaker Coordinator reports on what has been completed by the offender. The Crown prosecutor assesses what has been done against the nature of the offense. If she thinks it is appropriate, the prosecutor will withdraw the

⁵ Justice M. Erb in "From the Front Page to the High Court: Marsha Erb's Extraordinary Journey" 2004 Green and White, Winter 2004. Erb was general counsel for the Tsuu T'ina (Sarcee) Nation before her appointment to the Alberta Queen's Bench. She was retained to create the Peacemaker Court. In this statement she expresses her acceptance of Aboriginal criminal jurisdiction as purely derivative.

⁶ L.S.T. Mandamin PCJ, "Peacemaking and the Tsuu T'ina Court" 2003 8(1) Justice as Healing 1.

⁷ *Ibid.* at 2. Respect for the Elders in Aboriginal communities is a touchstone of commonality between many diverse First Nations' peoples. See Melissa S. Williams, "Criminal Justice, Democratic Fairness, and Cultural Pluralism: The Case of Aboriginal Peoples in Canada" (2002) 5 Buff. Crim. L. Rev. 451 at 472.

charge. If the matter is serious, the prosecutor will agree that the peacemaking report will be part of the considerations placed before the court on sentencing. Either way, the outcome of peacemaking is an important factor in resolving the offence.⁸

Even at the front end, “[b]efore court sits, the Peacemaker Coordinator meets with Crown counsel to determine which cases are suitable for diversion into a community-run peacemaking program.”⁹ The programme is not for recidivists.

"They only get one shot at peacemaking," says Crown counsel Lauren Wuttunee. "If you never got a chance in the regular justice system, okay, we'll give you a chance. But if you screw up again, you're treated like everybody else. There's a limit to the leniency in terms of peacemaking."¹⁰

Court proceedings are also modified:

The protocols of the Court reflect Tsuu T'ina traditions. The Court starts with a smudge, a traditional burning of sage or sweetgrass signifying a prayer for guidance. The judge wears a beaded medallion symbolizing the Tsuu T'ina Nation. The court clerks wear tabs embroidered with eagle feathers, a sacred symbol for Aboriginal People. These measures are taken so that the Tsuu T'ina will see the Court as their court, their system of justice, and their wish for peace and order in their community.¹¹

Accordingly, while the Court itself operates as an indigenized non-Aboriginal Court, it has as an adjunct a legitimate and authentic Aboriginal forum for practicing a modern manifestation of traditional justice. Taken as a whole, it is not a separate, parallel form of criminal dispute resolution; the undiluted power of the Crown sees to that. This said, however, one should not underestimate the power of judicial persuasion over matters not strictly within the judicial bailiwick. As with the Cree Court, the ability of judges to make their wishes known as to whether a matter should be diverted or not has a

⁸ Mandamin, *supra* note 6 at 3.

⁹ See Ehman, *supra* note 4.

¹⁰ *Ibid.*

¹¹ Mandamin, *supra* note 6 at 2.

significant impact upon the inclination of the gatekeeper to accede to diversion. Given a credible alternative,¹² a judge's suggestion that a matter be diverted carries great weight.

5.2.2 Gladue Court

The *Gladue* (Aboriginal persons) Court sits two days a week at Old City Hall in Toronto, Ontario. It accepts cases for Aboriginal people that are running through the much larger group of courts at that location; it does not accept referrals from courts elsewhere.¹³

While the Court is styled as a reaction to the case of *R. v. Gladue*,¹⁴ it actually provides services to Aboriginal people throughout the legal process. The Court arose from concerns raised at a joint conference of the Ontario Conference of Judges and the Canadian Association of Provincial Court Judges in Ottawa, in September 2000.

Judges from across the country who attended workshops about how to apply the Court's decision in *Gladue* expressed common concerns - some as fundamental as knowing when an Aboriginal person was before them. More importantly, judges thought that everyone - lawyers, probation officers and judges - did not yet have the directed resources to give full attention to the special circumstances of Aboriginal people appearing in court.¹⁵

In order to achieve its aim, the Court has dedicated Crown counsel, clerks and community corrections workers. Defence counsel may be provided with training on

¹² Not surprisingly, a lack of resources will inhibit judicial encouragement of diversion in the same way that it may mandate jail for offenders who would be otherwise be made subject to community sanctions.

¹³ A parallel may be drawn to the Cree Court. One of the concerns raised at the initial planning of the court was whether the court would be willing to deal with matters from other court points at the request of accused. The short answer was no. In practice, matters have been waived to Cree Court points in the same fashion, and with the same frequency, as matters waived to non-Cree points. The traditional rule is that matters are dealt with at the nearest court point to where they occur. If an accused agrees to plead guilty the Crown will generally agree to a transfer to a court point convenient to the accused. Very few judges, with the notable exception of those currently sitting in Prince Albert, object to this practice. (Personal observation, *inter alia*, Northern Justice Initiative meeting, September 27, 2000 at Saskatoon).

¹⁴ *R. v. Gladue*, [1999] 1 SCR 688, 133 CCC (3d) 385 considered the impact of s. 718.2(e) on sentencing of Aboriginal people. Accordingly, the court's full service approach means that its ambit is significantly wider than its name would suggest.

¹⁵ Aboriginal Legal Services of Toronto, "Gladue (Aboriginal Persons) Court- Ontario Court of Justice - Old City Hall Fact Sheet" (October 3, 2001), online: Aboriginal Legal Services http://www.Aboriginallegal.ca/docs/apc_factsheet.htm

relevant topics. The only unique feature, however, is the hiring of an Aboriginal Caseworker, employed by ALST, whose job it is to prepare reports for defence counsel to file with the Court. These reports are to provide the enriched information demanded by *Gladue*.¹⁶ The expectation is that by ensuring that potential community resources are accessed, offenders will be referred to more appropriate programmes. The result will be less incarceration and less recidivism. One has to be sceptical about the potential for healing-oriented sentencing under *Gladue* to reduce Aboriginal incarceration as unrealistically onerous “restorative” sentences increase the possibility of incarceration. Accordingly, the prospect of a positive impact on over-incarceration by a court may depend as much on a court’s commitment to change, as on the depth of its resources and access to information about them.¹⁷ If this is the case, then arguably the practices of the *Gladue* Court, as well as the Cree and Tsuu T’ina Courts, opens up new potential for amelioration.

5.3 The Cree Court

5.3.1 Origins

¹⁶ *Ibid.* This information is mandatory for the sentencing of Aboriginal people in Saskatchewan. *R. v. Carratt*, [1999] S. J. No. 626, (1999) 185 Sask. R. 221, *R. v. John*, [2004] S. J. No. 61 (Sask. CA). In practice, courts rely upon trained probation officers and youth workers to provide this information in pre-sentence reports. Sadly, the current format provides little detail. For example, until recently the “*Gladue*” information provided by youth pre-sentence Reports in Saskatchewan was only whether or not the youth was a member of a First Nation. This has now been supplemented by a report on whether the offender feels that he has been adversely affected by disadvantage concurrent with Aboriginality. (Personal Observation, 2004)

¹⁷ See the reservations expressed by K. Roach and J. Rudin (director of Aboriginal Legal Services of Toronto) in “*Gladue*: The judicial and political reception of a promising decision” (2000) *Can. J. Crim.* 354. Conditional sentencing continues to be thought of as restorative justice. See generally the Littlechild Report *supra* note 1 at chapter four.

Judge Claude Fafard was appointed to the Provincial Court of Saskatchewan at La Ronge in the late 1970s. He served until 2000.¹⁸ Fafard became very concerned about the (dis) service that the Court provided to northern people and to northern Aboriginal people in particular.¹⁹ Among his accomplishments was the introduction of Circle Sentencing to Saskatchewan in 1993 and support for the introduction of holistic healing for sexual offenders (modelled on Hollow Water and Alkali Lake) at Stanley Mission in 1996.²⁰ His “modest suggestion”, upon which the Cree Court was built, was founded in the language in Treaty Six that the Aboriginal treating parties “keep peace and good order between each other” and upon the signatories’ covenant to obey the laws of Canada.²¹ At the time, the Federation of Saskatchewan Indian Nations (FSIN) had produced a “Strategic Plan for Native Justice” building upon this inherent law making power.²² In addition, Bill C-41 had just been passed. It added section 718.2 (e) to the *Criminal Code*,

¹⁸ Fafard J. transferred to Weyburn provincial court, but concurrently went on a stress-founded medical leave that lasted until his eventual retirement. Many dangerous court airplane flights over the years culminated in a 1999 Piper Navaho flight from Wollaston Lake to La Ronge. The left engine failed and an emergency landing was required at Key Lake. (Personal observation, 1999)

¹⁹ Numerous personal conversations, 1995-2000. Fafard was also concerned about the amount of court time that was occupied with less serious matters, and saw the Cree Court as one part of a two part scheme. The second part involved the hiring of a justice of the peace with appointments under both the *Indian Act* R. S. c. I-6 s. 1 and the provincial *Justices of the Peace Act 1988*, R.S.S. c. J-5.1. to handle these types of cases. See C. Fafard, PCJ, “A Modest Suggestion” (January 9th, 1996) [unpublished, archived at Northern Legal Aid, La Ronge].

²⁰ Sentencing circles have been the subject of extensive popular and academic review. The Stanley Mission initiative drew little attention until one of the offenders under supervision violated a release term. At that point the Lac La Ronge Indian Band justice committee decided that the programme did not fit their (primarily Anglican) vision of spirituality, and fired the Stanley Mission justice workers who were spearheading the movement. The Crown in turn successfully appealed Judge Fafard’s sentences on which the healing initiative was based. See L. Perreux “Band Dumps Justice Panel” *The Star Phoenix* (March 5th, 1997) A-1, L. Perreux, “Indian band accused of discrimination” *The Star Phoenix* (March 6th, 1997) A-3, *R. v. H.K.C.*, [1997] S.J. No. 577, 158 Sask. R. 157.

²¹ Fafard, *supra* note 19 at 1.

²² The document to which Fafard referred is actually called the “Strategic Plan for Indian Justice”. FSIN Chief’s Legislative Assembly (May 1& 2 1996) [unpublished, archived at Northern Legal Aid, La Ronge]. See generally, M. R. J. Leonardy, *First Nations Criminal Jurisdiction in Canada*, (Saskatoon: Native Law Center, 1998).

which mandated special considerations for the sentencing of Aboriginal offenders.²³

Fafard therefore proposed that a Cree speaking Court be set up to cover the territories of northern Saskatchewan largely occupied by members of the Peter Ballantyne Cree nation. He felt that a court so conducted would be more effective and credible.

