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**LOCATING ABORIGINAL PEOPLES IN CANADIAN LAW:
ONE ABORIGINAL WOMAN'S JOURNEY THROUGH
CASE LAW AND THE CANADIAN CONSTITUTION**

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A thesis submitted to the Faculty of Graduate Studies in
partial fulfillment of the requirements
for the degree of
Masters of Law

Graduate Program in Law
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Aboriginal Woman's Journey Through Case Law and the
Canadian Constitution

by

Patricia A. Monture

a thesis submitted to the Faculty of Graduate Studies of York
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ABSTRACT

This thesis has three principal goals. The first goal is the most onerous. It is to examine the degree to which Aboriginal Peoples' experience, knowledge systems, traditions and ways of being can be held within the existing boundaries of Canadian law. This first goal is narrowed and shaped by the second which is to examine the way gender impacts on the first question. Women's roles and responsibilities, as well as the exclusion of women's experience, is a theme which is woven throughout the entire thesis. The third goal is methodologically based. This thesis offers up one example of the way in which Aboriginal practices and traditions can be united with conventional Canadian legal practices. This last goal requires that this thesis is written in plain language that is accessible to people without access to technical and sometimes complicated "law talk".

This thesis is a journey of one Mohawk woman through Canadian legal relationships. The journey is an idea that is common among many Aboriginal traditions and ways. This concept as well as the practice of story telling is used to trace the author's progress from law student to law teacher as the vehicle through which the above goals are met. It is, as well, an examination of legal concepts such as discrimination, rights (both individual and collective) and equality. This specific examination is complemented by discussions of oppression and colonization. The conclusion which examines what is Aboriginal justice, is offered to provide one opportunity to begin to consider how Aboriginal laws can be balanced with Canadian law.

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Acknowledging all of the people who have stood with me during the course of my legal education is probably a more difficult task than the writing of this thesis. I am honoured by the many caring relationships I have had with friends, family, teachers and most importantly my students. I am forever learning from them.

This thesis would not have been possible without the support of my supervisor Kent McNeil. Even on the day that my then four year old son dumped a thermos of water all over the papers on his desk, he was kind, caring, challenging and supportive. My biggest thanks go to him. Equally, Noel Lyon was a significant figure in my legal education and I was honoured to have him on my committee. It is doubtful that I would have completed my first law degree without Professor Lyon's ability to "come around the corner" just at the very moment I was set to quit forever. I also wish to acknowledge the helpful comments provided by the examiners, Professors Mary Bernard, Patrick Macklem and Toni Williams. In this circle of legal mentors, Dr. Mary Ellen Turpel-Lafond also stands central. Since I began teaching she has always stood in my circle. We have shared both tears and moments of empowerment and strength.

And, of course, there is my family. My partner, Denis Okanee Angus, provides constant strength, support, encouragement and understanding. My children (Nadia, Brandon, Genine, Blake, Kate and Jack) remind me of those who come behind at the same time as they offer hope that things are changing. My other relations, David, Michael, Denise, Patti, Darrell, Tracy, and Shirley have also made significant contributions to making my life full and helping me understand.

Nia:wen kowa (Mohawk thanks) to you all.

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INTRODUCTION

This thesis examines one Aboriginal woman's journey through Canadian Law. It has as one of its principle goals the task of determining the degree to which Aboriginal Peoples (particularly First Nations) experience, knowledge systems, traditions and ways of being can be held within the boundaries of existing Canadian law. This examination seeks to determine the degree to which the repatriation of the Canadian constitution in 1982 brought Aboriginal people into the constitutional fold. It examines both section 35(1) which contains the recognition and affirmation of Aboriginal rights as well as the provisions of the *Canadian Charter of Rights and Freedoms*. Necessary to this discussion is an examination from a cultural standpoint of the legal constructs of rights (both individual and collective), discrimination and equality.

This examination has as its primary focus the period between 1970 and 1990. These two decades in Canadian legal history saw significant developments in the legal protection of women and other disenfranchised groups in Canada. Aboriginal people are just one of these groups although we are unique in many ways. In the early 1970s the decisions of the Supreme Court of Canada in the *Lavell* and *Bedard* cases are in many ways parallel to the decision in the *Person's Case* some decades earlier. This analysis of gender relations in Canadian law,

particularly in these two decades, is a second significant goal of this thesis.

The methodology used in this thesis is, in some ways, unconventional. It is a union of Aboriginal tradition and the practices that legal scholars would be familiar with. Although the idea of an Aboriginal tradition does not exist given the vast diversity of Aboriginal cultures, most Aboriginal cultures use story telling as a significant method of education. Discussed in greater detail in chapter one, this story telling tradition facilitates not just the memorization of knowledge but assists the learner in developing analytical skills as well as the ability to synthesize information as the listener in the story telling tradition is not told *the answer* but is left to determine meaning in their own way. This tradition is in some ways similar to the narrative method used by some academics.¹ To remain true to this tradition, all of this thesis is written in language that is accessible to Aboriginal people, many of whom have not had access to complicated legal language. Offering up Canadian law in a form and language that is consistent with Aboriginal experience is the third significant goal of this thesis.

Journeying is a familiar concept to many Aboriginal people. Here I use it to reflect the struggles I faced first learning and then teaching

¹ Judith M. Newman, *Interwoven Conversations: Learning and Teaching Through Critical Reflection* (Toronto: OISE Press, 1991), 11.

Canadian law. Journeying symbolizes for me the struggle of self-reflection that I faced during my years of legal education. Self-reflection is a concept clearly central in the oral tradition of my people (that is in part the story telling method). I went to law school believing that it was the road to bringing home to our First Nations communities that which had been illusive, just relations with the Canadian state and people. I learned instead that law was not really about justice (written large) but instead it was the story about the way in which Aboriginal Peoples in Canada had been oppressed. The taking of our lands, the creation of reserves and locking our people up on them, the taking of our children whether by residential school or child welfare and the current jailing of our people all have one thing in common. They are justified by various forms and enactments in Canadian law. This realization shook my reality right to the foundations. This realization that the story of Canadian law was very much a story of oppression is presented in chapters one and two.

Canadian law is more than just the mere codification of rules in the constitution and statutes. Understanding the oppressive aspects and elements of Canadian law requires an understanding of the way law is assigned meaning. It is the judges who examine the written legal rules and assign more detailed meanings to the words and phrases of the

statutes. In order to begin an examination of Canadian law's ability to reflect Aboriginal realities, it is necessary to understand the way in which judicial decisions (or case law) compliments the process of codification. As the oppressive nature of Canadian law is more transparent in the area of child welfare, I have chosen to provide this as an example. Chapter three focuses on an examination of how racial superiority in the definitions of "good parent" and the "best interests of the child" arises in Canadian law. This knowledge of how the case method operates then assists in the analysis presented in the following two chapters.

Chapters four and five are the centre of this thesis. The examination of the way in which the new 1982 constitutional provisions reflect Aboriginal realities is presented. By walking through both the words and phrases of the *Canadian Charter of Rights and Freedoms* and section 35(1), the entrenchment of Aboriginal and treaty rights, I am able to draw the conclusion that this entrenchment of rights does not go far enough to satisfy me that I am reflected in the new constitutional provisions. The reflection that I seek is not necessarily my own, but the reflection of a person who is both Mohawk and woman.

The last chapter of this thesis is offered as a conclusion. I have not yet given up hope that one day Canadian law will have the power to reflect Aboriginal realities. Much of my work in Canadian law has been in the area of criminal justice, although I find that construct to be an

overly narrow description of the work I do. I seek relations, legal or otherwise, that hold the potential for Aboriginal nations and their citizens to reclaim their ways of peace and balance. Necessary to this understanding of “law as relationship” is an examination of the responsibilities we carry, as opposed to the rights that we think we possess.

Although my journey through Canadian law has been, and continues to be, a difficult one I am not resentful or regretful of the experience. Ironically, it has often operated as an “inverse mirror” which informs my understanding of who I am as Mohawk woman, mother and teacher. It is through this mirror that has often offered up the opportunity to self-reflect on my responsibilities as a Mohawk woman. I am grateful to the many Elders and traditional people who have provided the traditional teachings on which I ground this self-reflection. I offer these thoughts and this analysis to you in the spirit of kindness with the hope that my own journey will inform others about the possibilities in Canadian law for sharing our distinct, beautiful and bountiful heritages.

CHAPTER ONE

FIRST LESSONS IN CANADIAN LAW: THE LAW SCHOOL EXPERIENCE²

I have come to realize the importance of the experiential because without human experience we will never achieve a true form of equality. In order to understand equality, people must understand caring. Without understanding caring, we cannot understand "peoplehood", be it in a community as small as a gathering of a few people to something as large as the global community. Each person must be respected for whom and what they are. Only when we all understand caring will we have reached equality.

Aboriginal³ history is oral history. It is probably fortunate for

²This chapter has been published under the title "Ka-nin-geh-heh-gah-e-sa-nonh-yah-gah" which roughly translates roughly into English as "the way Flint Women do things". The way of Flint Women is a way of strength in which the fire of our nation shall be kept kindled. This is the responsibility of the women of the Mohawk nation (who are known as the "People of the Flint"). In this way, this comment follows the oral tradition of my people.

³Every time I edited the chapters in this thesis, I hesitated when I saw the word Native or Indian. Over the course of time this thesis was written, the words in vogue to describe Aboriginal people evolved. I was not comfortable with them but I used them. Every draft, I changed my mind about which word I would use. Neither of these words feel right or fit right (like shoes a size too small). I am more comfortable with the word Indian than I am with the word Native. Perhaps it is because it is the word I grew up with. Familiarity is comfortable. I know that others are more critical of the use of the word Indian, a word forced on our people because explorers got themselves lost.

I also believe that some consistency in the terminology chosen (Aboriginal, Native, Indian, First Nation and so on) is of assistance to people just beginning to learn about Aboriginal people and issues. I have settled, somewhat arbitrarily, on using the term Aboriginal. It is the word most in "vogue" at least in legal circles

Aboriginal people today that so many of our histories are oral histories. Information that was kept in peoples' heads was not available to Europeans; could not be changed and molded into pictures of "savagery" and "paganism". The tradition or oral history as a method of sharing the lessons of life with children and young people also had the advantage that the Elders told us stories. They did not tell us what to do or how to do it or figure out the world for us - they told us a story about their experience, about their life or their grandfather's or grandmother's or auntie's or uncle's lives. It is in this manner that Indian people are taught independence as well as taught respect because you have to do your own figuring for yourself.

Following this tradition or oral history and storytelling, I want to share one of my experiences with you. Like most other academics, I spend at least a little bit of time going to conferences, listening to other people, and learning and sharing what we are thinking. This is a story about a conference I attended, a legal conference, that I want to tell you. It is also a story about anger. My anger is not unique to this conference; it is paralleled at many other conferences I have been to and the classes I have been to, most other days in my life, so it is an important story.

(and owes its origins to the 1982 constitutional amendments). There is an exception. In this chapter, I talk about my personal experiences and there the word Aboriginal did not feel right. I am comfortable with the word "Indian". I want to re-claim that word forced upon us and make it feel good.

I arrived at the conference at supper time. That was no mistake. I wanted people to be busy doing something else when I arrived. You see, when you know you are going to be the only Indian in the place, it is not exactly a comfortable feeling. Although the drive from my home to the lodge where the conference was being held was only forty-five minutes, it seemed much longer.

I was scared. I was scared because I was going to be the only Indian person in pretty much a room full of White people. And it just was not any old bunch of White people; this was a gathering of university professors - law professors from elite and non-elite schools all across the continent; the kind of people I had held in awe and respect through these last eight years of university; people who are published and doing the things now that I am still dreaming of doing and working toward.

I was scared too because I know that those people do not think the same as I do. White people do not line up reality in the same way that I do. They do not understand life and creation the same as I do. They do not know things in the same way that I do. I guess what I am not saying, because I am trying to be polite, is that I know that racism exists in Canada. I know that, because I have lived it.

I planned well; everybody was busy when I arrived at the conference. I checked in and got unpacked and settled without incident

and decided that I would go for a walk to stretch my legs. I was happy and relieved to be out in the woods again, near the water. As the earth is my mother, being close to her is always calming. As soon as I got outside of my room, I bumped into a couple of women friends, women that I went to school with at Queen's. They are students too, so that lessened the burden of feeling a little out of my element as a student in with all these professors. I started to unwind and feel much more comfortable.

It was not very long before it was time to go to the evening session. It was a large group session. It had been explained to me earlier that we would be breaking down into four small working groups first thing the next morning. In order to set the stage for that, the entire group (approximately fifty people) was meeting for a discussion that evening. The discussion was down the road and around the bend in a community hall in this small village where the lodge was located. It was kind of nostalgic and rustic and I had managed to shake most of my fears before I got there.

I think the topic of discussion that evening was racism. I am finding that my memory is a little bit foggy after the events to follow. I know that I sat and listened. I wanted to know where people were coming from. I was not going to jump with both feet into a situation and gathering I knew very little about.

I know that I was not entirely happy about what I heard, that it did not sit well and I lost the comfortable feeling that I had carried with me into the room. I know that because I spoke, and if I remember right, I spoke about understanding and respect. I spoke about how it is that the position of Aboriginal people is so frequently described as a position of disadvantage. This is not true simply for Aboriginal people, but also for Black people and Chinese people and Chicano people and Mexican people and anybody else who does not fit into the norm of white and middle class. Generically, I am speaking about racism and sexism and classism and all the other "isms" and of how the individuals who fit those stereotypical classifications get qualified as disadvantaged. We are only disadvantaged if you are using a White middle class yardstick. I quite frequently find that White, middle class yardstick is a yardstick of materialism. We will see how valued you are by the size of your bank account or the number of degrees you can write after your name.