The government responded with the Northern Cree Court Initiative Proposal.²⁴ It was one part of the Northern Justice Strategy that the cabinet of the government of Saskatchewan instructed the Department of Justice to develop in May 1998. It,

... focused on finding a way to resolve the issues of Aboriginal people in northern Saskatchewan... to clearly identify successful methods of resolving justice-related problems in traditional communities.... Weaving Aboriginal traditional concepts into an existing justice environment requires blending the best of both cultures in a way that focuses on Aboriginal participation and responsibility.²⁵

Notably, its vision was of a “creative enhancement to the current system with a restructuring of the Euro-Canadian approach to justice issues.” Like the T’suu Tina model, a peacemaking component was to be grafted on to existing court practice. This would be supplemented by a judge knowledgeable of, and sensitive to Aboriginal values.²⁶ The role of the prosecutor would be “markedly different.” “The emphasis would be on healing and restorative justice as opposed to a punitive approach.”²⁷

²³ Of course, *Gladue* was at that time three years in the future. Fafard’s prescience is particularly remarkable given the prevailing thinking at that time that s. 718.2(e) was essentially declaratory of existing practice. See *R. v. McDonald*, [1997] S. J. No. 117, 113 CCC (3d) 418 and its treatment by Vancise, J. in *R. v. Laliberte* (2000), 143 CCC (3d) 503 (Sask. C.A.)

²⁴ Unpublished, Court Services Branch, Saskatchewan Justice c. 2000. Archived at Northern Legal Aid, La Ronge, Saskatchewan.

²⁵ *Ibid.*

²⁶ Although all parties, including Gerald Morin, pretended that the circuit was not being tailored in anticipation of Judge Morin’s appointment, in reality all were aware of, and comfortable with this reality.

²⁷ *Ibid.* I refer the reader to my discussion of the critical role of the Crown prosecutor in section 4.8.2 *supra*.

5.3.2 Cree Court practice

This language makes it clear that the Court was set up to do the same job as before, but to do it differently, and better.²⁸ By providing service in the indigenous tongue, two key areas could be addressed. Firstly, respect for, and credibility of, the Court could be engendered. A respectful and culturally sensitive approach would establish stronger linkages between the justice system and the community, provide culturally sensitive service to people before the Court, and promote community healing and cohesiveness. In sum, the language aspect was, quite rightly, seen as fundamental to community acceptance of the scheme. By recognising the critical importance of language in Aboriginal culture and identity, the project facilitates community involvement in the Court and enables the gradual disintegration of the cultural wall (arguably a colonial artefact) between the justice system and the community. The whole point, then, is to make the Court part of the community and give community members an investment in it and in its processes.

Secondly, access to justice was to be improved. For example, the three court points currently on the Cree Court circuit are Sandy Bay, Pelican Narrows and Big River.²⁹

Before the advent of the Cree Court, Sandy Bay court was held once a month, Pelican

²⁸ Indeed, the planning sessions of the Northern Cree Circuit implementation committee considered the experience of the First Nations Court in Alberta, (s. 5.2.1 *supra*) as well as the Justice of the Peace courts currently under way in northern Manitoba. While lessons were obviously learned (as demonstrated by the reference to Peacemaking) it was decided to honour the value of the Cree language and make it integral. (Personal observation, Committee meetings at Saskatoon, 2000)

²⁹ Although it is not officially a Cree Court point, Montreal Lake is on Judge Morin's circuit. It is a northern community with a strong and proud Cree culture. Cree is sometimes used in court proceedings there by Judge Morin. However, the Cree Court's translator/clerks are not always present and Legal Aid is currently represented by a non-Cree speaking lawyer. Usually Don Bird, the Cree speaking prosecutor, handles court, but not always. (Personal observation, 2001-2004) Also see A. Mclean, "Anecdotes of a Cree Court Legal Aid Lawyer- Part 1" (Winter 2002) Saskatchewan Bar Association Bar Notes 20.

Narrows twice. These have now been doubled. In theory, this should mean that the oft-made complaints, that clients do not have access to legal aid services at circuit points, and that court is unduly rushed, can be addressed.³⁰

There are problems. The first is funding. Judge Morin's position was new, rather than an allocation of an existing Provincial Court position. However, Judge Morin had to lobby firmly for the two bilingual clerk/translators who accompany the Court.³¹ Justice was able to fund a new prosecutor position (and pay sufficiently well to attract an experienced bilingual prosecutor) but, sadly, the same was not true for Legal Aid.³² Funding for legal aid counsel was not included in the initial budget for the Northern Cree Court Initiative. The Saskatchewan Legal Aid Commission (SLAC) applied for, and received, grant funding for this position from Justice Canada. This funding was subsequently replaced by further federal funding through the Justice Partnership and Innovation Fund of Justice Canada.³³ Legal aid counsel is now provided with Cree speaking paralegal support, but only for the short term. Counsel will still be without the resources to visit the

³⁰ This remains a concern of northern circuit point communities such as Montreal Lake and Cumberland House. (Personal attendance at community justice meetings at Montreal Lake, March 18, 2004, Cumberland House, March 25, 2004.) These concerns are long standing. See A. Durocher, "A personal perspective on Northern Circuit courts" and C. Fafard, "On being a northern judge" both in R. Gosse, J.Y. Henderson & R. Carter, *Continuing Poundmaker and Reil's Quest: Presentations made at a conference on Aboriginal Peoples and Justice* (Saskatoon: Purich Publishing, 1994).

³¹ It had been approved by September 27, 2000, well before Judge Morin's appointment on January 24th, 2001. He had been working behind the scenes.

³² The role of legal aid counsel in the court is pivotal. The court as a whole is being evaluated with a report due in March 2004. The Cree-speaking legal aid aspect has also been evaluated with a final report produced November 2003 and released internally in early 2004. This evaluation is an integral part of the project. Legal aid counsel travels with the court party to provide service to qualified applicants. A private lawyer, Mr. Garth Bendig of Prince Albert, also travels with the court. His practice is largely legal aid "farm-outs" of matters that are a conflict of interest to legal aid, along with a small private practice of non-legal aid clients. (Personal observation, 2003-2004)

³³ This is short term funding. See Justice Partnership and Innovation Fund, online: Justice Canada <http://www.justice.gc.ca/en/ps/pb/jpif.html>

communities other than on court days. Caseloads are high and the amount of time available for each case accordingly quite limited.

Second, the Cree-speaking legal aid lawyer does not yet speak Cree well enough to use it in court. Accordingly, the clerk/translator (or paralegal if available) must provide the same verbatim translation services to him as to non-Aboriginal counsel. This is done either by written summary or by having the translator whisper in the ear of counsel. This is different from normal court translation where a translator will provide verbatim interpretation (either simultaneous or phrase-by-phrase, depending on the skill of the translator) audible to the Court and gallery. This difference emphasises the privileging of Cree in the Court's process. This is an important and tangible symbol of respect for the indigenous community. Obviously, counsel's linguistic challenge does not advance community respect as much as fluency would. He is working hard (with SLAC's support) to improve his fluency.

Third, the Cree Court was not set up in partnership with the communities in which it operates. There was no community consultation nor any direct community involvement in the implementation committee.³⁴ There *was* consultation by Judge Morin with representatives of various Cree communities with respect to scheduling and location.³⁵ His Honour is a member of the Peter Ballantyne Cree Nation, comes from the Sturgeon Landing (Cumberland House) area and has retained close ties with his community. If

³⁴ For example, at the Northern Court Part Meeting at Saskatoon September 27th, 2000, the only Aboriginal people were Judge Mary-Ellen Turpel-Lafond and Gerry Morin (as he then was) (personal observation).

³⁵ Memos from Chief Judge G. Seniuk to Barb Hookenson, executive director of Court Services March 30th, 2001 and April 5th, 2001 (unpublished). Archived at Northern Legal Aid, La Ronge Saskatchewan.

community ownership is a goal, then community consultation and involvement are logical components of the project.

Fourth, the success of the peacemaking element of the Court depends upon the availability of community resources. Indeed, the vision of the Court is that the Court itself not be involved in the peacemaking process; it is to be a community process.³⁶

Healing resources are an essential corollary to the peacemaking activities of the judge and Court. Judge Morin says, "I do not believe that laws and policies should be allowed to stand in the way of two parties who wish to reconcile."³⁷ In reality, these processes take resources. At the end of the day, the Court goes back to Prince Albert. It leaves behind people who must be assisted in resolving issues arising from, *inter alia*, addictions, family violence, grieving and interpersonal conflict. The project requires the services of well trained and experienced resources appropriate to these needs.

Unfortunately, while there are Aboriginal court workers, justice workers, alcohol treatment referrals and the like, resources are limited and there are waiting lists even for people with urgent needs.³⁸ Unlike its Albertan counterpart, the Court has no formal peacemaking group to whom matters can be referred. This function is performed as an incident of alternative measures/EJM referrals and the regular substance abuse and

³⁶ Littlechild Commission *supra* note 1, chapter six at 14.

³⁷ See T. McLeod "At the end of the day: Observations of restorative justice processes in Northern Communities, (Winter 2003) Saskatchewan Bar Association Bar Notes 12 at 16.

³⁸ See reference *infra* note 43. The Cree Court is better serviced in this regard than some other court points. At the time of writing, Fond du Lac has no court worker or justice committee or police management board. Even within what most would consider to be logical institutional requirements, there exist incredible gaps. For example, if a youth court judge in a remote community (such as Fond du Lac) directs an offender to undergo a psychological assessment as part of a pre-sentence report, that report is based upon a *telephone* interview. There are no funds available to transport youth to meet with psychologists as part of the sentencing process unless they are remanded. (Personal observation, 2004) Happily, the adult probation officer servicing the Cree Court (out of La Ronge) is a Cree speaking member of the Cumberland House

counselling resources available in the community.³⁹ These referrals remain in the discretion of the prosecutor or the police.⁴⁰ In practice, the Crown is quite liberal in its referrals, and quite amenable to bending to judicial pressure to divert matters. Judge Morin does not shrink from all but directing that matters be diverted.⁴¹ However, discretion is retained entirely by the entities engaged to prosecute alleged offenders. Accordingly, the structural objections raised earlier with respect to diversionary referrals, hold true here. These reservations also resonate in the resource-allocation decisions of governments. While studies such as the Littlechild Report can recommend an expansion of community resources,⁴² the choices are political. In my submission, the lack of a formal peacemaker structure is, in itself, a political choice that enables the emasculation of a vital aspect of the Cree Court. It permits this emasculation to be done in the largely hidden arena of social work rather than the public arena of judicial process.⁴³ This

Cree Nation. See, for example, A. Mclean "Anecdotes of a Cree Court Legal Aid Lawyer-Part 2, (Spring 2003) Saskatchewan Bar Association Bar Notes 27 at 28.

³⁹ There are now two justice workers at the two Peter Ballantyne court points (Pelican Narrows and Sandy Bay). If the Crown approves a referral, the court will adjourn the matter two months if mediation is to be attempted, four months if a healing circle is to be convened. If unsuccessful, matters are returned to court. See McLeod *supra* note 37 at 12.

⁴⁰ This "raises questions regarding the Crown's commitment to restorative justice practices." McLeod, *supra* note 37 at 15.

⁴¹ Judge Morin has clearly made it part of his mandate to interact with communities outside court to build the capacity to deal with diverted matters. He believes that he has been successful in this regard. See Littlechild Commission *supra* note 1 chapter six at 14.