I explained how I just could not understand how Aboriginal people are disadvantaged. Looking only at the materialistic yardstick, just about everybody in the country knows that we have less education and less income and more kids and less life expectancy than the majority of the other people in this country, but I still do not see, I said, how we are truly disadvantaged. You see, when non-Indian people are not satisfied with the world they see around them, and it seems to me that more and

more of the people that I meet are in this position, well, those people do not have anywhere to turn. They have nowhere to run to. I have an entire community, or rather, pockets of community all over this land. Wherever you find Aboriginal people, things are done in a different way, against a different value system. And the measure is not materialism. It is not what you are that counts, it is *who* you are. So when the world of the dominant culture hurts me and I cannot take it anymore, I have a place to go where things are different. I simply do not understand how that is disadvantaged.

I also do not understand that by having the teachings of the Elders available to me - different ways of learning, different ways of knowing, the ways of traditional spirituality - that I am more disadvantaged than White people. I have had the opportunity to learn Aboriginal teachings, to learn about body, mind, and spirit; to learn about balance. Most of the time I am a happy and complete individual, but when I look around me at the people at university, this is not by and large what I see. I see a lot of people who are hurt, a lot of people who know how to live in their heads and do not know that anything else even exists. I have a hard time understanding again how my experience is an experience of disadvantage. Disadvantage is a nice, soft, comfortable word to describe dispossession, to describe a situation of force whereby our very existence, our histories, are erased continuously right before our eyes. Words like

disadvantage conceal racism.

When I left the gathering, I remember I felt a little bewildered. Why was it my professor friend had so insisted that I go to this conference? I had spoken, but I did not feel like many people had listened. I know they did not listen. It did not seem that people wanted to hear what I was saying, it did not seem like most of the people in that room wanted to understand how it was that we are different. This bewildered me, but it did not surprise me. This refusal, this inability to accept difference and respect difference and rejoice in difference is the point at which my anger grows. Equality is really a celebration of difference.

There was a reception after the gathering back at another room at the lodge and I went to that. I really did not talk to anybody except for the two students that I had met earlier, and looking back I think that was because I was looking for a safe place to be. A safe place to stand, one that was not threatening. My experience of the first evening at the conference set the stage for the following day. I did not stay at that reception for very long. I did not feel comfortable. Why should I stay? I was tired, so I went to sleep.

The next morning I got up and went over to breakfast. What a breakfast we had! The food was so good. Again, I stayed pretty close to the women I knew from Queen's. I had decided through breakfast that I

just wanted to watch again for a while because I definitely was not feeling like I was in a safe place. This is pretty typical of an Indian person who is not feeling comfortable. We are taught that inaction is a better course than action because it is in that manner that we learn where it is we are and how to participate.

During breakfast, the professor friend who had invited me and who was involved in organizing the conference came over to me and asked me if I would mind changing small section groups because one group only had one "Person of Colour" in it. My friend did not want to leave that person all by themselves. On one hand I was really pleased that this professor was conscious enough to know that when you leave a minority person alone in a gathering of non-minority people, you are leaving that person in a vulnerable spot. But at the same time, the conscious shuffling of bodies from one group to another made me uneasy. Was I no more than a coloured face? This shuffling of bodies contrasts against the Indian way, in which things are allowed to happen as they should. This belief reflects the recognition that we cannot control our natural environment. We cannot master the universe. I have not been able to fully unpack the feeling of discomfort that the move from one group to another group caused. But it did serve to intensify the fact that I really just wanted to watch and that I really was not trusting the people that were around me. This should be

understood as my fear and my difficulty and my problem. It has to be my problem as it is *my* daily reality. If what I am saying is going to be understood, it must be understood as what I, as one particular person, am feeling and am experiencing and what I think of it. I think it is of value in that experience is the experience of a member of a dispossessed group within this society.

The morning session and lunch were rather uneventful for me. We had a good intellectual talk in my small section and made a good effort at getting to know one another. For the most part, I sat back and listened and did not have a whole lot to say. My friends will tell you that is somewhat unusual. I was starting to feel a little bit comfortable again. After lunch, we went back to our small session.

I should probably tell you a little bit about the woman who stepped forward as chair at this particular small section meeting. She was not the group facilitator. She is a White woman, I guess from a fairly privileged background. She teaches at an elite United States law school. She conveys herself in a caring manner.

She started the afternoon session by telling a story. That story was about a sixty-seven year old Black woman, whose name I forget, who lived in the Bronx or some place like that. She was poor. She was a month behind in her rent. Because she was a month behind in her rent, her landlord wanted to evict her. She was old and arthritic and had no

place to move to, so she just decided that she was not going to go. The landlord contacted the police and the police came to her apartment door and told her she had to move. Well, if I remember right, they kicked in her door and found her with a knife - she was not going to leave her home. So the policeman, another Black man, shot her hand off. I am not too sure how or why or the details, I have lost them. Then he shot her in the head, dead. The police officer was eventually charged with murder or manslaughter, the point being that there were criminal charges laid. He was not convicted, I do not know if that means we are supposed to believe that this sixty-seven year old Black arthritic woman was a danger to society or what, but she is dead.

In the manner of good lawyering, we began to pick at this hypothetical. What if she had been a White woman and he had been a Black man, would he have been convicted? What if he had been a White man, would he have been convicted? And on and on and on in the method of legalism we went. I started squirming in my chair. I did not miss the fact that the Black woman in the room was not missing the fact that I was squirming in my chair. I could not identify why, but the conversation we were having hurt.

I suppose I sat and listened for about half an hour. I am not sure how much I really listened. I was thinking quite intensely on why is this hurting me. Why is this experience so brutal? Why do I want to get up

and leave the room? I do not want to hear anymore of this.

By the time I spoke I was almost in tears. What it was that I had identified was that we were talking about my life. I do not know when I am going to pick up the phone and hear about the friend who committed suicide, the acquaintance that got shot by the police, the Aboriginal prison inmate that was killed in an alleged hostage taking, ironically two days after two Aboriginal inmates in Stoney Mountain had killed a White prison guard. *This is my life.* I do not have any control over the pain and brutality of living the life of a dispossessed person. I cannot control when that pain is going to enter into my life. I had gone away for this conference quite settled with having to deal with racism, pure and simple. But, I was not ready to have my pain appropriated. I am pretty possessive about my pain. I worked hard for it. Some days it is all I have. Some days it is the only thing I can feel. Do not try to take that away from me too. That was happening to me in that discussion. My pain was being taken away from me and put on the table and poked and prodded with these sticks, these hypotheticals. "Let's see what happened next?" I felt very, very much under a microscope, even if it was not my own personal experience that was being examined.

I explained this to the group and I know I cried a little bit, I do not hide my emotions and I guess that is difficult for some people to handle. I probably talked for five or so minutes trying to explain what it was that

was troubling me, upsetting me. I put it all on the table. When I was done, like so many times before, everybody just kind of sat there and looked at me. I watched the Black woman in the room quite carefully. She seemed relieved, so I guessed what I had done was okay and I waited.

The woman who was facilitating the conversation said essentially, "What do we do next? I think what Trisha said is important and what do we do from here? Does this mean that we cannot discuss issues of racism because we are causing more hurt when we do?" I did not like the sound of that idea too much because I do not think that until racism is understood we are ever going to be rid of racism, that is the kind of beast that it is. I thought about my criminal law class in first year. When we had to deal with the issue of rape, or whenever the issue of rape had to be dealt with, be it in the rules of evidence or whatever, people took great pains to make sure that they are not inflicting any harm on any of the women in the room. "You never know when one of the women in the room in the class that you are teaching has been a victim of rape." But as an Indian woman, I have never had the same courtesy extended to me when the issue was clearly racism.

In my first year criminal law, for example, I remember taking a case, a case about an Indian man. I think he was charged with breaking and entering. He was under the influence of alcohol at the time of the offence. I do not remember the point of the case or the legal issue at

stake, but at sentencing the judge was describing this Aboriginal man and it kind of went like this: "He is Indian and he is drunk and he is illiterate" and all of that belongs in one mouthful, so it is not a problem if we send him to jail for X number of years.⁴ "After all, he can go and see the rest of the Indians in jail." This case was only about ten or fifteen years old at the time I studied it, which was four years ago. The professor certainly made no more note than in passing, if he did that much, that this was a stereotype of Indian people that was being

⁴I still have my old criminal law textbook [Don Stuart and Ron Delisle, *Learning Canadian Criminal Law* (Toronto: Carswell, 1982)] lying around. As I prepared to finalize this chapter, I thought it would be interesting to go back and take a look at the case that had caused me so much anguish. The case, to my surprise, is not a sentencing case. It is a case about the accused "intent" to commit a crime. Students of law understand that intent is a very complex matter. The intent required to secure a conviction varies from offence to offence. In the case of *R. v. George* [1960] S.C.R. 871, Ritchie J. quotes the trial judge as follows:

A man of 84, was violently manhandled by *an Indian* on the date noted in the Indictment... as a result of which he was in hospital for a month. during this scuffle he was badly injured, dumped into a bathtub and pulled out again when he agreed to give *the Indian* what money he had, \$22 (emphasis added; in Stuart and Delisle, 322).

I have never seen a case where a "White person" has their race referred to in this kind of derogatory manner (and this is not a comment on the serious offence that was committed).

It is interesting to me that my memory is so different from the textbook. I cannot remember if what I recall reflects class discussions or my confusion in this class which is part of the first year curriculum. I struggled with criminal law more than I struggled with my other first year classes. This is partly because I carried with me a certain bias (largely a result of what I had experienced on the streets growing up). My experiences were very different from the majority of my classmates. Part of the struggle I faced was based in my cultural background. I had no place to locate this complicated understanding of intent. Lacking intent does not excuse your behavior in "Aboriginal Law". There is no parallel concept. None of these

portrayed and conveyed by the judge. I was hurt. I had felt very exposed at having my personhood and my reality laid bare on the table in front of the people in class without my consent. In that very same course the very same professor, at some length and with great caution, dealt with the issue of rape, explaining that he did not want to inflict any harm on any women in the class. He certainly hoped that this would not be the case. Yet, when we deal with the issue of racism, very much so do we allow ourselves to be blind to the further pain that we are inflicting.

I felt strong, although quite exhausted, at having put on the table the way I had been feeling as we talked in hypothetical about the murder of this Black woman in the United States by the police officer. I felt that - and maybe this is self-congratulatory - my tears and my pain had brought us to a really good place. The rest of the discussion that afternoon focused on racism and how to deal with racism in a classroom. How do we talk about racism? When do we talk about racism? In what manner do we talk about racism? Several of the men brought up how they would identify with feeling invisible, as I had earlier mentioned, when the issue of gender was discussed. Men are seen as the perpetrator and never the victims of the social reality that we live in. I thought that was a good point and all in all we had a good

considerations, however, excuse the intense pain I felt when we studied this case.

discussion that afternoon.

I left and went back to my room to have a little bit of a rest before dinner and did not stay for the wine and cheese or before dinner drinks that was going on after our small section. I needed some time and some space to be alone to let the rawness subside. At six o'clock I went to supper, I sat beside a law professor from California, a Chicano man I believe. We had an animated chat. During our conversation, I remember noticing that a very heated discussion was occurring at the dinner table behind me. It involved the woman who had headed up my small section that afternoon and the two women friends from Queen's who were attending the conference as students. It also involved at least several other White men. At the time, I had the feeling that something important was going on in that discussion, but I did not pay any attention to it. After supper there were no activities scheduled for the evening. It was just a rest and socializing time. I socialized a bit and chatted and then went back and crawled into my bed, still feeling quite exhausted.

The following morning, all the small sections were to meet to discuss what had gone on the previous day. I found it very, very difficult to get out of bed that morning. I was feeling very exposed and raw. I just did not feel up to walking into breakfast where I could possibly have to carry on a conversation, especially a conversation about

yesterday's discussions. So I waited around for the general store to open so I could go in and get myself a cup of coffee. The plenary started before I got my coffee.

I arrived at the plenary to hear the woman who had introduced the story of the Black woman's murder in our small section quite emphatically, and almost to the point of being defensive, insist that the issue she was talking about was not an issue of gender. This puzzled me greatly, because the woman in question is a White woman, and by her own admission she does not know very much about racism. I sat through a lot of that conversation not knowing quite what to think, knowing I did not understand what I heard. The conversation kept returning to the woman's insistence that this is not a gender issue.

At some point during that conversation, I finally figured out what everyone was talking about when one of the women there described what had taken place at the dinner table behind me the night before. The dinner table conversation focused on the desire of many "minorities" to challenge the structure of knowledge in a way that is inclusive of our pain. This challenge also requires a critical assessment of the sources of knowledge and how they are sanctioned as legitimate.

During this discussion of the dinner table incident, a Hawaiian law professor, also a minority woman, offered this story. She was having dinner with a group of her legal colleagues. The topic of the

conversation at that dinner was sports. As she told the story, the conversation began to centre around specific athletes, I believe football players, and what the people at the table thought of each of these superstar athletes. The woman who was telling the story was asked to comment on a certain individual and she said something like, "I used to really like him. I used to think this man was a great, great athlete. Then I saw him advertising beer or underwear or some such thing on television and I do not believe he is really interested in sports for the sake of sports.⁵ With all these endorsements that he has been doing, I think he is interested in sports only for money." The unfortunate part of that comment, and the woman did definitely confess that she simply did not know what else to say and did not know an awful lot about football or sports, was that the athlete in question was Jewish. There was a Jewish man sitting at the table at the dinner, and he took offence at the woman's comments. To him it sounded like very much "those money grubbing Jews" stereotype again. This was definitely not the intent of the woman. Her point in telling this story was that intent does not excuse somebody from racism. Racism is racism, and racism stings. All the good intentions in the world do not take away the sting and do not take away the pain.

⁵There are also obvious gender implications in this re-told story.

Shortly after the story was told, the session got very interesting. One of the men who had eaten dinner the night before with the woman who told that story identified himself. He was quite defensive. He took great pains to explain that he did not intend to harm anyone, that he was very concerned about "minority" issues and helped "minorities" whenever he could, but that he was seriously questioning whether the conference was accomplishing anything. I do not remember all that he said. What I do remember was getting angry. I said to one of the Queen's students next to me that I was getting very, very tired of hearing White men speaking for me, especially when I am in the room. I am quite capable of speaking for myself.

At this point, I began to notice that my friends were definitely uncomfortable. They were more uncomfortable than I was, and I could not figure out why. The whole morning I got the feeling that everybody else had a secret that excluded me. Something very important and very definite was going on here and I was somehow being excluded from it, and I could not quite grasp what it was. I was very shortly to find out.

After the man had finished speaking, the woman who had initiated the conversation that morning and he got into a definite back and forth - very argumentative, very quick, with each attacking each other's position. Each stating how important the issue of racism was, both stating that racism had very much been dealt with. The man

insisted that with all this experiential stuff we were definitely going overboard, and that it was certainly time for us to begin dealing with important things like "mega-theory". "Let's make this academic and stop feeling for a while." He also took great pains to explain all he had done to help minority people and how long he had been there for minority people. I think he was questioned about how he knew he was helping if he did not know what minority people actually felt.

Anyway, this arguing match went back and forth and back and forth, with emotions getting higher and higher on both sides of it. All through it, the woman insisted, "No, we are talking about racism, not gender. The fact that I am a White woman and that two other women there were White women and that the three men that were there were White men did not make it an issue of gender. Yes, there were issues of gender involved in it, but that was not the important issue." I was getting very bewildered about how this was not an issue of gender.⁶ White people were the only ones doing the talking.

Everything clicked into place when I realized *why* it was not a

⁶Looking back, it is very interesting to me to note how the conversation became diverted and focused very narrowly on a particular conversation among White people. I am not suggesting that we should have discussed "mega-theory" but the discussion could have focused on a substantive discussion of racism rather than degenerating into a "fight" about which "isms" had operated during the dinner table discussion. This is an important example of how difficult it is to discuss issues of race/culture in the format of what a conference is. It demonstrates one "tactic" that is used to avoid discussing racism in a manner that is responsible to

issue of gender: the comment that had gotten the entire conversation going the evening before had been made when one of the men and the woman were talking about whether this conference was too experiential. The woman from my small section had said, "No, it is not experiential. Let me show you the good stuff that can come out of the experiential, let me show you the good stuff that came out of the pain." Then she finished telling the story about the pain that I had laid on the table the previous afternoon, the man had said, "The pain of minority people is like television, we can turn it on and off as we want to."⁷ The woman who had brought this conversation to the meeting and put it on the table that morning had finally let that comment slip into the conversation. There had been at least a covert agreement to keep this comment from me. No wonder I had felt awkward and excluded.

I was stunned. I was standing up speaking before I knew it. I cannot find the words to describe how brutalized I felt when those words came out. That was me that was being discussed all morning. Did the

those who suffer the consequences of racism.

⁷In some ways this is an accurate reflection of how I experience pain. I do have some control about whether or not I let it in (not whether or not a particular situation is harmful). I have learned to turn myself on and off to stop having to feel all the pain (and that is not always a conscious process). The resulting numbness is not a healthy way to experience life. Whether this (White male) law professor from an elite American university could (or knowingly) capture a portion of my experience, is not the point. His telling of my story is an appropriation of grave proportions not to mention the inappropriate way in which he chose to express it.

man intend to belittle my pain and my life? Did he know how deeply he had clawed into my essence? Did that woman intend to appropriate my pain for her own use, stealing my very existence, as so many other White, well-meaning, middle and upper-class feminists have done?

It is difficult for me to remember what it was that I said. I know I cried. In many ways it was an emotional outburst and I was aware, I think, that the people there might discount my words on this ground. But, I said what I thought needed to be thought about. It has been too long, I said, that we have not been listened to. Whenever something like this happens in discussion of gender and race, I cannot separate them. I do not know, when something like this happens to me, when it is happening to me because I am a woman, when it is happening to me because I am an Indian, or when it is happening to me because I am an Indian woman. The forum has not been set yet in which those issues can be discussed. There are a lot of teachings that Aboriginal people have about balance and harmony and tranquillity, about well-being. The modern education system is not aware of these things. They have not listened. They have not understood. They still believe that they are going to help us. Well, I do not want to be a White person. You cannot make me be a White person. You cannot help me be a White person. Look at this world, look at what is around you. The earth is my mother. She is being raped. She is being destroyed. There will not be anything

left soon if we do not start taking care of the earth. And you, as a White man, and you, as a White woman, stand there and tell me that I do not know, I do not understand - because I feel.

I was angry all right, and I was hurt, I do not know how long I stood and spoke before exhaustion and numbness set in. I responded to what had been said that day as violence, for what had been done to me that day was violence. The White people there had already decided that I was not supposed to hear about that comment. That comment was what had been making the friend next to me so uncomfortable: she was afraid that comment would slip out and I would be hurt. Well, I am glad that it did slip out, even though I was hurt. I do not deserve to have those things kept from me. As I said before, my pain is all I have got some days. Do not take it away from me. It is mine. Understand it, understand where the pain comes from and why: I have to struggle with that. If we cannot understand this pain that women, that Aboriginal women, that Black women, that Hawaiian women, that Chicano women go through, we are never going to understand anything. All that mega-theory will not get us anywhere because without that understanding, mega-theory does not mean anything, does not reflect reality, does not reflect people's experience.

I remember speaking again about being labeled disadvantaged. Sure, Aboriginal people in this country are disadvantaged, everybody

knows that. Everybody knows the statistics. But those are all social and economic variables. You cannot go out and measure how happy people are. You cannot count happiness. You cannot turn happiness into nice neat tidy statistics. Aboriginal people are only disadvantaged if you use that materialistic yardstick. If you accept those kinds of measures about who is good and who is not, Aboriginal people are not "good". But if you want to go to a community where you are cared about as an individual who is important, go to a traditional Aboriginal community. That is not disadvantaged. What I have had is a real and an important advantage. When that world out there has hurt me, when I grew up and I did not like what I found and did not like what I saw out there in the city, I had some place to run to. I had another alternative. Most people do not walk into another alternative lifestyle, another alternative value structure. They do not have the same kind of access to those things because they are not people of a minority culture. I do not want to be called disadvantaged anymore. Call me economically poor, call me uneducated, call me all of those things. The education I have achieved does not mean anything. Do not call me disadvantaged anymore.

I think I talked a long time. I do not know. I think I was in shock. I felt brutalized, violated, victimized - all of those things - but I was not silent. I knew I had to respond, I knew I could not sit there and let it continue. I could not consent to my own disappearance and my own

death. I could not watch anymore, so I spoke. I was standing up speaking before I even realized that I was standing up speaking, at least thirty seconds went by before I realized I was on my feet addressing this group, I am saying something, *again*. When are those of you who inflict racism, who appropriate pain, who speak with no knowledge or respect when you ought to know to listen and accept, going to take hard looks at yourself instead of at me. How can you continue to look to me to carry what is your responsibility? And when I speak and the brutality of my experience hurts you, you hide behind your hurt. You point the finger at me and you claim I hurt you. I will not carry your responsibility any more. Your pain is unfortunate. But do not look to me to soften it. Look to yourself.

I wanted to sit down but I could not. I kept talking and trying to explain until I could not talk anymore. The words were all there in my head, my mind was fine, it was going ninety miles a minute and I wanted to keep on talking. Then I just shut down, there was nothing left, no strength left to keep trying to explain. I have explained this same thing so many times that I get exhausted. But, if one person in that room understood what I had to say, understood what it is that so many Aboriginal people I have listened to and spoken to have said, heard what the Elders have taught me, if one person understood it, it was worth that last ounce of energy. If I had to speak again tomorrow

and the day after and the day after, it will be worth speaking again.

I reached a point where I just could not talk anymore, but I did not know how to stop. Everybody else just sat there. I looked at them and they looked and looked and looked at me and I felt as if I had been caught under a microscope: "What is she going to do next. Let's watch." I could not think how to sit down. I could not think how to finish what I had started saying. I did not know what to do. Finally, I looked some more and they looked back some more and I ended my talk the only way I knew how. That was in an Aboriginal way, and that was to say: "Megwetch,⁸ I am glad you listened. I am glad that I stood up and talked, let these words I have spoken be good words." Then I sat down. After I sat down, I looked at them some more and they looked at me. My friend put her hand on my knee and gave it a squeeze. I wiped some more tears away and I felt at least as though I had a little bit of energy. A woman across the room very much wanted to break the silence. That is another difference between Aboriginal peoples and non-Aboriginals. Aboriginal people understand that silence is not a bad thing and silence can mean a lot of things. A lot of things can be said without opening your mouth. The silence itself did not make me uncomfortable, but the fact that everybody else in the room was uncomfortable with the silence

⁸This is the word in Ojibwe for thank you.

made me uncomfortable.

Eventually, this woman spoke and she said: What can I do to help?" Well, that pulled the rug right out from under my feet again, because I do not need you to help me. Helping is offensive; it buys into the "I am better than you are" routine. I know the woman who spoke did not intend to inflict that fresh pain; I know she did not understand that, but all I could think of were some unpleasant things to say to her. I was to the point where I was defensive and I knew I could not speak in that manner because I knew she had spoken from a kind and sincere place, the only words that she knew how to speak. I was very grateful when one of the other minority women, the one who had earlier told the story of how intent does not excuse racism, spoke very eloquently indeed and addressed the issue in a good way. I was very grateful for that and it made me smile. It made me smile because when we women - we Indian women and Black women and Chinese women and Hispanic women - are together we take care of each other. She took care of me and she spoke when I could not speak anymore. She carried the ball for awhile, which is something you see all too rarely in this individualistic world that we live in. When will all peoples, all nations, all colours, respect the circle of life?

After that, the session got wrapped up and there was a lot of nervous energy in that air. People did not know what to do. Before I

knew what happened, I was surrounded by the men and women of colour who sat in that room. In their physical proximity to me I felt safeness. I knew they understood, I knew they had been there too and they stayed there with me and it was good.

Another good thing happened. We (all the so-called "minorities"⁹) went to lunch together and we did something we oh so rarely do at a racism conference: we sat together and we talked about what racism means to us. What it means to go to a conference like this and never get a chance to be with each other and how we do not get a chance to hear each other.¹⁰ We do not know what the differences are

⁹I am disturbed by the language choices available to me to describe the experience of non-White people. Speaking of White versus non-White; coloured and not; does not accurately reflect my experience. I am not sure Aboriginal people are "People of Colour". We are very different, at least in one way. We are the original people of this territory. We have no other "motherland" to return to. In this sense, we are not "minorities".

I am disturbed for another reason. White people are not all the same. They are of various racial/cultural backgrounds. White peoples are as diversified as Aboriginal peoples. By constructing this dichotomy, I am falsely feeding a conflict which is not real. The other extreme is to be silent and not try to describe racism (culturalism) and the effects that it has had on my life. It is interesting to me to note that when I use the term "White people" it often invokes a hostile response. This hostile response is a tool of silencing and I will not be forced into silence as a result.

The last concern I will mention here is what the colour dichotomy - White versus not - does to Aboriginal people who are fair skinned. It creates a hierarchy of experience based on a biologically determined trait. This is not to deny that White skinned privilege does operate to advantage certain people. It also operates to exclude the experiences of some fair skinned Aboriginal people as not legitimate.

¹⁰Earlier I mentioned the discomfort I felt at having one of the coordinators

between a Black woman's experience and an Indian woman's experience because we have never had the chance to talk about it. This is one of the ways that racism and oppression are perpetuated. But we need to talk about it, so that is what we did. We talked about our need to talk about it and it was a start and it was a good lunch. The reason that we all went to lunch together was because we wanted to demonstrate to the White people there that we do stand together, that there is solidarity amongst us. You cannot attack the only Indian woman at a conference and think that the Black women are not going to be there standing beside her, because they will be there standing beside her.

This story does not have an end. It goes on and on and on. When I am done telling this one, I can tell you another one and another one and another one and another one. I want to know and I want to believe that it makes a difference. That what I have struggled with will make a difference to my son and to his children and to those who come after. We have an obligation to those children to see that there is something here for them, but I am scared that is not happening and it is not happening fast enough. How many hundreds

shuffle the "coloured" bodies around so that there were at least two "minority" representatives in each group. Consider who that advantages. The People of Colour were there to accommodate the White experience of the conference. Our presence was not about speaking to each other. Our presence was an appropriation. Unfortunately, this is a common experience I have had at conferences.

and hundreds of years have we been doing this?

CHAPTER TWO

REFLECTING ON FLINT WOMAN¹¹

The ways of my people teach that there is a special beauty in living life according to the old First Nations ways. These old ways teach us how to live in respect of creation. Part of this special beauty we have been given is our ability to learn about creation. A person is never so complete that he or she has a perfect understanding of creation. Learning is, therefore, a lifelong process. It is because all living things -- the animals, plants, humans, the wingeds, the water life --are a part of creation that we are all created equal. The life process is continuous. It exists independent to our individual human existence. What must be understood is that the circle of creation is the centre of the life way of First Nations Peoples.¹² It is the way in which our experiences are understood.

What I am concerned about is that the First Nations ways of understanding and learning are not the same as those that are accepted within the dominant institutions of learning in this land,

¹¹This article was written in 1990 and first published in Richard Devlin (ed), *Canadian Perspectives on Legal Theory*, (Toronto: Emond Montgomery, 1991), 351-366.