⁴² *Ibid.*

⁴³ Indeed, the submission of the Department of Corrections and Public Safety to the Littlechild Commission put it in these terms,

The capacity of human service providers outside the justice system can also be an institutional barrier, since individuals are often ordered to attend programs providing services for addictions, family violence or other issues. Often there are lengthy waiting lists for these services, and individuals may commit other crimes while waiting to access the services they need. This in turn leads to more charges and more serious interventions by the criminal justice system. See Saskatchewan Justice and Saskatchewan Corrections and Public Safety,

Working Together for Safer Communities (Regina: Saskatchewan Justice, 2003) at 29. Online: Government of Saskatchewan <http://www.saskjustice.gov.sk.ca/pdfdocs/WTFSC.pdf>

situates the issue in a place where under- funding is endemic and consequently, if not acceptable, at least not embarrassing to government.

Finally, and related to the third matter (above), there is the problem of what Turpel-Lafond PCJ called “vision.” To paraphrase, she has asked whether the intent of the project was to do the same old thing, that is Euro-Canadian justice, but do it in Cree, or to incorporate cultural conflict resolution norms and so do things differently.⁴⁴ She was concerned that judicial attempts to “do things differently” would simply engender Crown appeals.⁴⁵ She highlighted the importance of ‘buy-in’ by two key parties, the prosecution and the community. A change in language without a change in practice *and* a fundamental change in community/Crown support would be ineffective. She pointed to the demise of circle sentencing in the north as an example of the “bitter lesson” to be learned from the divorce of community and the court.⁴⁶ Accordingly, she urged community consultation to find out what the community wanted as a pragmatic way of reconstructing traditional ways of doing things lost to colonialism.⁴⁷

5.3.3 Evaluation

This dialogue exposes the philosophical tension in the structure of the Court. It is an indigenization of a Euro-Canadian mechanism of social control. Even if it comes to be

⁴⁴ Personal observation, Northern Cree Court Party meeting, Saskatoon, September 27th, 2000.

⁴⁵ Her fears have, to be fair, been borne out more by her own experience than by that of the Cree Court. Prosecutor Don Bird advises that he has not appealed from Judge Morin whereas a number of her Honour’s more progressive decisions have been reversed by the Saskatchewan Court of Appeal (see, for example, *R. v. M. (B.)*, [2003] S.J. No. 377, reversed [2003] S. J. No. 870, *R. v. L.E.K.*, [2000] S. J. No. 434, reversed [2000] S. J. No. 844) and by the Queen’s Bench (see *R. v. T.L.K.*, [2001]S. J. No. 184) (Personal communication with Don Bird, May 2004).

⁴⁶ All of these comments are taken more or less verbatim from Judge Turpel-Lafond’s comments at the September 27th meeting.

well integrated with the community, and supported in the way it deserves, it remains premised upon an acceptance that the Euro-Canadian way of doing the business of criminal law remains the best practice. It remains to be seen if the dedication and energy of the members of the Court are sufficient to change practices enough to make this untrue.⁴⁸ The Court has the potential to become so responsive to community ideas of justice, to take indigenous justice and rebuild it in the modern context, that it becomes what I suggest is the ideal: a model of justice based on a community's own values and practices, founded in traditional practices and values but fully integrated with the practical exigencies of modern life in the communities in which it operates. It might be argued that these "modern exigencies" are, in reality, nothing more than doing what the dominant justice paradigm says must be done. The Court can, and does, send Aboriginal people to jail. I suggest, however, that it is simplistic to expect the new to be entirely different from the old; the objective is to have the new cross the boundary, the interstitial space, and become something new.

The measurement criterion, the way of defining the line, is elusive. No writer that I have encountered has attempted to answer the important question of when "better than it was before, but still colonizer's justice" becomes the justice of the people. My modest suggestion is that the line is crossed when the entire system of justice becomes part of the community's way of doing social control; when the integration is comfortable, accepted and supported in the same way that non-judicial social controls are. Obviously, this

⁴⁷ The objections she raised were met with the spirited rejoinder that the project should proceed, "damn the torpedoes" (to use the words of one, non-Aboriginal participant). Problems were to be worked out later.

analysis is well in the future. I submit, though, that the Cree Court's holistic emphasis is the key to unlocking the transformation because it is consonant with a broader (and indigenous) concept of the control of social interaction. The challenge was demarked by The Royal Commission on Aboriginal Peoples. It pinpointed the reason for the failure of the criminal justice system to serve Aboriginal people in these terms:

The principal reason for this crushing failure is the fundamentally different world views of Aboriginal and non-Aboriginal people with respect to such elemental issues as the substantive content of justice and the process of achieving justice.⁴⁹

Accordingly, even given the fact that the Court has been imposed on the community, there is potential for the "Restoration of Justice"⁵⁰ that cannot possibly exist where the commitment to community roots is absent, as elsewhere in the north.

The Littlechild Commission considered the potential of transformation as an alternative to indigenization. In the words of Professor John Burrows, "If you reformed a caterpillar you would get a better caterpillar, if you transformed a caterpillar you would get a butterfly."⁵¹ He was also, like Fafard, of the view that the treaties provide essential context for the project. In his view,

Treaties are the path to the transformation of the criminal justice system because they allow the people of Saskatchewan to start where they are, while simultaneously reorienting the entire scope and context of how they approach and achieve justice. This metamorphosis would gradually alter the reach and

⁴⁸ Morin PCJ acknowledged very early on that the court would be developing its unique practices as it went along. W. Popoff "Cree Spoken in Northern Court, Judge Gerald Morin Presiding" (Fall 2001) Saskatchewan Bar Association Bar Notes 13.

⁴⁹ Canada, *Bridging the Cultural Divide: a report on Aboriginal People and justice in Canada* (Ottawa: Minister of Supply and Services Canada, 1996) at 306. This passage has been widely cited; see, for example, *R. v. Gladue*, supra note 14, J. (S.) Y. Henderson, "Aboriginal Attorney General" (Paper presented to the IBA Spring Conference: "Specialized Tribunals and First Nations Legal Institutions," 29-31 May 2002) [unpublished, archived at Northern Legal Aid, La Ronge] at 3.

⁵⁰ In the words of the FSIN "Strategic Plan" supra note 22 at 1.

⁵¹ Littlechild Report supra note 1 at chapter 4, page 7.

framework of what could be accomplished to bring about peace and order in the province.... [Justice professionals] would still be expected to be good police officers, lawyers, judges, parole officers, etc., but they would be expected to practise their profession in a Treaty milieu, taking account of any change that Treaties would require.⁵²

The Commission did not develop this thesis, but did make a number of recommendations that advocate the primacy of community involvement in justice, and an essential disengagement of the justice system from conflict-resolution.⁵³ Arguably, if one sees conflict resolution in this holistic way, and courts as one (overused) part of a spectrum of social responses to antisocial activity, then the Cree Court's activities fit in as a constructive part of a larger whole.

5.4 Alternative/ Extra-judicial measures

5.4.1 Introduction

As discussed in chapter four, Bill C-41 introduced *Criminal Code* s. 717 as part of comprehensive sentencing reform package. It permits the Attorney General of a province, his delegate or a person, or person within a class of persons authorized by the Lieutenant Governor in Council of a province to set up an alternative measures scheme if a number of criteria are satisfied. In turn, each of the schemes in Saskatchewan permit referrals only to "approved diversion programs consistent with Section 717."⁵⁴

⁵² *Ibid.*

⁵³ Indeed, in the current format of restorative justice via diversion the net is widened so that matters are being brought into the criminal justice system, which would not otherwise be prosecuted, in order that they might be diverted. See Government of Yukon, *Research Framework for a Review of Community Justice in Yukon Community Justice – Net Widening* (unpublished) online: Government of Yukon http://www.justice.gov.yk.ca/pdf/review/04-3_Netwidening.pdf This brief paper refers to a few Canadian, American and New Zealand sources.

⁵⁴ Saskatchewan, Saskatchewan Justice *Diversion Program Policy* (1996) being Schedule "A" to Minister's Order of the Minister of Justice and Attorney General, September 30th, 1996.

Its purpose, according to the press release, is so that:

first time or less serious offenders can be diverted from the courts. Alternative measures will only be used when they are not inconsistent with the need to protect the public. Their use can free up valuable prosecutorial and court resources to deal with more serious cases.⁵⁵

For youth, the promise to restrict availability has certainly been kept. The most recent data indicates that less than 1% of participants had previous records and 2% had prior experience with formal diversion.⁵⁶ A full 67% of adult referrals were for property offences; among youth 55% were for theft under \$5000. While referrals ostensibly come from Crown Prosecutors,⁵⁷ in practice the police decide who is going to be charged or diverted pre-charge and, if charged, who will have the benefit of an alternative measures recommendation. In Saskatchewan, the exercise of this discretion has been recognised as potentially problematic. For example, the Littlechild Commission, prior to the introduction of the *YCJA* on April 1, 2003, made five recommendations toward *YCJA* implementation. Among them was Recommendation 1. It said:

[t]hat Saskatchewan government, First Nations, the Métis Nation and the police work together to create a set of guidelines for the use of police and Crown discretion that ensures that First Nations and Métis youth will be diverted into culturally appropriate programs or services.⁵⁸

This was repeated in the Commission's second interim report with the following comment:

The [Saskatchewan] Minister of Justice and the Minister of Corrections and Public Safety have indicated that they fully endorse the development and implementation of culturally appropriate services throughout the criminal justice

⁵⁵ http://canada.justice.gc.ca/en/news/nr/1996/Chap22_bkg.html

⁵⁶ C. Engler and S. Crowe, *Alternative Measures in Canada* Juristat 85-002-XIE 20 (6) (Ottawa: Canadian Centre for Justice Statistics, 2000) at 10.

⁵⁷ See section 4.8.2 *supra*.

⁵⁸ Commission on First Nations and Métis Peoples and Justice Reform *A dialogue in progress: focus on Youth* Interim Report January 15th, 2003 online: Justice Reform Commission http://www.justicereformcomm.sk.ca/docs/JRC_report.pdf at 57.

system...the use of alternative measures can be limited by the capacity of community agencies, rather than by prosecutorial discretion or referral guidelines. They are currently working with community –based justice agencies, Tribal councils and alternative measures programs to increase the number of referrals.⁵⁹

Practitioners are well aware that the quality of alternative measure available has a significant impact upon the willingness of the Crown to refer.⁶⁰ It is disingenuous of the very parties charged with funding the system to suggest, as this does, that they need not change referral policies because resourcing of diversionary agencies, for which they are also responsible, is the limiting factor.

5.4.2 Federal Justice Diversion

Prosecutions in the province are conducted both by the province (for *Criminal Code* and provincial statute transgressions) and by federal prosecutors (for matters contrary to federal statutes such as the *Controlled Drugs and Substances Act*). Diversion is permitted for both. We will look at each in turn as the policy guidelines differ somewhat; each reflects not only the type of charge being dealt with but the philosophy of the authorising agency.