¹²When I wrote this article I believed that the term First Nations captured the experience of all original peoples resident in this territory now known as Canada. Since then, the term First Nations has become more narrowly defined and generally to refer only to the registered Indian population. Minimally, First Nations includes the peoples known as the Indian (status and non-status), Inuit

especially within legal institutions including law schools. The understanding and respect of these different ways must be recognized and respected if we are truly going to make any headway in "race relations".

We must stop and consider the preliminary assumptions underlying institutional beliefs and ideas. These assumptions shape the content of our thinking. This is necessary before we blindly make our way forward assuming we all think, learn, and understand alike. In the words of Marlyn Kane (Osenntonion):

If the educators are going to teach anybody, and if their students are going to learn anything, then we have to try as much as possible to get them to at least realize that they are going to have to twist their minds a little bit (or a lot) to try to get into the same frame of mind as us, or to try to get on the same wave-length. They must realize that their own thinking cannot be applied to what we are going to say, so that what we say "fits" - there seems to be a tendency for that to happen. We must somehow get them to empty their heads of what they may think they know about us, so that they are prepared to begin to learn the truth.¹³

It is necessary that we (all races)¹⁴ must begin to collectively define our social relations, institutions, and values in an inclusive as

and Métis.

¹³Osenntonion (Marlyn Kane) and Skonaganleh:ra (Sylvia Maracle), "Our World" in 10(2 & 3) *Canadian Woman Studies* (Summer/Fall 1989), 7.

¹⁴In the First Nation's way there are four races. They are the red, yellow, white, and black. It is believed that each of these races had a traditional faith teaching

opposed to exclusive way. Within law schools, it is the study of jurisprudence that is best suited to an analysis of this kind.¹⁵

It is not for the benefit of so-called minorities that this re-evaluation of assumptions and understandings is so necessary. The accepted and conventional academic process affirms that understanding. Complicity then characterizes what scholars have become by habitually clinging to the processes which establish traditional power. Not only is this dangerous, but it is also anti-democratic.¹⁶ Mari Matsudi gives a number of examples of the traditional processes which are problematic, and the following is but one example:

Citation counts are a standard measure of academic prestige. Scholars proceed in research and information-gathering by following a trail of footnotes. In addition to following footnotes, people cite what they have read and discussed with their academic friends. When their reading and their circle of friends are limited, their citations become limited. The citations then breed further self-reference. This process ignores a basic fact of human psychology: *human beings learn and grow*

such as the First Nation's teaching that I have begun to share with you.

¹⁵This article was written after Richard Devlin (the editor of the text in which it first appeared) telephoned seeking my permission to republish "Flint Woman". I was not comfortable with this idea. I did not want my ideas about the experience of racial oppression to be frozen in that one article. Racial oppression is a topic upon which I continually reflect. I had been thinking about issues of race/culture and gender since the time when the first article was published. I sat down and wrote this piece (which was already floating around in my head) as a result.

¹⁶Mari Matsudi, "Affirmative Action and Legal Knowledge: Planting Seeds in Plowed-Up Ground", 11 *Harvard Women's Law Journal* (Spring 1988), 7.

*through interaction with difference, not by reproducing what they already know. A system of legal education that ignores outsiders perspectives artificially restricts and stultifies the scholarly imagination.*¹⁷

My point is a simple one. My purpose in challenging the way academics think and process is *not* a benevolent one for the benefit of some disadvantaged group. It is necessary for the benefit of all people. The goal is to develop legal and educational institutions which are inclusive as opposed to exclusive and hierarchical.

I want to facilitate this purpose by continuing a discussion that I started in an article written and published several years ago.¹⁸ This article was named in Mohawk and is more commonly referred to as "Flint Woman". The concepts central in that first article -- race, culture, women, law, education, disadvantage, silencing and exclusion -- are concepts which continue to occupy a great deal of my thinking time. I now understand these concepts in a more complete, but not perfect, way. I am not recanting what I said. This is not the way I think or feel about that first piece. That piece is important for a number of reasons. It offers an important insight for those people

¹⁷Ibid, 3 (emphasis added).

¹⁸Patricia A. Monture, "Ka-Nin-Heh-Gah-E-Sa-Nonh-Yah-Gah" ("Flint Woman") in 2(1) *Canadian Journal of Women and the Law* 1986, 159-171.

who have never been silenced because of their race and culture.¹⁹ If offers those individuals the opportunity to understand the cost to other individuals that they silence, willfully or not. Just as important, it offers the opportunity to consider the cost to themselves of silencing others. All that I am saying about that first piece, is that I now understand things in a different way. I have had several years to think, to live, to learn, to grow. Therefore, I should understand things in a different way if I have been fulfilling my traditional responsibility to learn.

The way I am using the concept, responsibility, is unique to the First Nations way of ordering the world. It can be juxtaposed to the rights philosophy on which Euro-Canadian systems of law are based. The focus of First Nations society is not based solely on individual rights but also on collective rights.²⁰ Collective rights are greater than groups of individual rights. In my understanding of First Nations ways, both individual and collective rights are of utmost importance. They must be understood together. Responsibility as a

¹⁹I do not primarily consider that my work involves speaking to feminism or women's reality. This is not to deny that I am woman. My work primarily focuses on exposing racism. I do not mean to disappear gender. It must be realized that my race and culture shape my gender experiences as my women's identity flows through and from my experience of my culture and traditions.

²⁰For examples of how courts have treated collective rights, see *Boyer v. Canada* (1986), 65 N.R. 305 (FC); *Dumont v. Canada and Manitoba* (1988), 52 Man.R. (2d)

basis for the structure of a culturally based discourse, focuses attention not on what is mine, but on the relationships between people and creation (that is both the individual and the collective).

Oren Lyons explains in this way:

We human beings, however, have been given an added responsibility. We have been given an intellect - that is , the ability to decide for ourselves whether we will do a thing this way or that way. The human being has been give the gift to make choices, and he has been given guidelines, or what we call original instructions. This does not represent an advantage for the human being but rather a responsibility. All the four colours of mankind received those original instructions, but somewhere in time, in many places, they have been lost. It is a credit to us native people that we have retained those instructions. Many non-Indians have tried to destroy the original instructions because they view them as detrimental to progress.²¹

Obligations and duties are rights-based words and do not hold the same meaning that I give to responsibilities.

"Flint Woman" was written during a particularly frustrating period in my life. I was overwhelmed by the number of ways I was silenced and excluded during my university education (particularly during my legal education). Naturally then, this first article was shaped around silence and exclusion. What I have come to

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²¹Oren Lyons, " Spirituality, Equality and Natural Law" in Leroy Little Bear, Menno Boldt, and J. Anthony Long, *Pathways to Self-Determination: Canadian Indians and the Canadian State* (Toronto: University of Toronto Press, 1986), at 6.

understand since that time, and now understand to be my responsibility, is the responsibility to be empowering and not merely reactionary. The experience of racism is one that is done to us. We react to racism. Even our pain and anger are reactions. It is objectification. We must begin to be subjects to the extent that we can be. Effectively, you then end your own silence and to a lesser degree, your exclusion. Exclusion is a different experience. It is what is done to you collectively as members of a distinct group. To end exclusion, we must do more than offer our pain, but we must also offer our visions on what must come.

This process of gaining control over your experience is essential. Therefore, what is just as important as the ways in which we are silenced, are the ways in which we receive and maintain our voices. We receive our voices when we become empowered and overcome the silencing. And there is an important connection between overcoming silencing and ending collective exclusion. It is much easier to exclude a silent so-called minority, than a vocal one. "Flint Woman" is important as an example of the way in which one voice, my voice, was re-claimed. My voice is the voice of a Mohawk woman, mother and law professor. My voice is all that I have experienced and can speak to. It is a mere glimpse in what was and remains a very long process, a very long struggle.

The relationship between race and gender is also an important aspect of the "Flint Woman" discussion about silencing and exclusion. I am particularly concerned with silencing along the lines of race (more appropriately culture) than gender. I do not mean to be constructing a hierarchy of "isms" nor do I intend this to be perceived as exclusionary. It merely reflects that my voice is the voice of a Mohawk woman (mother and law professor). It is *only* through my culture that my women's identity is shaped. It is the teachings of my people that demand we speak from our own personal experience. That is not necessarily knowledge which comes from academic study or from books.

The First Nations concept of learning is introduced in the "Flint Woman" article. It is a theme which runs through the entire article but this particular quotation is illustrative:

Native history is oral history. It is probably fortunate for Native people today that so many of our histories are oral histories. Information that was kept in peoples' heads was not available to Europeans; could not be changed and molded into pictures of "savagery" and "paganism". The tradition of oral history as a method of sharing the lessons of life with children and young people also had the advantage that the Elders told us stories. They did not tell us what to do or how to do it or figure out the world for us - they told us a story about their experience, about their life or their grandfather's or grandmother's or auntie's or uncle's lives. It is in this manner that Indian people are taught independence as well as taught respect

because you have to do your own figuring for yourself.²²

There are two points I wish to clearly make here. First the role that experience plays in qualifying individuals is different in my culture. A personal example is that I have frequently been referred to as a "prison expert". It is necessary for me to always qualify this statement, as I am an academic expert only. My knowledge comes from books and volunteer experiences within the criminal justice system. Within my culture, this does not make me an expert. I have never spent any time in jail as a prisoner and I cannot speak to that experience. The second point, is the importance of oral history. In order to communicate with others of my profession, I must rely upon a medium, the written word, which is a foreign way of communication given my cultural identity. The fact that my participation in academia goes through at least several stages of translation and accommodation (so that you can hear me) is an invisible edge in my participation. Effectively, it is a form of exclusion for the majority of First Nations.

Choosing what to call yourself in English is a political choice. Although I use the word "Aboriginal" when speaking to Canadian constitutional provisions, of the choices (Aboriginal, Native, Indian,

²²Supra, Monture, "Ka-Nin-Geh-Gah-E-Sa-Nonh-Yah-Gah", 160.

etc.) First Nations is the terminology I now am most comfortable with. Writing for an introductory text for women's studies, I discussed this difficulty of determining what to call myself:

I am a member of the Ho-Dee-No-Sau-Nee Confederacy. The Confederacy is a "political" union which is a democracy in the truest sense of the word. For many years, our nations were known as the Iroquois. But, this is not how we call ourselves. There are six nations which make up the Ho-Dee-No-Sau-Nee Confederacy. We are the Seneca, Oneida, Onondaga, Cayuga, Mohawk, and Tuscarora. I do not like to say that I am a Mohawk woman. A friend recently told me that she had been taught that Mohawk means "man-eater" in one of the European languages. This is not a nice way to be known. That is not what being "Indian" means to me. I am a proud member of my nation and that is a good way to be. This is just one good example of how colonialism and oppression operate in the dominant society.

When I was growing up, the word I learned to describe who I was, was "Indian". Since then, I have learned that it is not a good way to name myself. I have been learning how these constructs and processes support racism. The meaning of the word "Indian" is a purely legal definition. An Indian is a person who is entitled to be registered under the definitions in the Indian Act. It is also not a good way to describe ourselves because it is a definition that has been forced on us by the federal government.²³

Not being in control of the process of naming, that is defining who you are, serves as one of the most express examples of silencing that I can think of.

²³"I Know My Name: A First Nation's Woman Speaks" in Geraldine Finn (ed), *Limited Edition: Voices of Women, Voices of Feminism*, (Halifax: Fernwood Publishing, 1993), 328-344 at 328.

This process of learning about creation that I was earlier talking about, must encompass a reflection on and with the traditional gifts and responsibilities that we were given. I must strive to understand how I fit into creation. There are four guiding principles which illuminate the way in which we are expected to respect these traditional gifts and responsibilities. The guiding principles are kindness, sharing, truth (or respect), and strength. These principles are different aspects of the same whole (or circle). When you are kind the kindness is returned to you. When you share you reap the benefits of what you share. Perhaps you share a teaching and in this way the teachings are kept alive. Sometimes the truth is hard, but it may be the only way that we will learn. These three responsibilities - kindness, sharing and truth - will lead to the fourth, which is strength. One principle cannot exist without the other three. There is no changing them. They exist just as the north wind continues to blow.²⁴ And they shall continue to exist in this way for all the generations left to come.

These traditional concepts I have just shared with you are impossible to explain to you in a paragraph, chapter, or even a thousand books. These principles must be lived and shared to be

²⁴This is an Ojibwe teaching shared with me by Shirley O'Connor.

understood. Oren Lyons, also a member of the Confederacy, explains these concepts in this way:

Imagine a circle divided into four parts by directional arrows. This is the universal symbol that all indigenous peoples recognize and understand immediately. The centre of that circle is the family, and at the heart of it is the woman. Just as Mother Earth is the core of life, so the woman as mother is the core of her family.²⁵ The family sits in a circle, and that circle is called the clan. The clans in turn also sit in a circle, and that circle is called a nation. Then these nations sit in a circle, and that is called the world. Finally, there is the universe, which is the largest of the circles. The symbolism is meaningful, and it is important.²⁶

There are two things that must be understood. The ways of First Nations cannot be understood or explained at a glance. And second, that these ways are not the same as the ways known to the dominant society.

It is the ways of my people that are at the core of my being. It is from the teachings that I draw my strength, my hope, and my vision for the future. Becoming a law teacher has not shifted the traditional focus in my life. It remains the core of my being. But, becoming a law teacher has fundamentally shifted my thoughts as I

²⁵Over the years, I have noticed that much confusion is caused by statements such as this one. Please do not understand these words through Euro-centric constructions of family and the role of women assigned in a different (and dominant) culture(s).