The federal diversion policy guidelines apply to both adults and youths. It begins with an introduction that outlines some justifications for using alternative measures.

⁵⁹ Commission on First Nations and Métis Peoples and Justice Reform, *Working Together* Interim Report November 20th, 2003. Online: Justice Reform Commission http://www.justicereformcomm.sk.ca/final/jrc_11_20_03.pdf at 29.

⁶⁰ See Youth Justice - Police Discretion with Young Offenders - environmental Factors Affecting Police Discretion - External resources online: Department of Justice Canada <http://www.justice.gc.ca/en/ps/yj/research/carrington/environmental/external.html> at 3.0.

This is no different than the inclination of judges to avoid measures that they perceive to be ineffective such as fines (for which there is no longer incentive to pay), community programmes (where such programmes do not exist or are not credibly run) and youth conferencing. (Personal experience, 1993-2004) For an interesting judicial reflection on the latter, and the inadvisability of judges descending into

[A]lternative measures may provide greater benefit to the offender, the victim, and society than can the formal criminal process. Indeed the fundamental principle underlying alternative measures is that criminal proceedings should be used only with restraint and only when less intrusive measures have failed or would be inappropriate. This allows the courts to devote their resources to dealing with serious crime.⁶¹

Significantly, its General Principle states that

...in some cases, because of the nature and circumstance of the offence and the offender, the public interest would be better served by a resolution outside of the traditional criminal process. Generally speaking it will be most suitable for younger offenders and those of previously good character, who have committed minor offences.⁶²

The guidelines follow the latter part of the policy carefully. It is “aimed at offenders who have not violated the criminal law in the past, and are unlikely to do so in the near future.”⁶³ Offenders/offences for which there is a real possibility of jail are thereby excluded. Accordingly, the point is not to reduce reliance on incarceration; it is to save money on prosecutions. This is consistent with directions such as the 1998 federal prosecutions provision allowing diversion. It stated:

If there is a provision in your particular judicial center to engage in some form of alternative measures in accordance with the enclosed policy of September 1997, arrangements can be made for the program. However this is on the proviso that it does not result in any disbursement on behalf of the Federal Prosecution Services (emphasis in original).⁶⁴

the fray, see *R. v. Sasakamoose* (unreported, Saskatchewan Provincial Court, 2003) per Tucker PCJ (archived at Northern Legal Aid, La Ronge)

⁶¹ Canada, Department of Justice, *Federal Diversion Policy Guidelines* (Ottawa, Minister of Justice, 1997)

⁶² *Ibid.* at 2.1.

⁶³ *Ibid.* The contrast between this directive, and Judge Morin’s view of recidivism, especially addictions based recidivism, is striking. He says, with respect to another addictive substance: “I don’t care if a guy falls off the wagon fifteen times. Maybe the sixteenth is the chance he needs to turn his life around. The justice system should be flexible enough to evaluate the underlying factors behind the offence before it sets its sights on punishment.” T. McLeod, *supra* note 37 at 15.

⁶⁴ Letter from Fran Atkinson, Federal Crown Agent, to Prince Albert Police, RCMP and Legal Aid dated July 14th, 1998, (unpublished: archived at Northern Legal Aid, La Ronge.) The referenced policy is that cited at note 61 *supra*.

The decision to divert is subject to a number of other federal prosecution policies that are not public, such as “Native Law Issues” and “Spousal Assault.”⁶⁵ It may also be precluded for a number of reasons, including, for example, that the offender trafficked drugs, or possessed them for the purpose of trafficking, to a person under 18 or “where the motivation for committing a drug offence was primarily profit.”⁶⁶

Perhaps as a result of these policies, federal diversion is relatively rare. The programs that participate in Saskatchewan Justice’s Alternative Measures Database reported 1440 adults referred to their programs in 1999-2000 and 1388 in 2000-2001.⁶⁷ Of these, 2% were for drug matters, or approximately 29 referrals.⁶⁸ In the calendar year 2000, 88,091 drug “incidents” were reported to Canadian police.⁶⁹ 2343 were reported to Saskatchewan police.⁷⁰ The paucity of referrals is hardly surprising given the philosophy evident in the language used by federal prosecutions in their referral protocol.

⁶⁵ *Supra* note 61 at 3.2.

⁶⁶ *Supra* note 61 at 3.3. The latter disqualification can be relaxed with special authorization from above. Cases of people trafficking for philanthropic purposes are rare but not unknown. See, for example, P. Brady, “Mark Emery Arrested” online: Cannabis Culture <http://www.cannabisculture.com/articles/3387.html>

⁶⁷ Saskatchewan Justice, *Use of Alternative Measures in Saskatchewan 1999-2000 and 2000-2001*, (Regina, Saskatchewan Justice, April 2003) at 10 ff. These statistics must be used with some caution, for a number of alternative measures service providers take referrals but do not report out to the database. For example, the total number of adults referrals (as opposed to discrete persons, the measure used in my text) in 2000-2001 was 2226. This does not include 838 cases dealt with by Saskatoon Community Mediation and 553 cases conducted by agencies not hooked up to the database. The published report suggests that the latter number is made up of raw data from Aboriginal-oriented agencies such as the Agency Chiefs Tribal Council, Saskatoon Tribal Council (on reserve), Prince Albert Grand Council (on reserve) but the document is not sufficiently precise for one to comfortably draw this conclusion. *Ibid* at 6. A recent roundtable evaluation of Saskatchewan Alternative Measures also highlighted the difficulty in drawing useful conclusions when service providers do not compile statistical information in comparable ways. See T. Kirkland, “Alternative Measures Focus Group Synopsis” (Regina: Saskatchewan Social Services, November 8th, 2001) (unpublished, archived at Northern Legal Aid, La Ronge).

⁶⁸ *Ibid*.

⁶⁹ M. Wallace, “Crime Statistics in Canada, 2002” *Juristat* No. 85-002-XIE Vol. 23 (5), (Ottawa: Minister of Industry, July 2003) at 16.

⁷⁰ N. Desjardins & T. Hotton “Trends in drug offences and the role of alcohol and drugs in crime” *Juristat* No. 85-002-XPE Vol. 24(1), (Ottawa: Minister of Industry, February 2004) at 18

5.2.3 The Saskatchewan programmes

The Saskatchewan protocol uses different language and has quite different roots. A bit of history is instructive to highlight the importance of concerns about Aboriginal people in the formulation of policy. The first community-based youth and adult alternative measures programmes were established in 1985 and 1987 respectively. They were brought in in response to the 1984 *Young Offenders Act*⁷¹ and a concern about the large number of Aboriginal people in the justice system.⁷² As one author noted with respect to youth,

An unintentional result of the *Young Offenders Act*, high rates of charging and incarcerating youth, coupled with Saskatchewan's high crime rate and growing Aboriginal youth population, had resulted in a situation where the youth justice system had, by default, become the youth services system. This was an undesirable, ineffective and costly situation that validated the provincial government's commitment to target the development of alternative justice responses.⁷³

In 1992 Judge Patricia Linn led a committee to review Aboriginal justice in the province. Its report, delivered in 1992, made specific recommendations to facilitate the engagement of Aboriginal people. It suggested *inter alia*,

The federal and provincial governments, in consultation with Indian and Métis organisations, establish youth and adult mediation/diversion/reconciliation programs. Such programs would be culturally appropriate and embody a holistic

⁷¹ *Young Offenders Act* R.S.C 1985, c. Y-1.

⁷² T. Kirkland & P. Braun, "The Saskatchewan Community-Based alternative measures model" Paper presented at the Sixth International Conference on Restorative Justice, June 2003. Online: Simon Fraser University <http://www.sfu.ca/cfrj/fulltext/kirkland.pdf>

⁷³ *Ibid.* at 2. Also see s. 39(5) of the *Youth Criminal Justice Act* S. C. 2002 c.1 which states "A youth justice court shall not use custody as a substitute for appropriate child protection, mental health, or other social measures. The substitution of youth custody for welfare removals has also been of concern in Australia. See Q. Beresford and P. Omaji, *Our State of Mind: Racial Planning and the Stolen Generations*, (South Fremantle: Fremantle Arts Centre Press, 1998). Sadly, the *YCJA* prohibition is ineffective in resource-deprived northern communities, for the *Act* permits custody if the sentencing judge has considered community resources. If there are none, then custody is the only remaining option.

approach to offender rehabilitation (that is, an approach sensitive to the spiritual, emotional, psychological, physical and material needs of offenders).⁷⁴

In 1993 a four year Aboriginal Justice Strategy was developed. It was adopted as part of the Government's Aboriginal Policy Framework in 1994. The following year, the Department of Social Services and Saskatchewan Justice created a joint Restorative Justice Strategy, primarily for youth. On the adult side, the looming advent of Bill C-41 among other things precipitated an in-depth look at alternative dispute resolution in criminal justice.⁷⁵ It noted,

A better, perhaps tougher approach to crime is needed but not in the traditional punitive sense. Getting tougher on crime by increasing offender accountability and strengthening and involving communities is a workable option...⁷⁶

At the same time, the police began to crystallise their interest. Since 1995, the Royal Canadian Mounted Police have endorsed Restorative Justice as part of their Community policing strategy. They have developed materials and protocols for the use of local detachments.⁷⁷ However, as their material correctly notes,

[w]hile the police are well placed to develop restorative justice because of their discretionary role as gatekeepers to the justice system, the current push to expand diversion, and because they are well placed to develop community partnerships, it may be much harder for them to do so appropriately and effectively than others.

⁷⁴ Indian Justice Review Committee, *Report of the Saskatchewan Indian Justice Review Committee* (Saskatoon, January 30, 1992) recommendation 4.1 at 42.

⁷⁵ P. Braun, *Saskatchewan Justice Alternative Measures Consultation Paper* (Regina: Saskatchewan Justice, 1996)

⁷⁶ *Ibid.* at 3.

⁷⁷ F. Shaw & F. Jané, *Restorative Justice and Policing in Canada: Bringing the Community into Focus*, (Ottawa: RCMP Research and Evaluation Branch, August 1998) Summary online: http://www.rcmp-grc.gc.ca/ccaps/restorative_policing_e.htm (full text available from the RCMP on request). The RCMP's primary *modus operandum* is Community Justice Forums, a type of conferencing. It has been used largely pre-charge and would seem to be a formalised version of the traditional role of the police in minor dispute resolution. The use of pre-charge referrals implies that the matters dealt with are not those that the police feel require judicial intervention, that is, more serious matters. Of significance, though, is the recognition of a possible increase in the efficacy of policing through reducing community alienation. That the RCMP implicitly acknowledges, in this way, the fact of community/police disengagement is encouraging. Also see J. Chatterjee, *Report on the Evaluation of RCMP Restorative Justice Initiative: Community Justice Forum as Seen by Participants*, (Ottawa: RCMP Research and Evaluation Branch, 1999) Summary online: RCMP http://www.rcmp-grc.gc.ca/ccaps/restorative_chatterjee_e.htm

More than any other agency or community group, the police face much stronger pulls and expectations, both internally and externally, towards a retributive offender-based justice system.⁷⁸

In 1995 the Saskatchewan government directed Justice (adult) and Social Services (youth) to develop a joint restorative justice programme.⁷⁹ The RCMP took on a partnership role.⁸⁰ To effect the programme, adult and youth diversion policies followed in 1996 and 1997 respectively and are still in effect today. Significantly, the plan was to avoid the temptation of rebranding existing resources. Rather, restorative justice would be built on the new foundation of public education, community development initiatives and alternative measures.⁸¹ It was envisioned that about a quarter of offences province-wide could be diverted.⁸² La Ronge was selected as a “priority location” for the first year (1996/1997) of the programme.

5.2.4 Youth Alternative Measures in La Ronge

Braun’s 1996 paper advocated a community-based delivery of alternative diversionary programmes. Currently, all youth alternative measures for youth are delivered in this way, often by Métis and First Nations organisations.⁸³ In La Ronge, the Kikinahk friendship centre is the service provider for youth.⁸⁴ It has one staff person who works

⁷⁸ Shaw & Jané, *ibid.* at executive summary.

⁷⁹ In October 1993, Saskatchewan Justice held a conference called Justice 2001 that formally recommended developing less formal justice mechanisms for less serious crime. This was pivotal in the development of the 1994 draft guidelines that were adopted two and three years later. See Braun, *supra* note 75.

⁸⁰ Kirkland & Braun, *supra* note 72 at 11.

⁸¹ Braun, *supra* note 75 at 7

⁸² *Ibid* at 17. In 1993 there were 102,818 offences charged against 19,854 offenders.

⁸³ Saskatchewan Correction and Public Safety *Annual Report 2002-2003*, (Regina: Corrections and Public Safety, 2003) at 4.

⁸⁴ Although Kikinahk’s website indicates that they take referrals for adult mediation clients, the reality is that they do not. Kikinahk Friendship Center Inc. is one of 12 Aboriginal friendship centers in Saskatchewan co-ordinated by the head office of Aboriginal Friendship Centers of Saskatchewan (AFCS) in Saskatoon. It is a non-profit corporation, founded in 1986, that provides a host of community services to Aboriginal and non-Aboriginal people. It originated from an earlier organisation, the Neginauk Friendship

full time in the programme.⁸⁵ That individual attends youth docket court in La Ronge (every Monday afternoon) and docket court in the smaller outlying Aboriginal community of Pinehouse. La Ronge court deals with matters from La Ronge and area, including the communities of Hall Lake and Sucker River. The majority of referrals are post-charge. In the 2000-2001 year, 26 files were referred and 31 closed. The comparisons for 2001-2002 and 2002-2003 are 55 and 41, and 59 and 61 files respectively. Of the 61 files closed in 2002-2003, 17 were pre-charge referrals. Approximately 80 files were closed in 2003-2004.⁸⁶ When youth appear in court and the charges are read, the court officer will sometimes indicate that the matter is suitable for diversion. This is generally because the Prosecutors Information Sheet prepared by the investigating officer for the instruction of the court officer or Crown prosecutor so indicates. Rarely does the Crown or court officer have any personal knowledge of the matter. If the matter is not so delineated, sometimes the Court will enquire as to whether the matter can be diverted. This is generally if the type of charge suggests to the youth court judge that the matters may be appropriate for diversion. If the diversion is

Center, which arose from a need in the community for healthy activities for youth to ameliorate youth offending.

⁸⁵ Funding was increased so that the position could be full time effective January 1998. Kikinahk operated a part-time programme prior to that time pursuant to an authorisation of the then Minister of Justice, Bob Andrew dated November 26th, 1986. It was one of three provincial friendship centers that provided the service prior to 1996. The balance of the province was served by the John Howard Society (in urban areas) and social Services personnel in outlying areas. As noted, the move to community-based programming was a deliberate policy shift. See Braun *supra* note 75 at 11.

⁸⁶ These are the most recent statistics available as of July 2004. Provided by Krista Layton, Youth worker Kikinahk Friendship Center Inc. (Personal communication, July 14 2004. Archived at Northern Legal Aid, La Ronge.) Because this exceeded Ms. Layton's capacity, about five matters were referred to the Lac La Ronge Indian Band's Justice Unit. This is the service provider for adults in the La Ronge area. Each file is a charge or charges diverted at the same time. If an offender acquires another unrelated matter later in the year, that is a new file.

approved at this point, the offender fills out a form with the Kikinahk worker. This may be done on the spot, or at a later time.⁸⁷

Youth have a right to consult with counsel under the *YCJA*⁸⁸ and accordingly it is the practice of the court to advise the youth of that right and to enquire as to whether they wish to retain private counsel or apply for legal aid. Youth who are being diverted at first instance are not advised of their right to the advice of counsel.⁸⁹ Disclosure is then provided to counsel (all but a very few are referred to legal aid). If matters fit within diversionary criteria (or are close), the youth accepts responsibility and either has no viable defence or wishes to waive same, counsel will attempt to persuade the Crown that diversion should occur. The police provide their file to the Crown for approval.⁹⁰ The Crown has the final say.

Matters referred may be dealt with in a number of different ways, depending on the charge, the severity of the offence, the willingness of the victim(s) and the imagination of

⁸⁷ More recently, Sucker River and Hall Lake have developed functioning justice committees to which matters are now referred.

⁸⁸ *Supra* note 71 at s. 25 (1).

⁸⁹ Personal observation April 1, 2003 to present. Extrajudicial sanctions involves the acceptance by the offender of responsibility for the behaviour in question. S. 25 of the *YCJA* and the Saskatchewan eligibility guidelines specifically note the presence of the right to be so informed right at the stage where EJ sanctions are being considered. However, the guiding manual for these sanctions outlines the role of all parties in the process *other* than counsel for the alleged offender. It anticipates that youth will only avail themselves of legal advice if the matter is not diverted or is returned to court after a youth decides not to accept responsibility for the act. See generally, *Extrajudicial Sanctions: Policy and Procedures Manual for Young Persons in Saskatchewan* (Regina: Saskatchewan Corrections and Public Safety, c. 2004). Not surprisingly, requests for the advice of legal aid from youth in this situation are extremely rare. (Personal observation, 1993-2004)

⁹⁰ This can be contrasted with the fascinating procedure in other areas of the province where matter are referred by the police to the Extrajudicial Sanctions co-ordinator and the Crown at the same time. If nothing is heard within 7 days, Crown consent is implied. *Ibid* at 9.

the worker. The Extrajudicial sanctions manual⁹¹ anticipates that a conference will be held, the result of which will be a referral to one of three bodies: a Community justice forum,⁹² an accountability hearing⁹³ or a Mediation meeting.⁹⁴ The purpose is to reach a realistic agreement for the performance of tasks appropriate to the situation including personal or community service work, apologies, assessment and/or counselling for addictions or personal/family issues, restitution and the like. There is no mention in the Manual of referrals with an Aboriginal orientation, such as sweats, hunting trips, cultural activities and education, elder counselling, trapline visits, and sharing circles.

Although the intent of the process is to use conferencing extensively, in practice they are very rare.⁹⁵ The majority of cases result in the performance of community service work and an apology. The community service is done through the Kikinahk facility. It is paid by Saskatchewan Corrections and Public Safety and is also the local service provider for

⁹¹ *Supra* note 89. The foundational document for Canadian alternative measures simply notes that the views of a victim may be taken into account in the first objective of the process, the agreement between facilitator and offender. VORP could be used, depending on the capability of the agency. See B. MacKillop, *Alternative Measures in Canada 1998* Cat. N. 85-545 (Ottawa: Minister of Industry, 1999) at 9.2.2. The original Saskatchewan Justice Diversion Policy from 1996 permitted referrals to mediation as an option under restricted circumstances, including victim agreement and agency capability. The Consultation Paper on which that policy is based noted that, “[w]here appropriate Family/ Community Conferencing could be utilized. Conferences could be designed on either the New Zealand or Wagga models.” Braun *supra* note 75 at 19. Braun does not explain what he means by this. One presumes that this is shorthand for non-police and police-run conferences respectively.

⁹² A restorative justice meeting of the accused, the victim and selected community members. This is the Saskatchewan equivalent of the Family Group Conference. One presumes that “selected community members” includes the family of the youth. Manual *supra* note 89 at 5.

⁹³ Also known as a community justice circle. The Manual does not elaborate as to what this is to entail.

⁹⁴ Defined by the Manual as Victim/offender reconciliation. *Supra* note 89 at 6.

⁹⁵ For example, a bomb threat at a school led to a charge of conveying a false message against T.J. B. (unreported, La Ronge Provincial court August 12, 2002.) then aged 15. Although the youth had no criminal record, diversion was refused as the matter was “too serious”. Eventually counsel persuaded the Crown that a community meeting and subsequent punishment would suffice and the matter proceeded to a conference with police, school, fire and emergency officials grilling the youth who was accompanied only by counsel. The referral was a success in that the agreement to perform a large number of both community service hours and apologies was fulfilled. Sadly, the youth went on to reoffend. (Personal observation, 2002-2004).

court-ordered community service work. A significant number of referrals involve consultation with the victim. From this may come a request for personal service work but this is not as common as referrals to community service work. There are a number of reasons for this. Victims of crime are not always enthusiastic about having offenders nearby nor do they wish to act as a supervisor.⁹⁶ Restitution is equally rare as few La Ronge youth who offend are employed. As in other northern communities, referrals to community substance abuse facilities are made where a substance abuse problem is evident. There are waiting lists for treatment programmes. Facilities for youth requiring mental health counselling, substance abuse counselling (particularly for solvent abuse) and Foetal alcohol syndrome disorder are particularly scarce.⁹⁷

A full analysis of the effectiveness of this programme is outside the ambit of this thesis, but a critique that explores marginalisation is not. Two aspects are pivotal; the first is the limited utilisation of youth diversion, the second is the impact of traditional ways of conflict resolution on the way that it operates. First, one notes the small (but rising) number of youth referred to Kikinahk. Generally, Saskatchewan has a relatively high participation rate in youth diversion. In 1997-1998, 941 out of every 10,000 Saskatchewan youth were referred to youth court. 179 per 10,000 were referred to

⁹⁶ Personal communication, Krista Layton, July 16, 2004. Ms. Layton was the Kikinahk youth worker from 2002 to July 1, 2004 and was kind enough to provide the information related in this part. Only one business in La Ronge (the Field department store) wished to have anything to do with personal service. The balance did not even wish to participate in formal mediation, but would simply ask that offenders be "put to work" somewhere else."