²⁶Supra, Lyons, 160.

now reflect on "Flint Woman". As I prepared myself to teach, I had to consider the many ways that I had been silenced and excluded. Now that I have a position of responsibility, how do I prevent the silencing of someone else? What I came to realize was that it is not the silencing that is so crucial. What is important is to give my students the opportunity to develop their own unique voices; specifically, their legal voices. A legal voice that also respects²⁷ the fact that they may be women, or homosexual, or poor, or First Nations, or Black.

This empowerment that comes when we find our voices is so often what is missing in our education systems. Law school is merely a reflection of what is happening generally in education systems from primary to university. We take away people's voices and force them to conform to status quo values and norms. And in law, the norm was defined solely by the monolithic white (and male) voice. For me learning to teach, was and is fundamentally learning how to respect different voices.

A monolithic legal voice developed in the law for a very long time. It was the voice of white men of at least a middle class upbringing. This brings our focus back to what is central. As long as

²⁷By respect, I do not refer to a liberal notion of pluralism or liberty such as Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977). Respect simply means to stop forcing conformity to a single norm, such as

the monolithic voice remains sanctioned in law and education, these experiences will be silencing and exclusionary for those of us who speak in a different voice. Again, this means we all lose.

Participating in a system which does not reflect the basic value structures of my culture is a constant challenge on a number of different levels. Whenever I write or speak, I often complain that I feel like I am engaging in a long process of footnoting life. It sometimes feels like I never get out of the footnote and truly live. This process of language, which I am referring to, is definitional (or perhaps, more accurately, re-definitional) and structural. I do not believe that First Nations people use English words in the same way as people who do not share our culture with us. We all use the same words but they mean different things. An example should make this point clearer. In my language (Mohawk)²⁸, we have the Great Law. It is our constitution. A literal translation from Mohawk to English is "the great big nice". I am not sure about you, but this has not been my experience of the Canadian legal tradition.

It is very important to understand the relationship between language and silencing and exclusion. Remember, as I earlier pointed

the white, male, middle class or better, heterosexual voice that is sanctioned in law.

²⁸I am not a traditional language speaker. This story was first told to me by Tom

out to you, that the sanctioned form of discourse within my culture is oratory. The emphasis on oral as opposed to written culture is overlooked. The result is that First Nations people are often referred to as illiterate. And I do not deny that many of my people have not had the privilege of a long and/or meaningful formal education. Neither is my point that reading is not important. The dominant culture has sanctioned the truth and importance of the written word. The dominant society largely believes that without the practice of writing things down, you cannot have law, or knowledge. This is one of the reasons First Nations laws and legal orders were invisible to the first settlers, traders, and explorers. It is another one of the difficulties that First Nations continue to confront. And again, this sanctioning is also silencing and exclusionary.

Oral history is also a concept that is not well understood. Having a culture based on oral history means something greater than valuing the spoken word over the written word. It is an entire process of accurately recording history. The courts have tended to simplify the process of oral history and treat it as something less advanced than recording history on paper. This fits very neatly with the "noble savage" stereotype. This is wrong. What you hold in your head cannot be taken from you and destroyed in the same way a book can.

Porter of the Mohawk Nation, Akwesasne Territory.

The institution of oral history also ensures the passing down of history from generation to generation. One example from a recent judgment should clarify this point:

In addition to the findings that were *essential* to the issues before him, the trial judge paid counsel for the Temagami Band the *courtesy* of dealing extensively with matters of some historical and cultural interest but of little relevance to this case. As to the history of the band, the trial judge expressed disappointment that so little evidence was given by band members. Chief Potts was the principal Indian witness to give oral history *and his testimony was not oral history in the traditional sense*. His own family did not arrive in the Land Claim Area until 1901, and his principal source of information was not his parents and grandparents. Instead, he gave evidence that was the result of his research and that which he had learned from other members of the band who were not called as witnesses. His evidence was not, in any sense, the best evidence available, and there were available older band members who could recount oral tradition. Chief Potts' testimony was not similar in quality to the type presented in other cases where oral history has been admitted...²⁹ (Emphasis added.)

There are present in the court's interpretation several fundamental misconceptions of First Nations. First, oral history is not only passed down from grandparents to parent to child. First Nations society is not structured around linear and nuclear family concepts. Second, by inference, Chief Potts' knowledge is characterized as childlike. This completely overlooks the fact that the man was selected by the community to represent them as Chief. Again, the

"noble savage" imagery appears. Finally, oral history does not mean, "I was there!" "I saw." Clearly the rules of evidence operate to the disadvantage of oral history. It was not Chief Potts who misunderstood oral history, but the judges hearing this case.³⁰

What is also overlooked is what my people have done with language! We have taken a language that does not speak for us and given it a new life. Perhaps, we break all of the structural, style, and grammatical rules. But we have learned to use a language which was forced upon us to create powerful messages which convey to you our experience.³¹ I do not call this a problem. I call it creativity. It is time my people give themselves credit for the great things we have accomplished against great adversity, rather than continuing to accept and embrace our exclusion. I am proud of my people. We are a strong, creative people. This is witnessed by the fact that we are still here to share with you.

A second good example of the importance of language, is found

²⁹A.G. *Ontario v. Bear Island Foundation et al.* (1989), 30 O.A.C. 66, at 69.

³⁰For a further critique of the racist assumptions that often underlie court decisions in the area of child welfare, see Patricia A. Monture, "A Vicious Circle: Child Welfare and First Nations", 3(1) *Canadian Journal of Women and the Law* 1987, 1-17.

³¹In the summer of 1988, I had the opportunity to hear Lee Maracle speak at a conference in Toronto, Ontario. These are very much ideas that were inspired by Lee. I would recommend her book, *I Am Woman*, (Write-On Press, North Vancouver: 1988), to everyone.

in one of many justice inquiries that are happening across Canada.³² The Marshall Inquiry has already made public its final report. The report opens highlighting several findings including the recognition "that the fact that Marshall was a Native was a factor in his wrongful conviction and imprisonment."³³ Consider the language chosen for a moment. The report comes very close to embracing the notion that what happened to Mr. Marshall happened because of the racism inherent in the criminal justice system (and elsewhere) in this country. I am disappointed that the Commission did not embrace that "racism" word and instead chose soft language. Racism is a word which suggests the collective nature of actions against entire groups of people. However, the language of the Marshall Report by focusing only on one "Native" man suggests that the problem was merely an isolated incident. I know this is not the true nature of the problem. Language is powerful. Yet, in this important report, it was overlooked.

³²These are the Manitoba Justice Inquiry, the Inquiry in Alberta of the Blood Reserves, and the Nova Scotia Inquiry into the wrongful conviction of Donald Marshall, Jr. Also important, is the Report on the Task Force of Federally Sentenced Women which is the only inquiry focused on women and a substantial amount of that document focuses on the over-represented of First Nation's women in the federal prison systems.

³³Chief Justice T. Alexander Hickman (Chairman), Associate Chief Justice Lawrence A. Poitras, and The Honourable Mr. Gregory T. Evans, *Royal Commission on The Donald Marshall, Jr., Prosecution, Volume 1: Findings and*

The study of law only confounds the exclusionary experience of language. Law is a very structured discipline with rules of style and language unique only to itself. It requires that we examine the way in which perception is subtly embraced in language. It then requires that we critically examine the way we load our perceptions and how each of our perceptions shape our realities. This is the same process I earlier referred to as examining our assumptions. The academic literature sometimes refers to this as reconstruction.³⁴

Law's rigid structure often forecloses the involvement of "outsiders" in our profession. Is that the purpose or intention of the rigid structural rules of the legal system? In any event, these rules do compound the First Nations or other dispossessed collectivities, sense of powerlessness. Our understanding of law is not represented within the structure of the Canadian legal system. We experience that system, particularly the criminal justice system, as racist and oppressive.³⁵ We, as individuals, did not participate in the process whereby the legal system was formed. We did not participate in the

Recommendations, (Province of Nova Scotia: December 1989), 15.

³⁴See for instance Joan W. Scott, "Deconstructing Equality - Versus - Difference: Or, The Uses Of Poststructuralist Theory for Feminism", in 14(1) *Feminist Studies* (Spring 1988).

³⁵Fran Sugar and Lana Fox, "Nistum Peyako Seht'wawin Iskwewak: Breaking Chains" 3(2) *Canadian Journal of Women and the Law* 1989-1990, 465-482.

process of agreeing to the assumptions and values reflected in that system. Further, we have been excluded as Peoples in participating in the formation of that system. More importantly, First Nations Peoples have never consented to the application of the Canadian legal system to any aspect of our lives. It is important to note that the issue of consent is different from the issue of inclusion. These realities are continually ignored by the Canadian government, the legal profession, and the judiciary. Only by understanding the history of the Canadian legal system can we then understand why the result of this system is not justice but exclusion and force.³⁶

It seems a logical expectation to me that legal studies in Canada will begin to examine this critical area of exclusion. Jurisprudence courses seem to me a logical place to start. Jurisprudence is the formalized study of legal systems and the corresponding legal philosophy. This is frequently accomplished by the review of judicial decisions. This approach is too constraining and unnecessarily so. It separates form from content. As Mari Matsudi earlier described, it is an approach which allows the accepted practices to continue to define the future. At minimum, this is exclusionary, dangerous, and anti-democratic.

³⁶Supra, Monture, "A Vicious Circle...", 1-17.

Returning to the notion of footnoting life, there are a number of words which I will naturally understand in a different way. This is natural because my experience is different from the mainstream. These words or concepts are racism, anger and pain, intent, and discrimination. These concepts must be given meaning that is greater than the meaning which they have historically been given. The concepts have been defined by collectivities that have had "power over" the individuals' lives which they are describing. If we *cannot* revisit these conceptual premises then any work we may accomplish to change social structures further down the line will become inverted or meaningless. This is a process which is complex and requires description in detail.

Anger and pain are the colourful prisms through which I experience and learn. Anger and pain are words for me which go together. Perhaps, they are feeling words, but they are essentially caught up in my learning process. Anger is largely external, in the sense that my anger is usually defined by someone outside of myself. It is common experience among so-called minorities to be labeled as angry. Most of the time, when I am so labeled, I am not feeling angry. My suspicion is that people use this label when they are having a difficult time hearing what it is that I am saying. I resent being forced to carry a negative label to convenience someone else who

cannot cope with what they themselves are feeling. This is oppression at the individual level. Until now, I have not thought as much about the use of pain as a concept as I have about anger. I know that they are connected and that the connection is a descriptive version of racism. Anger and pain, perhaps, are the violence that grows out of racism.

In re-considering "Flint Woman", I discovered that pain is a re-occurring theme in that article. I describe:

I do not have any control over the pain and brutality of living the life of a dispossessed person. I cannot control when that pain is going to enter into my life. ...I am pretty possessive about my pain. It is my pain. I worked hard for it. Some days it is all I have. Do not try to take that away from me too.³⁷

What was interesting for me to note in my review of this concept, is that pain is externally sourced. It is not resolved anger. It is not anger changed to pain.³⁸ Pain is the instantaneous result of living racism, just as physical violence results in pain. When I pick up the telephone only to hear that yet another First Nations woman has

³⁷Supra, Monture, "Ka-Nin-Geh-Heh-Gah-E-Sa-Nonh-Yah-Gah", 163.

³⁸Pain and anger have been "criticized" as rhetoric. (See Toni Pickard, "Lament on the Rhetoric of Pain" in *Newsletter of the Conference on Critical Legal Studies*, November 1989, 44.) Rhetoric has a negative connotation for me even though I recognize it as the positive and fundamental skill which has developed over the centuries in the western legal tradition. Professor Pickard suggests that this rhetoric has developed as the result of "minority" participation in the legal academic profession. I believe that the inclusion of feeling words into the study of the so-called objective law is necessary to the transformation of law from

committed suicide at the Prison for Women, the third in eleven months, it is intense pain that I feel. Pain so intense that I am numb. But the pain is reassuring. It is feeling. Therefore, I am. Pain then is the reaction and not the action. Perhaps, anger is the action? What I do know is that my experience of both pain and anger are integrally connected to my experiences of racism.

Racism is often defined in the academic literature as "white skin privilege plus power".³⁹ At the outset I want to express clearly that I do *not* disagree with this definition. It conveys a powerful and necessary message to white people⁴⁰ about their responsibility to unlearn racism. And it is a responsibility I am speaking about. It took me many years to understand that I could not fix racism. I can label it. I can point to it. I can explain why that particular behavior or action or attitude is racist. But I cannot stop it. I cannot stop you. I can report what I have said earlier:

When are those of you who inflict racism, who appropriate pain, who speak with no knowledge or respect when you ought to know to listen and accept, going to take hard looks at yourself instead of at me.

exclusionary to inclusionary.

³⁹This theory was discussed by Esmeralda Thronhill at the Law and Society Conference, Learned Societies Conference, Windsor, 1988.

⁴⁰Please do not look at the colour of your skin and be immediately offended. Race is a particularly unsatisfactory label because it focuses our attention on skin colour. It is what is going on behind my skin, or yours, that is so fundamentally different. It is a difference of culture and not race or biology.

How can you continue to look to me to carry what is your responsibility? ...I will not carry your responsibility any more. Your pain is unfortunate. But do not look to me to soften it. Look to yourself.⁴¹

This is why a critical race analysis is so essential to academic study, and particularly legal study.

A clear and agreed upon definition of racism is not available. This should not be a surprising conclusion. Experiences of racism are as different as the different racial and cultural communities that have those experiences. Racism is not a monolithic experience.

Within the academic literature racism is a much used and little defined concept. In a text on ethnicity and human rights in Canada racism is defined as "the misunderstandings that have often influenced the kinds of prejudicial attitudes and discriminatory practices toward particular human populations."⁴² From this we can understand that racism is a process. Later in the text:

The tendency to evaluate, indeed, to judge, other races from an ethnocentric European-Christian perspective led many scientists to arrange these races in an hierarchical order of innate superiority and inferiority ranging from primitive to highly civilized.⁴³

⁴¹Supra, Monture "Flint Woman", 163.