⁹⁷ Personal observation, 1995-2004. Also see the official acknowledgment of the problem *supra* note 43. For a thorough and excellent discussion of the nature and prevalence of FAS/E in Saskatchewan, including information on assessment and treatment, see R. Mitten, *Foetal Alcohol Spectrum Disorders and the Justice System*, being section 9 of part 2 of the Littlechild Commission *supra* note 1 online <http://www.justicereformcomm.sk.ca/volumeone/14ChapterNine.pdf>

alternative measures.⁹⁸ One would expect, therefore that about one fifth of La Ronge and area's youthful offenders would be referred. This would mean that if 61 youth matters were referred to Kikinahk in 2002-3003, there should have been about 240 youth matters in court over the course of the year. Most youth, but not all, avail themselves of their right to counsel and apply for Legal Aid.⁹⁹ The notable exception is when the matter is diverted directly from court. In that circumstance, few bother to apply for legal assistance; the diversion worker picks up the matter directly from the police, talks to the youth and the case is adjourned for the worker to meet with the youth and take the matter forward. Accordingly, legal aid statistics should significantly undercount the total number of youth before the court. In fact, Northern Legal Aid received 226 applications from youth at La Ronge and Pinehouse for the noted year, and closed 232 full service files. Each file averaged 2.5 charges.¹⁰⁰ Why are more youth not referred? In the opinion of one La Ronge practitioner,

The Crown sees diversionary referrals as a defence strategy rather than a legitimate criminal justice initiative. It is seen as a way of avoiding criminal sanctions for clients. This ignores victim satisfaction, the providing of a sense of

⁹⁸ M. Kowalski, *Alternative Measures for Youth in Canada*, *Juristat* 85-002 vol. 19, No. 8 (Ottawa: Minister of Industry, 1999) at 6. In recent years, this has increased. In 2000-2001 Saskatchewan had 2,930 youth referrals, the highest rate in Canada. See Littlechild Report, chapter 4 at 15.

⁹⁹ As noted above, under s. 25 of the *YCJA* youth must be informed of the right to retain and instruct counsel from the very beginning of the criminal justice process. The *right* to be represented, however, arises only at various stages where liberty is at stake. If a youth cannot get legal aid, the court must appoint counsel (s. 25(3) *YCJA*). In practice, very few youths have the resources to retain counsel. Parental resources, if sufficient, will disqualify a youth from being granted legal aid only if the parents are willing to pay. If they are not, the youth's interests and the parents are at odds, and the youth will not be disqualified from obtaining legal aid counsel on this basis.

¹⁰⁰ Northern Legal Aid Case Management system (2002-2003), archived At Northern Legal Aid, La Ronge. These are the best statistics available. The provincial court keeps records in the Justice Automated Information Network (JAIN). This measures the number of times each charge appears in court. For example, if an offender has three charges, and the matter is adjourned five times in the course of completing it, (which is not unusual) the system registers 15 appearances. While this may be a valid measure of the court's workload, it is of little use in counting the number of youth who appear. It is also inappropriate for assessing workload trends, as a change in judicial case handling may profoundly change the numbers. For example, if a judge decides that he will not wait for matters to be dealt with by counsel during a court day, but rather adjourns them over for interviewing and the like, the statistical record for that matter will show a doubling of work. In reality, of course, nothing is accomplished.

responsibility in offenders, and the accomplishment of *de facto* restitution. The Crown sees it as a way of avoiding jail.¹⁰¹

The practical roadblocks are twofold, and interconnected. Because diversion is seen by the Crown as a soft option, it is not a favoured response to offending that is perceived as serious. This includes matters that, while not particularly egregious in and of themselves, are part of a larger community problem. For example, in La Ronge the first snow (sometimes as early as October) brings with it the season's first snowmobile thefts. Even though owners are ingenious in immobilising machines, youth are even more determined to take them. These "thefts" (as they are usually charged) are rarely accompanied by the intent required for a conviction under section 334 of the *Criminal Code*. They are classic cases of joyriding (and all too often wilful damage). The machine is abandoned once it runs out of fuel. For a time, the local Crown simply refused to refer these matters to mediation even for youthful, first time offenders. Although the Crown policy requires consideration of this option, in practice, it was simply refused on a blanket basis.¹⁰²

The problem is the police wish to see that an offence carries with it a serious consequence; they feel this is the best way to make the problem cease. The way of accomplishing this is for kids to go to jail. This is a sign to all that the matter will be dealt with harshly. The underlying issue then, is that the gatekeepers have little faith in diversion to accomplish specific and general deterrence.¹⁰³ The dissonance between this

¹⁰¹ Personal communication with Richard W. Bell, July 13, 2004. Mr. Bell is the only veteran private lawyer in La Ronge other than a semi-retired ex-legal aid lawyer. He is an experienced criminal practitioner with over 15 years at the bar.

¹⁰² Personal experience, 2001-2004.

¹⁰³ Often, the writer has attempted to persuade the gatekeepers to agree to a referral and been met with the response that it will only be agreed to if the mediation involves something more than community service work and an apology. The police are throwing back on defence counsel the task of negotiating a more onerous response from the diversion system as the price of the referral. In my submission, this is a vivid

attitude and the structural philosophy of the Youth Criminal Justice system is clear. Accordingly, the combination of lack of respect for the credibility of diversion and (and intertwined with) the perception of anything other than jail as not being punitive and hence not effective, means that at the practical level, diversion remains a marginalised criminal justice response.

Finally, the use of traditional Aboriginal justice for La Ronge youth depends very much on the inclination of the worker running the scheme. Kikinahk has two Cree elders who are actually part of a separate teen-parent programme. These elders have been utilised by the worker as advisers, surrogate victims¹⁰⁴ and as a resource to take offenders hunting and fishing and craft-making. La Ronge is a small community. Often these elders are familiar with the youth and their families. Offenders are given the option of spending time with these positive role models, and the experience is that youth respond positively and openly to the opportunity.¹⁰⁵ There is no guidance from any Indian Band or from Prince Albert Grand Council, nor is the programme oriented in traditional Aboriginal spirituality. Rather, it is a unique grassroots development based on a particular set of challenges and human resources. Because this level of development depends so much on the talent of one poorly paid worker,¹⁰⁶ it remains to be seen whether it will continue to

demonstration of the lack of faith that the frontline gatekeepers have in the ability of Extra-judicial sanctions to effect public safety.

¹⁰⁴ When victim-offender reconciliation is desirable and the victim does not wish to participate (or should not because of the potential for further harm, an imbalance of power and so forth) a surrogate, or substitute "victim" can be used.

¹⁰⁵ Again, I thank Ms. Layton for providing me with these unique insights. She has now left Kikinahk's employ.

¹⁰⁶ She was paid about \$32,000 per year. Pay for other alternative justice workers across the north is no better and is usually only part time. Workers cobble together a number of positions such as court worker, justice committee worker, youth justice service provider, fine option agent and parole supervisor to fill the

respond so creatively. It is unfortunate that, despite its history and accomplishments, this programme has not engendered the respect of the Crown and police such that diversion could be significantly expanded. The reason why this is so is, in my submission, rooted in the regressive inclinations explored in previous chapters.

5.3 Conclusion

There is some room for optimism. Some have observed that there has been a considerable shift elsewhere in the province to more serious matters being referred to diversionary programmes.¹⁰⁷ There are a number of possible explanations. Certainly there have been policy shifts such as those noted above on the part of the RCMP.

Similarly, more human resources have been allocated to the “gate” but the Crown has had dedicated positions to consider these referrals for years.¹⁰⁸ It is likely that the Crown and police have developed slightly greater confidence in diversion, with a concomitant rise in the credibility of the schemes. One might also speculate that the change is a function of mainstreaming. Programmes have been around so long that gatekeeper behaviour has changed. This is not a structural alteration, but can certainly be considered an important systemic one in that the behaviour of justice system actors in response to particular situations is (arguably) always an issue of guided choice even if the guidance is unwritten. The way that these guidances become discernible is in the choices made, and

need for a full-time salary. (Personal communication, David Gordon-Toutsaint, Black Lake justice worker 1997-2002).

¹⁰⁷ Remarks of Hugh Harradence QC at Saskatchewan Legal Education Society Inc. seminar, “Criminal Law Essentials” May 23, 2002 at Saskatoon, Saskatchewan. Harradence did not speculate as to why change may have occurred. I use this as an example because it pre-dates the *Youth Criminal Justice Act* and therefore removes that legislation as a potential explanation.

¹⁰⁸ The number of Crown prosecutors in Saskatchewan has doubled in the last 15 years. Some of them have had as their mandate the consideration of cases for diversion. Others are heavily involved in initiatives to expedite trials and otherwise improve criminal case management. This was one of the

accordingly this anecdotal observation is a valid discernment of a change in gatekeeper decision making. This said, these restorative ways of doing justice in the North remain very much alternatives to the norm, and very much in the margins.

recommendations of the 1997 prosecutions audit, See P. Martin & E. Wilson, *Operational Audit of the Public Prosecutions Department of the Saskatchewan Department of Justice* (Regina, 1997) at 86.

6.1 Concluding thoughts

There is hope for change. At the programme level, restorative justice must be sufficiently well supported that it becomes the normal way of doing business. This is the same analysis as that applied to the Cree Court. This support enables the indigenous development of systems and processes unique and adapted to a particular community. These, in turn, have the ability to acquire the credibility necessary to move upstream and affect gatekeeper behaviour. The pivotal point is that at which the gatekeeper's culture changes so that its power is exercised with reference to an entirely different paradigm of justice; a restorative, non-punitive paradigm. The threshold can only be crossed by the changing of the lenses of response to offending (to borrow Howard Zehr's metaphor).¹

The required cultural change is a complex decolonial interplay of legislation, policy, history, attitude and behaviour. All of these must come together to effect a shift to practices that this thesis has, I hope, demonstrated to be fundamentally antithetical to Canadian law's (and Canadian society's) punitive and retributive values. Thus far, they have not. Even the very latest legislation is timorous in its suggestion of less punishment, and resounding in its endorsement of retribution and "meaningful consequence" or punishment. The novel aspect of the Cree Court is that a judge, a very powerful actor, is tasked to effect change. This is in notable contrast to the more usual restorative justice situation (like Kikinahk), where underpaid and under resourced well-meaning people

¹ H. J. Zehr, *Changing Lenses: a new focus for crime and justice* (Waterloo: Herald Press, 1990). Some aspects of Zehr's influential work are discussed in chapter three.

attempt to do justice.² The roots of the movement demonstrate this in that they are found in churches, volunteers and concerned community, including Aboriginal community, rather than in the legion of highly paid corrections, police, and other justice system actors. Accordingly, the bellwether for advocates is not political rhetoric, but the funding that signals actual change in philosophy. The sign that a practice has become mainstream is not just that policy and legislation facilitate it, but that it is resourced in a way commensurate with it being the dominant way of doing things. For example, if the peacemaker aspect of the Cree Court were so well funded that *not* referring a matter to it became exceptional, one would know that the threshold in that one small area of the justice system had been crossed.