⁴²Evelyn Kallen, *Ethnicity and Human Rights in Canada* (Toronto: Gage Educational Publishing Company, 1982), 2.

⁴³Ibid, 4.

Not only is the failure to define racism in any succinct fashion interesting, but the failure of the law to embrace this word is also notable. In law, we do not discuss racism. We discuss discrimination. Discrimination is only the visible edge of racism. Perhaps then, combating racism through law can only be a partial solution, at least until the parameters of law are redefined in a way that is inclusive to all experience.

It must also be considered if a single definition of racism is sufficient or even possible. Racism operates at many levels, including the personal as well as the theoretical. The theoretical definition that I have provided ("white skin privilege plus power") assists me in understanding at an intellectual level. It helped me to understand that I was not the only individual that was responsible to erase racism and this was an essential understanding. But, now it does not help me live my everyday life. It does not help me on a personal level with the everyday experience of racism.

Here, I am assuming that an academic definition should relate to my everyday life. The way of my people is holistic. It does not separate my mind from my heart from my spirit. A student in my public law class complained to me that he did not understand what Aboriginal rights had to do with public law. Nor did the student

think the topic was being portrayed objectively even though we were reading Canadian court decisions and not the writings of First Nations Peoples. I have heard that complaint many times. What it fails to acknowledge is the fact that Canadian court decisions do reflect a specific culture, even if that culture is not named. As I am willing to share my perspective and acknowledge that it is an Aboriginal perspective, I am criticized for my failure to be objective. I see my willingness to share my perspective and its biases as an effort that is honest. I was raised to be honest not objective. The criticism is a result of a failure to examine the contours of academic and legal bias.

It is easy to provide further examples of the system's failure to be self-reflective and the contradiction this creates for me. I have heard about several law professor who emphatically assert that they do not understand how the teaching of property law has anything to do with Aboriginal title. Some professors of criminal law refuse to examine the bias inherent in Canada's criminal justice system because they see it as separate from the application of the criminal law. I have reviewed outlines of children and the law courses where Aboriginal issues have never been mentioned. And then, another First Nations woman commits suicide at the Prison for Women. I grieve for each of them. But, I am also angry. These emotions are not captured in the academic definition of racism. For me, therefore, the definition

remains incomplete.

What I am attempting to do is to re-claim racism, as a word, and as a concept, and as an experience. I want it to speak to me, of me, for me. I am tired of it defining someone else's experience who has the luxury of not living racism. Racism, both as a concept and as an experience, creates a subject outside of me and leaves me being object. The fact is that racism creates an unnatural inversion. It is therefore a neat little trick which oppresses the individual or collective who is already struggling to overcome their oppression. This is the neat little trick. As soon as I point out to most people, "HEY, that's racist". It is distancing. You become defensive. Perhaps you blame me for calling you names or maybe you distance yourself by calling me angry. I feel guilty as I had never intended to hurt you. That is not my way. I have the responsibility to be kind. Kindness is one of my original responsibilities. The power to define my own experience is then taken away from me because racism is a bad word!

Racism is turned against the "victim"⁴⁴ in this kind of a labeling process. This inversion of racism is partially the result of the well-established principle that academic training, and especially legal training, does not involve feelings. At the threshold this contradicts

⁴⁴Victim is not a word that is empowered. Being a survivor of racism is a positive and inspiring label.

my experience and what I have been taught. My First Nations teachers have told me that I must double understand. It is not enough to get the knowledge into my head. Instead, I must also get the knowledge to my heart so that I will live what I have learned. This is why the learning from experiencing everyday life is so valued in First Nations cultures. It is also a further profound example why the study of language must become essential to the study of law. The power to define is essential.

In an effort to help clarify an understanding which I believe to be difficult, I offer a second example. Much of the discussion at a political level between First Nations and the levels of Canadian government over the last decade or so has focused on deliberations around "self-government". In the same manner that racism has become inverted and is often used against the collectivities that experience it, so has "self-government" been definitionally inverted and made devoid of meaning. Osennontion explains:

Naturally, our own people, as continues to happen time and time again, have whole heartedly embraced the buzz-word [self-government]. Of course, the word itself is not the culprit; what it means to people, how it is interpreted, or misinterpreted, and how it comes about are causes for debate and dissension. When the Feds talk of recognizing "self-government" they mean delegated authority to "Indians", for example, to govern their affairs on the reserves wherein they were displaced, and this is accomplished through their legislation. When an aboriginal person, who knows what s/he is talking about,

speaks of "self-government", s/he means the particular system of government that was given to the people when they were placed in their territory on Turtle Island. This government needs no sanction through legislation or otherwise; rather, the "others" need only honour the original agreements to co-exist, and through their actions, show respect for our ways. However, because so many of our people don't know our ways, they have become involved in processes whereby they have attempted to gain recognition of our "right to self-government", instead of working on finding ways to effectively assert and exercise our own governments. Before I knew better, I myself supported and took part in some of those processes - this was before I knew what things like "Nationhood" and Sovereignty" really meant. I came to realize my mistakes; I am praying for others to do the same before any more damage is done on behalf of "the people".

If we are going to use the English language, I prefer the term "self-determination", as it better describes, for me, the action that needs to be taken. The establishment, exercise and enforcement of government, is only one aspect of "self-determination". In our own language, we have a word that, of course, even better describes what we have been instructed to do. TEWATATHA:WI best translates into "we carry ourselves" - a rather simple concept, some might say, but I think it says it all.⁴⁵

In searching for meaning and for language that expresses our experience, we must be careful of the words which we chose to embrace our experience. What is also important to understand is that it is not the word that is the problem, but the process by which and by whom it is given meaning.

⁴⁵Supra Kane and Maracle, 10.

Academic understanding is more than mere thoughts and ideas. As it involves sanctioning of thoughts and ideas, it is fundamentally about sanctioning knowledge. Knowledge only involves those things that can be objectively proven. In the instance of law, knowledge, as it is understood in the dominant culture reflects the preoccupation and continued assertion that law is objective. But what if my cultural experience teaches me that I cannot separate my feelings from my thoughts. This brings us back around to my criticism of the conventional understanding that jurisprudence involves only the study of form.

It is important to understand what is the result of the emphasis of objectivity to the study of law. We must study only what we can see and scientifically prove. Therefore, my only difference to you is the colour of my face. There is a person, a woman, beyond this brown skin that is different from you. In discussing the *Charter* and its underlying monopolistic value structure, Professor Mary Ellen Turpel articulates this position:

I intentionally use the term "culture" and "cultural difference" instead of "race" or "racial difference" because I view this as more accurate and more expansive: race or racial differences are too readily equated with "colour" or visible biological differences among people; whereas cultural differences should be understood more as manifestations of differing human (collective) imaginations, different ways of knowing. The expression "cultural difference" conjures up more than differences of

appearances (colour), it allows us to consider profound differences in understandings of social and political life.⁴⁶

Perhaps we value the same things, but the importance that First Nations attach to the values is different from that attached by the dominant society. Until we have examined the values upon which the legal system is structured, primarily to determine exclusivity, then we continue unwittingly to reinforce and support oppressive structures.

As we earlier noted, racism is not a word that is embraced within the legal discourse. For example, the laws we have prohibit only "discrimination". I believe that racism covers a broader range of behaviors than discrimination does. Discrimination involves actions or practices. It is the incident. Racism is about the way we think, the way we feel, what we believe, and how we structure our realities. Discrimination is only one aspect of racism. There is another parallel here too. In law, thinking (the mind) is superior to feeling (the heart and the spirit). As discrimination is the actionable, seeable, thinkable, portion of racism, law has again given priority to thinking as opposed to feeling. A brief examination of the law of

⁴⁶Mary Ellen Turpel, "Aboriginal Peoples and the Canadian Charter: Interpretive Monopolies, Cultural Differences" in Richard F. Devlin (ed), *Canadian Perspectives on Legal Theory* (Toronto: Emond Montgomery, 1991),

discrimination should help to clarify what I am suggesting.

It is largely the field of human rights which has come to reflect the development of anti-discrimination laws in this country.⁴⁷ The history of human rights legislation in this country is rooted in legislation of the 1940's⁴⁸ which prohibited by quasi-criminal sanction actions expressing racial or religious discrimination.⁴⁹ From the outset, the nature of these early statutes as quasi-criminal sanctions introduced the necessity to prove the intent (what is in their mind) of the wrong-doer. This created an almost impossible situation for the individual seeking to bring forward a claim. This left the complainant a next to impossible burden of proof to discharge. Without proof of a mental process, the discrimination was not illegal. The result was that legislation was grossly inadequate in dealing with discrimination.⁵⁰ What we must also consider,

503-538 at 503.

⁴⁷Walter S. Tarnopolosky, "The Iron Hand in the Velvet Glove: Administration and Enforcement of Human Rights Legislation in Canada", (1968) 46 *Canadian Bar Review*, 565. As the title indicates, this article traces the legal history of human rights legislation in Canada.

⁴⁸The two earliest enactments were in Ontario *Racial Discrimination Act* in 1944, and the Saskatchewan *Bill of Rights Act* in 1947. The Ontario legislation focused only on the publication or display of materials that were discriminatory on grounds of race or religion. The Saskatchewan enactment was much more broadly based.

⁴⁹*Supra*, Tarnopolosky, 567.

therefore, is not only what we are including but what (and who) we have excluded.

In the United States and Great Britain, by the earlier 1970's intent as an essential element of discrimination was being disregarded by the courts.⁵¹ It was not until 1985, that the Canadian judiciary accepted that intent is not relevant to a determination of discrimination. In the case of *O'Malley v. Simpsons-Sears*⁵² the Supreme Court of Canada articulated this definition of discrimination:

To take the narrower view and hold that intent is a required element of discrimination under the Code would seem to me to place a virtually insuperable barrier in the way of a complainant seeking a remedy. It would be extremely difficult in most circumstances to prove motive, and motive would be easy to cloak in the formation of rules which, though imposing equal standards could create, injustice and discrimination by the equal treatment of those who are unequal. Furthermore, as I have endeavored to show, we are dealing here with consequences of conduct rather than with punishment for misbehavior.⁵³

Although this step is laudable and certainly essential to the development of effective human rights sanctions (anti-discrimination

⁵⁰For a discussion see Beatrice Vizkelely, *Proving Discrimination in Canada*, (Toronto: Carswell, 1987), 13 - 58.

⁵¹Ibid, 24 - 25.

⁵²[1985] 2 S.C.R. 536.

legislation) in this country, it remains an insufficient advancement.

My real concern is with the insidious nature of racism and the ways in which racism is structured and sanctioned in this society. Merely going beyond intent is insufficient. Therefore, discrimination as a legal concept still remains an incomplete remedy. Two necessary considerations are fundamentally overlooked: by focusing our legal attention on intent, what did we exclude, and as a theory, is discrimination complete? This brings us back to legal theory, or the business of jurisprudence. Through the examples I have given, we can see how legal theory is incomplete. The essential question to ask is formed around an examination of: Whom are we excluding? and Whom are we silencing? Effectively, legal theory has so simplified the questions that I wonder if the answers that have been historically sanctioned are in fact answers. Marlee Kline expands on this notion with regard to feminist theory:

Because of the simultaneity of their experiences of oppression, women of color must directly confront contradictions white middle-class women do not face when attempting to understand and theorize about their oppression. White middle-class women are "unusual in the extent of the choices [we] can exercise and in the lack of contradictions in [our] personal lives". However disadvantaged we may feel as women, we experience great privilege in terms of race and class. As a result, white middle-class feminist theorists have tended to discount "the complexity of the contradictions which most women

⁵³Ibid, 549.

are embroiled". As just one example, consider the family, which is a site of contradictory experiences for women of color of ways unknown to white women. Although both women of color and white women sometimes experience the family as an institution of violence and oppression, for women of color the family often functions as a source of support for its members against the immediate harassment of racism and provides a site of cultural and political resistance to white supremacy. The failure of many white middle-class feminists to account for the contradictory experiences of the family by women of color and thus to concentrate only on gender oppression is but one illustration of bell hooks' observation that "[c]ertainly it has been easier for women who do not experience race or class oppression to focus exclusively on gender."⁵⁴

My experience of law is largely one of negotiating the contradictions.

As distinct nations who come to the study of law, I cannot tell you what it is that you need to do to make legal systems work for you. What I do know is that First Nations have a right to live without oppression and contradiction in the ways we were given. The most that I can do is maintain and nurture my voice. It is the voices for those who have been traditionally excluded who bring the tension to bear on all those systems that are oppressive to human life. It is that tension which is the site of true human development and knowledge.

⁵⁴"Race, Racism and Feminist Legal Theory" (Spring 1989), 12 *Harvard Women's Law Journal* 115, at 122-23.

CHAPTER THREE

A VICIOUS CIRCLE: CHILD WELFARE AND THE FIRST NATIONS

At the age of nineteen, Cameron Kerley brutally murdered his adoptive father. The murder followed years of sexual abuse. The child welfare systems of both Canada and the United States had clearly failed this First Nations child. Before he was taken into "care" by child welfare officials, and before he was placed for adoption in the United States, Canadian social workers took no preventive measures to keep Cameron with members of his own extended family. After he was placed in the United States, no social workers assessed his placement, nor the suitability of his adoptive father, nor completed a progress summary of Cameron's adoptive home despite a marked decline in his school achievements. No one in authority ever questioned the placement of a Cree child who resided in Canada across an international border - until a man was dead. The judge and lawyers who participated in his trial never got to the bottom of the matter. They never knew about the sexual abuse, nor of the frustration of being an "Indian"⁵⁵ in a foreign

⁵⁵The 1982 Constitution Act defines Aboriginal peoples as the "Indian, Inuit, and Metis". Tracing the linguistic roots of the word *Aboriginal* indicates that one meaning of *abo* is "off, away, from". (This was brought to my attention by Professor Nicholas Deleary who at that time was teaching at the University of Sudbury.) We are not people who are away from the original. We are the original peoples, the First Nations of this land. "Indian" has a strictly legal definition as it is found in the *Indian Act*. However, as I grew up the word we used was "Indian". Shortly after I began my academic studies, I learned that even deciding what to call myself was a dilemma in itself. Am I Aboriginal, Native, Indian? As a matter of personal preference, I will use "First Nations" or "original peoples". This dilemma is not only symptomatic of the "divide and conquer" colonial mentality (with Columbus "discovering" America), but also illustrates the dimensions of our struggle, even, to be.

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environment.

It is only Cameron Kerley who must bear the legal and moral responsibility for the life he took. Today, he sits in his prison cell, alone:

Cameron Kerley looks older than twenty-two, and wearier than a young man should. On bad days he wishes he'd never been born. On good days he dreams of another life, "a house, a job, a car, some quiet place in the country." He's convinced that someday, somehow, he'll find a place where he belongs.⁵⁶

When social institutions and legal processes fail, where do we place the responsibility? This is only the first question that must be asked about the Cameron Kerley case. Who stops to ask how many other First Nations children there are like Cameron Kerley?⁵⁷

Statistical data indicates clearly that the situation for First Nations children in Canada is bleak. The most recent comprehensive data available was collected in 1977. It is estimated that there are 15,500 First Nations children in the care of the child welfare authorities (this includes status Indians, non-status Indians, and Métis children). Twenty

As this chapter deals specifically with "Indian" child welfare matters, I have not changed the language from First Nations. Issues of child welfare are also important in Métis and Inuit communities. However, the legal framework has unique elements for each of the Métis, Inuit and Indian.

⁵⁶Ray Aboud, "A Death in Kansas", *Saturday Night Magazine* (April 1986), 39.

⁵⁷Please refer to Geoffrey York, *The Dispossessed: Life and Death in Native Canada* (Boston: Little Brown and Company, 1990) and in particular chapter 8, "From Manitoba to Massachusetts: The Lost Generation". The author tells the story of a young Métis woman who is located by her family in Boston. It is a long way from Camperville in northwestern Manitoba to the eastern sea coast of the United States. But this is Lisa's child welfare journey. There are many similarities in Cameron's and Lisa's stories including the sexual abuse they survived at the hands of their adoptive fathers (at page 201).

per cent of the total number of children in care in Canada are First Nations children. The First Nation population in the western provinces is larger, and the over-representation of children in care is also greater. Thirty-nine percent of the children in care in British Columbia are First Nations children; the figures are 44 percent in Alberta, 51.5 percent in Saskatchewan, and 60 percent in Manitoba.⁵⁸ In contrast, the First Nations population of Canada is approximately 3.5 percent of the total population.⁵⁹ First Nations children are clearly over-represented within the child welfare system. There are no indications that the situation is improving.

Not only are the First Nations children more likely to be apprehended, but, once they are taken into care, First Nations children are less likely to be either returned to their parents or placed for adoption. If a First Nations child is placed for adoption or placed in a foster home, it is unlikely that such a home will be a First Nations home.

⁵⁸H. Phillip Hepworth, *Foster Care in Canada* (Ottawa: Canadian Council on Social Development, 1980), 112. It was impossible to locate complete statistics more recent than 1980 on the issue of First Nations and child welfare. Is this an indication, in itself, of the importance Canadian social agencies place on this problem?

⁵⁹Michael Asch, *Home and Native Land: Aboriginal Rights and the Canadian Constitution* (Toronto: Methuen, 1984). As Michael Asch indicates, this is a difficult figure to calculate. Not only is there confusion as to the definitional limits of who is Native, as indicated above, but census figures only recently (1981) included questions regarding Native ancestry. Michael Asch relies on figures provided by the Secretary of State and claims that the two percent figure determined by the 1981 census is too low. He estimates that there are approximately 840,000 Native people in Canada.

Only 22 percent of such placements are with First Nations.⁶⁰ The effect of the child welfare process is to remove and then seclude First Nations children from their cultural identity and their cultural heritage.

The historical failure of legislative bodies and the courts to protect or respect the cultural identity of First Nations children has been identified in the literature as a disregard of the "indigenous factor." The unique character of First Nations children as members of a specific class is under-emphasized, undervalued, or ignored in child welfare matters. This situation requires a response that is particular to the needs of First Nations children, rather than one that is general to the needs of all children.⁶¹ The disregard of the "indigenous factor" within the Canadian child welfare system is merely a reflection of the position of First Nations within Canadian society. The pressure to assimilate (i.e., to disregard the importance of the "indigenous factor" in your own life) is immense. This places tremendous psychological burdens on First Nations children, families, and communities. First Nations communities believe that their future and the survival of the traditional ways depends on children. When children of original ancestry are removed from their homes and communities:

The traditional circle of life is broken. This leads to a breakdown of the family, community, and breaks the bonds of love between the parent and the child. To constructively

⁶⁰Patrick Johnson, "The Crisis of Native Child Welfare", *Native People and the Justice System in Canada* (C.L.A.B., 1982), 176.

⁶¹Emily Carasco, "Canadian Native Children: Have Child Welfare Laws Broken the Circle?", *Canadian Journal of Family Law* 5 (1986), 111. Emily Carasco introduced the term "indigenous factor". I am indebted to her work on race discrimination in the child welfare system.

set out to break the Circle of Life is destructive and is literally destroying Native communities and Native cultures.⁶²

Removing children from their homes weakens the entire community.⁶³
Removing children from their culture and placing them in a foreign culture is an act of genocide.⁶⁴

The failure to recognize the importance of the "indigenous factor" is not limited to the child welfare system and the corresponding legal decisions. The "indigenous factor" is ignored throughout the entire judicial system in matters which involve First Nations people or issues. First Nations people are also over-represented within the criminal justice process. Criminologists have long recognized the relationship between family breakdown and delinquency. Troubled children get involved in the criminal justice process. In a study of a single community where probation and court records were examined, it was found that 39 percent

⁶²Jessica Hill, *Remove the Child and The Circle is Broken* (Thunder Bay: Ontario Native Women's Association, 1983), 55.

⁶³At a recent conference, a woman from British Columbia spoke about her experiences and the impact of residential schools. She asked us to imagine a community without children for 30 years. She asked us to imagine the pain of her grandmother. This image has stayed with me.

⁶⁴Genocide is a crime at international law. See the *Convention on the Prevention and Punishment of the Crime of Genocide*, 78 UNTS 277. The convention was adopted by the United Nations General Assembly, 9 December 1948. It was entered into force on 12 January 1961. Canada signed this convention on 28 November 1949. The United Nations definition of genocide requires there to be an intent to destroy the culture of a people before an act of genocide is recognized. That lack of intention completely excuses this offense in the eyes of the law, is completely unsatisfactory. Genocide is a situation where a people's way of life has been destroyed. This is the reality that justice must now begin to address. This is also the position of the British Columbia Native Women's Society. See Johnson, *supra*, 62.

of the sample were First Nations children, even though the total First Nations population in the area was only 10 percent.⁶⁵ The over-representation of Native people does not end with juvenile justice statistics. In Kenora, Ontario, the waiting list of fine defaulters convicted of liquor offenses could fill up the local jail four times over.⁶⁶ Sixty-six percent of fine defaulters are of original ancestry, and First Nations people are twice as likely to default on fines as are Euro-Canadian people.⁶⁷ The incarceration of First Nations people is reaching crisis proportions. Quite expectedly, studies of the federal penitentiaries reveal that 10 percent⁶⁸ of inmates are of original ancestry.⁶⁹

Indeed, the over-representation of First Nations peoples within

⁶⁵Carol Pitcher LaPrairie, "Native Juveniles in Court: Some Preliminary Observations", in *Deviant Designations: Crime, Law and Deviance in Canada*, ed. Thomas Fleming and L.A. Lisano (Toronto: Butterworths, 1983), 343.

⁶⁶Stan Jolly, *Anicinabe Debtors Prison* (Toronto: Ontario Native Council on Justice, 1983), 58.

⁶⁷John Hagan, *The Disreputable Pleasures* (Toronto: McGraw-Hill Ryerson Limited, 1977), 172.

⁶⁸Personal experience indicates that this figure is probably low. In the Ontario region, the federal penitentiary population may be as high as 20 to 25 percent original ancestry. About thirty of the one hundred and twenty women in the Prison for Women are First Nations women. Statistics cited are likely low due to the failure of the court process to regularly consider the "indigenous factor" and cultural identity as relevant factors at trial or sentencing. Thus First Nations people are not identified. Secondly, once in prison, being a First Nations individual carries additional costs, and many chose not to identify themselves officially to prison authorities as First Nations people. The common difficulties with collecting data on First Nations people also operates here.

⁶⁹James S. Frideres, *Native People in Canada: Contemporary Conflicts* (Scarborough: Prentice Hall Canada, 1983), 182-83; J. Rick Ponting and Roger Gibbins, *Out of Irrelevance: A Sociopolitical Introduction to Indian Affairs in Canada* (Toronto: Butterworths, 1980), 58.

institutions of confinement - be they child welfare institutions, provincial jails, or federal prisons - is part of a vicious cycle of abuse. Cameron Kerley was trapped in this vicious cycle, and he is but one example of how the dominant culture in Canada is grinding down the people of the First Nations.⁷⁰

This vicious cycle of abuse is the subject of the Canadian Bar Association's report entitled *Locking up Natives in Canada*.⁷¹ The report does not focus principally on criminal justice institutions or even on First Nations prisoners. It is a detailed analysis of the models available to establish tribal courts. The conclusion of this report is simply that the jurisdiction and the control over matters of criminal justice must be meaningfully assumed by First Nations. It is in this way that the over-representation of First Nations citizens in Canadian institutions of incarceration will be alleviated. The report traces the problem of over-incarcerating First Nation's citizens to a failure to recognize the sovereignty of the First Nations in any meaningful way.

I am deliberately connecting child "welfare" law with the criminal "justice" system. From the perspective of a traditional First Nations woman, I see the child welfare system as being on a continuum with the criminal justice system. The child welfare system feeds the youth and

⁷⁰The degree of harm being inflicted on First Nations citizens as our plight is made visible is to effectively make invisible the private lives of those individuals who bravely speak out. We must make public our private lives. No amount of social change discounts the pain those particular individuals carry who become the symbols of our struggle. To Cameron Kerley, an apology for this further invasion into his private life.

⁷¹Michael Jackson, *Locking Up Natives in Canada* (Toronto: Canadian Bar Association, 1988).

adult correctional systems. Both institutions remove citizens from their communities, which has a devastating effect on the cultural and spiritual growth of the individual. It also damages the traditional social structures of family and community. Both the child welfare system and the criminal justice system are exercised through the use of punishment, force, and coercion.

As a First Nations woman, my worldview⁷² does not revolve around the acceptance of punishment or the validation of force and coercion. Instead, it revolves around balance. The spiritual ceremonies and traditional teachings given by the Elders⁷³ involve instruction about who we are as individuals and as members of a nation. These holistic teachings involve education, spirituality (you say, religion), law (we say, living peacefully), family, and government. Holistic means to be connected. The earth is mother. The sky is father. Woman is earth and earth is woman. They are inseparable. The traditions in no way involve a hierarchical ordering. There exists a natural balance between women and men in the way of creation. It is the woman who stands at the

⁷²I recently attended a workshop where I had the opportunity to discuss philosophy, tradition, and culture with Lee Maracle, the author of *I Am Woman* (Vancouver: Write-On Press Ltd., 1988). In her view, culture is the way we do things. Philosophy is what we carry around inside us (the values of consensus and cooperation) that shapes our culture. This philosophy is what First Nations individuals are born with. This points then, to the fallacy of the assertion that one's culture can be destroyed or one can be truly assimilated.

⁷³It is impossible to capture the essence of traditional ways in a moment or on paper. It is a lifelong commitment to learn these ways. For fear of being misunderstood, or worse, it is with great hesitancy that I speak of ceremonies. What I have given is a simplistic rendition of ceremonies because I have not earned the right to conduct any ceremony. What is given are my views and feelings.

centre of the nation because women are the caretakers of children. The children are first women's responsibility. Before this can be understood, the role and meaning of caretaker must be understood.⁷⁴ Spiritually, women are more fortunate than men, especially in this modern society where the role of provider has substantially dwindled in importance or been confused through social welfare programs and women's developing economic power.⁷⁵ As women, we know who and what we will be when we grow up. We will be mothers, and mothers have even today primary responsibility for children.⁷⁶ It is in this way that Aboriginal women's roles remain clearer than the roles of our men.

The structure of First Nation's society is based on cooperation and consensus. When difficulties arise within a community, the community responds by attempting to bring the person who is the source of the difficulty back into the community. This process naturally involves all

⁷⁴The way in which First Nations see our relationship to land is very different from western concepts. Land is not "owned" - the Creator put the people of the First Nations here to be the caretakers of the land. Considering our relationship to land will help bring a simple understanding of women's role as caretakers.

⁷⁵In today's society our roles and responsibilities as given to our nations have become confused and forgotten as we become more involved in the structures of the dominant society where sex roles have become de-gendered. My comments are not intended to de-value the important, positive, and necessary accomplishments of women in this country.