What is in the way? The first barrier is philosophical. While the Saskatchewan programme has expanded the scope and availability of diversionary options, it has not yet changed the philosophy underlying the administration of justice. The system is still underpinned by sanctions that effect the deprivation of personal liberty. Diversion programmes might, to use Said's term,³ delay the point at which the "other" goes into custody (a little), but not the route by which he got to that point. It will not change the Aboriginal experience of poverty, disadvantage and marginalisation that are such important factors in offending. It may, and the Cree Court demonstrates this, have an

² One can take as a further example Youth Justice Committees authorised under s. 18 of the *YCJA*. Even though these committees are integral to youth justice, as a matter of (at this time draft) government policy, they are to be entirely unremunerated. The government will only provide information, orientation and developmental support. Further, the policy requires that members be appointed by the Attorney General of Saskatchewan, and requires that they set up their own non-profit corporation. Not surprisingly, there are none operating within the bailiwick of Northern Legal Aid. Corrections and Public Safety, "Draft Policy Statement on Youth Justice Committees" (Undated, unpublished) Archived at Northern Legal Aid, La Ronge.

³ E. Said, *Orientalism* (New York: Vintage Books, 1979) at 7. Said stresses that a we-they dichotomization is essential to maintaining superiority in Eurocentric cultural hegemony.

upstream effect by integrating and legitimising healthy social control and conflict resolution in communities that are not healthy in this respect. The respect is engendered for an indigenized colonizer's system. One should not celebrate a tiny change in a punitive structure as better than nothing if the result is to become complacent and cease agitating for a larger transformation of the justice system so that it becomes based on a healing paradigm.

A second difficulty is the absence from the discourse of the largely voluntary aspect of diversion. Why are people motivated to participate? Is it because they can avoid pain/minimise the consequence of their actions, or because they feel a social duty to make amends (or a bit of both)? In very alienated and unhealthy communities, custody can become a "rite of passage" for youth. In such circumstances diversion has little potential because offenders are disconnected from society, a criminal record is so common (or desirable) as to constitute neither stigma or consequent deterrent, and custody is, objectively viewed, a more attractive circumstance than continued existence in the community.⁴ From the perspective of the judicial system, lack of co-operation is problematic. The offenders before the Court are there often because their life challenges have stripped from them the capability and motivation to deal with decision making responsibly. What judicial sanctions do is take away the freedom of the offenders by

⁴ Q. Beresford & P. Omaji, *Rites of Passage: Aboriginal Youth, Crime and Justice*, (Fremantle: Fremantle Arts Center Press, 1996). See also, E. Ogilvie & A. Van Zyl, Young Indigenous Males, Custody and the Rites of Passage," *Trends and Issues in crime and criminal justice No. 204*, (Canberra: Australian Institute of Criminology, April 2001). Although some communities have been studied, and dysfunction, marginalisation and lack of diversionary initiatives noted, these are rare. See, for example, C. LaPrairie, *Seeking Change: Justice Development in La Loche, Saskatchewan* (Ottawa: Department of Justice, 1997) cited in Ministry of the Solicitor General of Canada, D. Clairmont and Rick Linden, *Developing & Evaluating Justice Projects in Aboriginal Communities: A Review of the Literature* (Ottawa: Department of Justice, March 1998)

substituting the decision making power of another person for the defectively exercised discretion of the offender. The obligation to pay a fine or to do community service work has a clear impact upon the resources and time that that offender can choose to allocate to other activities. Probation, and the various forms of custody progressively remove the offender's discretion from him; this is their *modus operandi*. Is it realistic to expect that, without very significant support, offenders will perform well in diversionary programmes? Restorative justice will not work on the cheap because it requires support not only for unhealthy individuals, but also for unhealthy communities.

Accordingly, the issue raised throughout this thesis, that of over-incarceration of Aboriginal people, is compounded and highlighted by the problem of what to do with people who do not perform. Alternative measures workers, faced with a recalcitrant youth or adult referee, can and do return the matter to court. This is part of the protocol of the programmes.⁵ Police and the Crown, faced with a person who reoffends after having previously been diverted, simply refuse to divert again; demonstrably, diversion does not work. The fact that an offender has had an opportunity for a "restorative" experience, and re-offends may be proof that he is recalcitrant. It has the potential to make the decision to incarcerate easier for judges who otherwise might not. Judges presented with people who do not respond to community sanctions do threaten to incarcerate them and regularly follow up on the threat.⁶ This is no different than judicial

⁵ See for example, "Extrajudicial Sanctions: Policy and Procedures Manual for Young Persons in Saskatchewan" (Regina: Department of Corrections and Public Safety, 2004) at 20.

⁶ Personal observation 1993-2004. Sometimes the penalties are quite stiff. Recently a La Ronge Cree man who failed to perform at least 52 community service hours received 45 days in jail. Thankfully, Judge Robinson's sentence was reversed on appeal to one of time served (about 10 days). See *R. v. Raymond Okemau* (unreported, archived at Northern Legal Aid, La Ronge) March 5, 2004 per Foley, J.

response to “systems-generated charges.”⁷ The *YCJA*’s drafters were keenly aware that these charges are very common and that they led to incarceration.⁸ For example, in 2003-2003 (the last full year that the *YOA* was in force), 205,146 youth charges were laid, 18.1% for breaching the *Young Offenders Act*. A further 13.7% were for administration of justice offences, largely for disobeying court orders (10.6%). 70% of youth sentenced received probation averaging 375 days.

The law maker’s timid response is an excellent example of what this thesis’s critique would lead one to expect. For example, *YCJA* section 39 (1) (b) allows incarceration when a youth has previously failed to comply with non-custodial sentences (plural). It (arguably) prohibits incarceration for the first two pure *YCJA* probation breaches, as the common breach section (section 137) is a pure summary offence and so only the third pure breach can result in gaol. The effect is that youth may get one more chance.⁹ Sadly however, many youth commit breaches along with substantive offences. Others may be

⁷ By this I mean charges that arise as a result of the actions of the justice system alone. Examples are breaches of probationary orders that forbid offenders from doing that which would otherwise be legal, such as leaving one’s house to go for an afternoon walk. Some judges react with remarkable (and unseemly) anger to counsel who use the term. These judges take the position that the charge is generated by the offender’s behaviour, not the system. Their vehemence arises from a lack of comprehension that the actions of the judge can, sometimes, be unjust and unfair. (Personal observation, 1986-2004)

⁸ See P. Robinson “Youth Court Statistics 2002-2003” 24(2) *Juristat* (Ottawa: Canadian Centre for Justice Statistics, March 12 2004) online: Statistics Canada <http://dsp-psd.pwgsc.gc.ca/Collection-R/Statcan/85-002-XIE/0020485-002-XIE.pdf>

⁹ This may depend on whether the first sentencing was for one, or more than one, offence. The Saskatchewan Provincial court, sitting at Fond du Lac, recently considered the case of a youth charged with breaching probation on which he had been placed for a number of offences. The predicate offences had all been pled to at the same time, but arose from different occurrences. They were his first convictions. The court held that the youth’s probation was composed of a discrete sentence for *each* of the predicate offences, and accordingly the subsequent breach of the single probation order created a situation in which incarceration was permissible. I recommended an appeal as the sentencing court declined to follow my argument that the case was analogous to a situation when a number of driving convictions are entered at the same time. The Supreme Court in *R. v. Skolnick*, [1982] 2 SCR 47, 68 CCC (2d) 68 held that such charges create but one conviction should the accused be convicted of a further offence at a later date and the Crown seek greater punishment under 255(1) of the *Code* as a result thereof. See *R. v. R. A.* (unreported oral decision of Tucker PCJ, dated August 7 2004).

breached many times in succession. Notably, whenever evaluating the suitability of non-custodial sentences, judges must take into account compliance with previous non-incarceral sentences (section 39(3)(b)). This is a mandatory qualification of the soft obligation to “consider” non-custodial alternatives and clearly encourages system-generated incarceration. The statistics establish that judges incarcerate for breaches.¹⁰ Failure to respond to non-custodial interventions (no matter how inappropriate they might be) is conducive to incarceration. The point of this example is the same as that made in many ways in the chapters above; the system is structurally incarcerative. The words that purport to set things up otherwise only conceal reality.

Justice workers complain that they do not have the time or resources to do home visits or to provide transportation to offenders.¹¹ I submit that the confluences of circumstance that lead to offending are exactly the same as those that, in the absence of substantial community resources *of the same scale as those allocated to policing and custodial*

¹⁰ Only robbery (narrowly) caused incarceration more than breaching in 2003. In 2000-2001, 37.6% of youth coming to court with charges that included a breach came for that breach only. This includes all of those appearing on breaches, regardless of their previous record for breaching. Some would be first-time offenders, others may have a substantial history of previous breaching. Of all of these, 70.5% of pure breach accused were found guilty and 44.1% sent to gaol. Having been gaoled once, the chance of these youth being gaoled in the future would significantly increase. Under the *Young Offenders Act*, judges applied the “step” theory of sentencing ruthlessly. See J.B. Sprott, *Understanding cases of failure to comply with a disposition* (Ottawa: Department of Justice Canada, 2004) online: Government of Canada <http://canada.justice.gc.ca/en/ps/yj/research/sprott/section1.html>. (Note: this link was deactivated sometime in September, 2004. Personal communication with Professor Sprott revealed that the study is the property of Justice Canada. They apparently have withdrawn the paper from their website and, despite enquiry, have not indicated when and if it will be restored). Will s. 39(1)(b) of the *YCJA* change this? While there were problems with the data in that study, it nevertheless establishes that at least 26% of youth coming before the court for their second stand-alone breach were being gaoled for it (a circumstance that the *YCJA* might now prohibit.) Accordingly, while anecdotally youth are not usually gaoled for their first pure breach, the scheme is attractive (if Judge Tucker’s view does not hold sway as in note 9, *supra*) in that it may modestly reduce, or at least delay a little, incarceration for systems offences. Out of the 22,867 who came before the court in the year examined, the subset (pure second breach offenders) gaoled in this way totalled 755. Arguably, this is a fairly small number of children whose incarceration will be avoided/delayed as a result of the *YCJA*. Its impact has not yet been evaluated.

¹¹ Comments of Montreal Lake alternative measures worker, March 18th, 2004 at Montreal Lake/ PAGC community justice meeting (personal observation).

facilities, lead to the failure of diversion/ alternative measure programmes. Resource allocation is, I suggest, a function of political will that is driven by the dominating retributive/punitive paradigm whose development and power have been traced throughout this thesis. The structural and philosophical sequelae are as apparent in practice as they are in the fundamentals of principle.

The issue of control of resourcing is as pivotal as that of legal structure, and interrelated with it. Money is power; the vast majority of the participants in the criminal justice system, and in particular Aboriginal participants, are penurious. The amount being spent by the dominant justice system on restorative programmes is a pittance. Saskatchewan Justice spent \$229.6 million in fiscal 2002-2003, the latest year for which figures are available.¹² For adults, \$3.36 million, or 1.46%, was spent on community services. \$1.2 million of this came from the federal government. Out of this came \$1.387 million, or 6/10 of one percent of the total, for adult alternative measures with a further \$2.63 million, or 1.14%, to be spent on a range of Aboriginal community justice programmes such as victim and offender services and restorative justice/alternative measures delivered through Aboriginal organisations.¹³

For youth, Corrections and Public Safety spent a total of \$34.439 million on youth services, with the federal government contributing an additional \$7.6 million. Of this,

¹² See Saskatchewan Justice and Saskatchewan Corrections and Public Safety, *Working Together for Safer Communities* (Regina: Saskatchewan Justice, 2003) at 29. Online: Government of Saskatchewan <http://www.saskjustice.gov.sk.ca/pdfdocs/WTFSC.pdf> at 7. This includes corrections, policing and coroners as well as legal aid and prosecutions. Volume two of the 2003-2004 public accounts had not been released at the time of writing.

¹³ *Ibid.* at table 2, page 13.

\$1.26 million, or just under 3%, was spent on all restorative justice programmes, including alternative measures.¹⁴ By comparison, \$26.556 million, or 63.17%, was spent directly on youth incarceration and a further \$7 million allocated for program support and regional services. One can only contrast the political rhetoric with reality. In 1993, at the Saskatoon conference on Aboriginal Peoples and Justice, the then Deputy Minister of Justice, Brent Cotter said,

Federal ministries have had the unfortunate tendency to limit funding for innovative or pilot programming to two- or three-year projects. It seems to me this has to stop. There has to be money made available to give Aboriginal self-government the opportunity to succeed. Particularly in the justice sector, Aboriginal peoples have to have full access to stable sources of long-term funding.¹⁵

A decade later, the sad parsimony continues.

This thesis has, I hope, demonstrated that Canadian criminal justice is structurally colonial. Our legal, cultural and legislative history conspire to perpetuate a system that supports (and thrives on) Aboriginal disadvantage. In chapter one, I posed the question of what can be done. The answer is simple and terribly difficult; it is self-determination. The settlers cannot impose self-determination on Aboriginal people. They can (and must) support and encourage it. However, this is not enough. First Nations organisations that are sufficiently empowered to lead must not shy from doing so. This courageous

¹⁴ *Ibid.* at table 3, page 15. These figures do not coincide well with those published in Vol. 2 of the Saskatchewan 2002-2003 public accounts. They indicate \$38.182 million spent on Young offender programmes, including \$4.588 million on "Community and alternative measures". One could conclude that \$3.32 million was spent on non-diversionary community programmes, but the breakdown is unclear. Government of Saskatchewan 2002-2003 Public Accounts, vol. 2 (Regina: Queen's Printer, 2003) online, Government of Saskatchewan <http://www.gov.sk.ca/finance/paccts/paccts03/volume2.pdf>

¹⁵ B. Cotter, "The Provincial Perspective on the split in Jurisdiction" in R. Gosse *et al.* *Continuing Poundmaker and Riel's Quest* (Saskatoon, Purich Publishing, 1994) at 134.

political decision will happen the day that First Nations leaders stop talking and start writing cheques.

Until organisations whose paradigms are different from the dominant colonizer culture take a serious interest in justice, nothing will change. Faith-based groups have insufficient resources; government-based initiatives merely bureaucratise and contribute to marginalisation. This means First Nations governments must take responsibility not only for talking about healing justice, but also for running it and paying for it.¹⁶

Governments like to focus on forward-looking, popular (and important) initiatives like land claims, treaty/ rights recognition and economic development, whilst not taking concrete action in the less attractive area of dealing with offending and the social dysfunction that is concomitant with it. Community justice means more than just being the service provider for the Saskatchewan Department of Corrections and Public Safety. This is a pernicious indigenisation. In my view, it is a discredit to First Nations peoples that their governments leave justice too much to others. A model of capacity building is already in place in the development of Indian child and family services through (under funded) tripartite agreements, and in the development of First Nations primacy in Saskatchewan gambling establishments. RCAP and the Manitoba Aboriginal Justice Inquiry make it plain that capacity building in justice, through the negotiation of justice

¹⁶ RCAP recognized, as I do, that sources of funding for Aboriginal government should be multi-faceted, as is the funding for other levels of public administration. It is fair that non-Aboriginal governments bear significant financial and remedial responsibility; this is not only part of the redistributive foundation of our state, it is also a function of these treaty obligations.

See Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples*, (Ottawa: Minister of Supply and Services Canada, 1996) particularly at volume 2, *Restructuring the Relationship* at part 3.2. It identifies four sources of funding, own-source, transfers from other governments, borrowing and funding from treaty and land-claim settlement. While the report recommends the development of taxation powers (at Recommendation 2.3.19) it recognises the problems inherent in this type of funding. See discussion to Recommendations 2.3.19 and ff).

issues in the development of Aboriginal self-government, is essential.¹⁷ I agree with the writers of the latter when they assert that the “right to establish and maintain Aboriginal justice systems is an ‘existing treaty or Aboriginal right’ within the meaning of section 35 of the *Constitution Act, 1982*.”¹⁸ Treaties apply to all of Saskatchewan. The foundation for the opinion of these two enquiries is plain from the words of the treaties. Prior to colonisation, First Nations were self-governing with their own bodies of law. As has recently been asserted, the negotiation of treaties was understood by Aboriginal people to function to continue their law and way of life and not to affect the inherent right of self-governance.¹⁹ This understanding is reflected in the recognition of treaty and Aboriginal rights in section 35 of the *Constitution*.²⁰ Accordingly, the covenants in, for example, Treaty Six, that Aboriginal people maintain good order as between themselves, members of other First Nations, and non-Aboriginal people, clearly express the continuance of law-keeping power in the right of self-governance.²¹

¹⁷ Royal Commission on Aboriginal Peoples *Bridging the Cultural Divide: a Report on Aboriginal People and Criminal Justice in Canada* (Ottawa, Minister of Supply and Services Canada, 1996), A. C. Hamilton & C.M. Sinclair, *Report of the Aboriginal Justice Inquiry of Manitoba* vol. 1 (Winnipeg: Queen’s Printer, 1991) The latter is particularly firm that “justice systems not be imposed on Aboriginal peoples. To do so would perpetuate the policy of paternalism and imposition that has long been the hallmark of Aboriginal affairs...” (at 310). First Nations may choose to incorporate parts of the Anglo-Canadian law into their own systems. The *locus* of the decision making power is critical.

¹⁸ Hamilton & Sinclair, *ibid.* at 313. The use of the term “Aboriginal justice systems” is deliberate, in that it envisions a holistic, systemic change rather than the current programme-by-programme approach.

¹⁹ This is a brief paraphrase of the FSIN Justice Secretariat submission to the Littlechild Commission, online: Commission on First Nations and Métis People and Justice Reform <http://www.justicereformcomm.sk.ca/volume2/07section4.pdf> at 9.

²⁰ *Constitution Act 1982* being Schedule B to the *Canada Act 1982* (U.K.), c. 11.

²¹ This is, of course, not the only source of the right of self-determination. As RCAP states, “[t]he right of self-determination is vested in all the Aboriginal peoples of Canada, including First Nations, Inuit and Métis peoples. The right finds its foundation in emerging norms of international law and basic principles of public morality.” *Supra* note 16 at Recommendation 2.3. This is not the only source of the right to self-governance: “The right of self-determination is the fundamental starting point for Aboriginal initiatives in the area of governance. However, it is not the only possible basis for such initiatives. In addition, Aboriginal peoples possess the inherent right of self-government within Canada as a matter of Canadian constitutional law. This right is inherent in the sense that it finds its ultimate origins in the collective lives and traditions of Aboriginal peoples themselves rather than the Crown or Parliament. More specifically, it stems from the original status of Aboriginal peoples as independent and sovereign nations in the territories

This thesis has, I hope, made it clear that the colonisation project continues both structurally and fiscally. Money is important, but not the sole element of an ameliorative plan. With exposition of hidden structure should come two related realisations. The first is that change must happen, not merely by funding, but also by empowerment. It has been made clear that funding is unmistakable indicia of empowerment: it would be fallacious to reason from this, however, that the sole fact of funding means empowerment.²² Second, the colonizer's justice institutions are not able (or inclined) to do anything about it. Its historical, cultural and political imperatives empower it only with inertia and self-delusion. This is the point at which the reformer must look to the promise of Aboriginal justice for hope.

The Royal Commission on Aboriginal Peoples suggested a number of different "sources of guidance" for developing Aboriginal self-government. These would, "assume many forms according to Aboriginal peoples' differing aspirations, circumstances and capacity for change."²³ It is essential that sovereignty in justice be within the available jurisdiction of Aboriginal self-governance, whatever its form.

It is wrong, in our view, simply to maintain the status quo on the assumption that eventually Aboriginal people will learn to accept the justice system as it presently exists.... It is wrong to assume that changes to the existing system will enable it to provide fully adequate services to Aboriginal people. To think in this manner is to ignore the impact of the past human experience of Aboriginal people.²⁴

they occupied, as this status was recognized and given effect in the numerous treaties, alliances and other relations maintained..." See RCAP *supra* note 16 at Recommendation 2.3.7.

²² The fallacy is one familiar to any freshman philosophy student in this form:

All dogs are covered in hair. Rob is covered in hair, therefore Rob is a dog.

²³ RCAP *supra* note 16 at Vol. 2, part 3.1.

²⁴ RCAP, *Bridging the Cultural Divide*, *supra* note 17 at part 2.2. This approach emphasizes the role of cultural difference in offending, and assumes that adjustment to the colonizer's justice norms will solve the problem. One has to question of the validity of assuming that Aboriginal justice culture is inferior.

It is also essential, and appropriate, that Aboriginal justice be developed holistically, for by its nature it does not operate in a vacuum, but must act in harmony with structural change in Aboriginal culture as manifested in, for example, health, education, housing and financial self-determination.²⁵ RCAP recommended that aspects of criminal justice and procedure that are “core matters”, those that,

- (a) are of vital concern to the life and welfare of a particular Aboriginal people, its culture and identity; (b) do not have a major impact on adjacent jurisdictions; and (c) are not otherwise the object of transcendent federal or provincial concern...

may be dealt with by Aboriginal governments as an incidence of self-government without the concurrence of any other level of government.²⁶ RCAP then goes on in a series of nine recommendations to deal at length with the structure and legal place of an Aboriginal justice system within both the larger holistic project of Aboriginal self-governance, and also in relation to non-Aboriginal justice systems and peoples.

It is my submission that non-Aboriginal governments have ignored (or worse, given lip service) to this framework since its publication almost ten years ago. My hope is, however, that this thesis has exposed the racist structure of Canadian criminal justice sufficiently to make the transformations recommended by RCAP not only desirable, but politically unstoppable.

²⁵ This recognises the many circumstances, both causative and incidental, pertaining to offending. See generally *ibid* and Royal Commission on Aboriginal Peoples, *Partners in Confederation: Aboriginal People, Self Government and the Constitution*, (Ottawa: Supply and Services Canada, 1993)

²⁶ *Ibid*. Commentary to Recommendation 2. Recommendation 3 notes the advisability of negotiation with other levels of governance.

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