⁷⁶This is a source of political conflict between First Nations women and the larger women's movement, which in my experience tends (I am generalizing) to minimize the role of mother as well as the responsibilities of women. I do recognize that the distance between the contemporary women's movement and First Nation's women has narrowed as the women's movement has begun to grapple with the concept of white privilege. Black women were instrumental in forcing this shift. See bell hooks, *Ain't I Woman: Black Women and Feminism* (Boston: South End Press, 1981).

parties - the parents, the child, the relations, and the Elders. In a criminal matter, the offender, the victims, and the Elders are all naturally involved. The aim and the result is to restore balance in the community which includes balance in the relationships among the individuals involved. In the case of child welfare, no parent is left believing he or she is a "bad" parent. Nor is any child alienated from the family or community. In a community which operates on norms of consensus and cooperation, the collective's rights are the focus. By contrast, the structures of the dominant society, where the philosophy of punishment is paramount and force and coercion are validated, there are winners and losers. As the dispossessed people of this land, First Nations citizens will continue to be the losers.

Whatever the issue, be it child welfare, criminal justice, family violence, alcohol and drug abuse, lack of education or employment, the same path can be traced to a conflict in the basic values of the two societies - force and coercion versus consensus and cooperation. This realization, then, can take us to only one conclusion: First Nations demands for self-determination (sovereignty)⁷⁷ must be realized. Drastic reforms are necessary both within the legal system and child welfare policy regimes as they affect First Nations citizens. What is not generally recognized is that to accept and advocate only legislative

⁷⁷Traditional Mohawk people assert that we have never lost or surrendered our sovereignty. Sovereignty has a meaning that is not synonymous with the western definition. To be sovereign is one's birthright. It is simply to live in a way which respects our tradition and culture. Sovereignty must be lived, and that is all. The traditional Mohawk perspective on sovereignty cannot be simply understood and accurately explained in a few words.

changes to the laws of child welfare is not the final solution.⁷⁸ To advocate only piecemeal changes to legislative structures is to effectively accept that the lives of First Nations individuals who fall prey to the instruments of the child welfare system will not substantially change. There has been only nominal change in the statistics reflecting the involvement of First Nations citizens in both child welfare process⁷⁹ and the criminal justice system⁸⁰ over recent decades. The failure to fundamentally shift the situation is the first indicator that piecemeal legislative reforms are not the singular solution. Failure to meet this

⁷⁸There are two levels at which change must be effected. Legislative changes over the last decade which legitimize the First Nations control of child welfare have begun to alleviate the suffering of our First Nations children, families, and communities. But the long term picture has not changed. The structural effects of the systems of the dominant society on First Nations must become part of our analysis and solution. For an examination and discussion of the child welfare initiatives which have taken place, see David R. James, "Legal Structures for Organizing Indian Child Welfare Resources", *Canadian Native Law Reporter* 2 (1987), 1-20; Johnston, *supra*; John A. MacDonald, "Child Welfare and the Native Indian Peoples of Canada", *Windsor Yearbook of Access to Justice* 5 (1985), 284-305.

⁷⁹In discussions with a representative of the Child Services Branch of the Ministry of Community and Social Services, it was agreed that recent statistics on child welfare are not available or accessible. For status Indian children who are crown wards, the number of adoptions has decreased from 86 in 1980 to 35 in 1987. It cannot be assumed this is a clear indicator that the situation is improving, because these figures do not include Métis, Inuit and non-status adoptions. Adoptions of non-crown wards (i.e., those adoptions informally arranged between consenting parties) are also excluded. The Ministry provides that there is "no guarantee that's what happened." The proportion of status Indian children adopted into status Indian families has increased from 27 percent in 1980 to 37 percent in 1987. The Ministry is not satisfied with this increase, claiming it is still not a satisfactory situation. The same cautions to the interpretation of these statistics also apply.

⁸⁰The disproportionality of First Nation's federal prisoners is also increasing and the situation is expected to intensify given the higher birth rate in First Nations communities. See *Correctional Law Review*, *Correctional Issues Affecting Native People* (Working Paper No. 7) (Ottawa: Solicitor General, 1988), 3.

challenge will continue to result in further piecemeal legislative reforms. The inevitable consequence will be the genocide of First Nations people.

If the premises presented thus far are correct, and I believe they are, they necessitate a reconstruction of the way in which we understand what has happened as First Nations have come in contact with dominant institutions. We must peel back the layers of misunderstanding of both the dominant culture and First Nations culture which currently shape our cross-cultural (mis)communications. This requires an extensive examination of the meanings underlying dominant social structures, including legal institutions and their traditions.⁸¹ It is also necessary to recognize how the concepts of the dominant society conflict with or contradict those of First Nations social structure as well as where there is common ground. If individuals who belong to a specific group are unable to accept the underlying values - such as force and coercion - of the dominant social system, they will never be able to participate fully in it.

Inviting people of the First Nations to the table to discuss the definitional structures and assumptions which underpin the dominant social systems is not a new idea. In 1966, the Hawthorne Report

⁸¹Our teachings advocate that we must understand where we have come from (past), who we are (present), and where we are going (future), before we as individuals or nations can be complete. In striving to understand meaning we must encompass these three states or processes. A similar position is now being advanced by a few feminist writers. See Kathleen A. Lahey, "Feminist Theories of (In)Equality", in *Equality and Judicial Neutrality*, ed. Sheilah L. Martin and Kathleen E. Mahoney (Toronto: Carswell, 1987), 71-85. Because my analysis involves on its periphery a glimpse at ideologies of law, see also Shelley A. M. Gavigan, "Law, Gender and Ideology", in *Legal Theory Meets Legal Practice*, ed. Anne f. Bayefsky (Edmonton: Academic Printing and Publishing, 1988), 283-295.

examined the plight of First Nations people in Canada in search for a solution. "The public concern about the Indians and the public knowledge of their problems that would demand a change are scanty and uneven. Public knowledge does not even match public misconception. Not enough is known of the problems to create a call for their solution."⁸² In 1980, a conference on social development cited as a "national tragedy" the plight of First Nations children within the child welfare system. Further, the situation of First Nations children was cited as the single greatest problem confronting the child welfare system in Canada in the 1980's. Federal government officials also agree, calling the access to child welfare and preventive services for First Nations people as "being grossly inadequate by any recognized standard."⁸³

Between the 1960's and the 1980's, little meaningful change has been accomplished. More than twenty years of First Nations children continue to suffer. That truth is a reality that First Nations women carry, for we are the ones who continue to watch the children suffer. If we have not yet arrived at a place where there can be an appeal to the general public for a solution, then education of the general public must be part of the solution. It is just part of the solution. We must also educate all individuals employed within the field or reach of the child welfare system. This must include, at a minimum, lawyers judges, social workers, policy makers, academics, scholars, and politicians. It is not

⁸²H.B. Hawthorne, *A Survey of the Contemporary Indians of Canada* (Ottawa: Indian Affairs and Northern Development, 1966), 6.

⁸³Supra., Johnston (1982), 175.

just *for* First Nations that this commitment is necessary. It is for all of us in this society.⁸⁴

I can best participate in this process by exposing the racism⁸⁵ inherent in our legal systems. This is a massive undertaking, because racism extends across all of our legal relations. Yes, racism is a hard word. But racism is woven into our legal system. I have chosen to start with child welfare because First Nations people are taught that our children are our future. It is also the logical starting place for me, as a woman who accepts responsibility for the traditional teachings which show us that we are responsible for seven generations yet to come.

Through the late 1970s and early 1980s, a great deal of the child welfare literature focused on the grave situation which First Nations children were surviving. This academic impetus reflected the lobbying efforts of First Nations coalitions and political bodies (undertaken within the larger society) to effect change in child welfare regimes. The cumulative efforts of these First Nations individuals were successful in

⁸⁴An example which is easily understood and demonstrates this point is the environmental crisis the world now faces. All nations must work together for this resolution or we will all face destruction. If First Nations teachings that all life is to be valued (the trees, animals, birds, plants, are all my sisters and brothers) had been followed, we would not be facing the potential destruction of the earth, our mother.

⁸⁵The devaluation of the "indigenous factor" in child welfare cases has already been mentioned. What has not been said is that the "indigenous factor" is a soft way of referring to the racism inherent not only in child welfare structures, but in the laws and cases regarding child welfare. It is necessary to understand the racism identifiable in legal processes and institutions. The case law of child welfare is only one example. Piecemeal reforms to legislative structures without changing the fundamental racist notions which underpin these laws only allows for a significant change in the *manner* which racism is constituted and implemented within legal structures - it cannot eliminate it.

securing a number of initiatives meant to address the crisis in child welfare. The Spallumcheen Indian Band by-law is the most well known of the initiatives secured by the hard work and dedication of members of that specific Band.⁸⁶ Both the federal government and numerous provincial governments have been involved in the negotiation of bipartite and tripartite agreements which primarily resolve disputes between levels of government and their respective financial and constitutional responsibilities.⁸⁷ These negotiations and agreements secured by the lobby of First Nations principally addressed the complete void of prevention services available to First Nations. The services secured by these efforts had been made available to all other Canadian parents and their children for many years. First Nations were excluded from receiving prevention services because of a jurisdictional dispute between federal and provincial governments which resulted in the provision of emergency services only to all children resident on Indian reserves. It must be wondered how many child apprehensions would have been unnecessary if preventive services would have been provided to First Nation families.

The history of child welfare and First Nations has been

⁸⁶A discussion of the by-law is contained in *supra.*, MacDonald, 75-95.

⁸⁷The most rigorous source which examines the situation in each province is Johnson, *Child Welfare System*. For an example of a tripartite agreement, see the Canada-Manitoba-Indian Child Welfare Agreement, [1982] 2 *Canadian Native Law Reporter*, 1-33. The Manitoba agreement led to the creation of a number of Indian controlled child welfare agencies. The establishment of Indian controlled agencies has not fully solved the problem, please see Marlyn Cox and Wally Fox-Decent, *Children First, Our Responsibility: Report of the First Nation's Child and Family Task Force* (Winnipeg: First Nation's Child and Family Task Force, 1993).

fundamentally shaped by the jurisdictional disputes between federal and provincial governments. The resolution of the jurisdictional dispute merely released First Nations children who were trapped in a void between the federal government and individual provincial governments as they argued over legislative and financial responsibilities. It did not, however, improve services for First Nations children.

The outright denial of child welfare services to the First Nations except in "life threatening"⁸⁸ situations precipitated the outcry which is reflected in the literature of the 1970s and 1980s. The outcry was further fueled by the removal of children from their cultural community when they were deemed children in need of protection - children such as Cameron Kerley. The denial of services except in emergency was sustained by the "jurisdictional dispute".⁸⁹ "Indians and Lands Reserved for Indians" is a head of federal authority under section 91(24)

⁸⁸Carasco, "Broken Circle", 116.

⁸⁹The resolution of the jurisdictional dispute required judges to interpret and finalize the legal meaning of section 88 of the *Indian Act*, R.S.C. 1970, c.I-6. Section 88 states that provincial laws of general application apply to status Indians, subject to exceptions which give precedent to treaty guarantees and the provisions of the *Indian Act*. The case of *Natural Parents v. Superintendent of Child Welfare* (1975), 60 D.L.R. (3d) 148, provides a detailed discussion of the possible interpretations of section 88 and its potential ramifications on the situation of First Nations child welfare. This case, however, did not finally resolve the interpretation of that specific provision. The Supreme Court of Canada in *Dick v. The Queen* (1985), 23 D.L.R. (4th) 33, provides that section 88 incorporates provincial laws which would otherwise not be applicable to status Indians because it touches on their "Indian-ness", which would otherwise be a head of power under federal authority. This issue is already adequately presented in the literature. See Carasco, "Broken Circle", 115 - 121; Johnston, *Child Welfare System*; and Kent McNeil, *Indian Child Welfare - Whose Responsibility* (Saskatoon: Legal Information Service, University of Saskatchewan Native Law Centre, 1984), 1-2 and 4-11. Kent McNeil's article also contains a useful and comprehensive review of the jurisprudence on child protection and adoption of First Nations children.

of the *Constitution Act, 1867*. Child welfare is a responsibility of provincial governments. Indian child welfare spans both these areas of government responsibility (the federal government is responsible for Indians, the provinces for child welfare) each level of government has been able to point at the other as responsible while denying their own accountability. Instead of receiving twice as much attention, Indian child welfare matters received none.

Both levels of government have historically exploited the contradictory distribution of their legislative powers to voice only their own lack of responsibility for child welfare services to the First Nations. In some provinces, individual judges⁹⁰ have been effective in resolving the unwillingness of either level of government in initiating responsibility. In a Manitoba decision, Judge Garson is explicit in citing the provincial government as the body responsible for Native child welfare.⁹¹ He lays the foundation for his judgment with this quotation from the Hawthorne Report:

An evaluation of Indian status and the consequences which have been attached to it by governments make crystal clear that there is a remarkable degree of flexibility or play in the roles which have been, and in the future could be, assumed by either level of government. For the entire history of Indian administration, this play has been *exploited to the disadvantage of the Indian*. The special status of Indian

⁹⁰The manner in which the British Columbia courts resolved this issue, as discussed by the Supreme Court of Canada, can be found in *Natural Parents*, supra, 148.

⁹¹This contradicts the view of many First Nations. Over the years, various National First Nations groups have repeatedly requested the federal government legislate national standards.

people has been used as a justification for providing them with services inferior to those available to the Whites who established residence in the country, which was once theirs.⁹²

Judge Garson follows the strong words of the Hawthorne Report with strong words of his own:

[T]he court would fail in its special responsibilities if it did not bring to public attention and scrutiny action or conduct by government allegedly justified by constitutional law that is *in reality, in truth and in law, unfair, discriminatory and unlawful*.⁹³

Judge Garson concludes that it is absolutely clear that child welfare services to treaty Indians are a provincial service which must be offered to treaty Indians in the same manner as all other residents of Manitoba.

The case demonstrates that First Nations people will indeed turn to the judiciary for resolution of issues when the political process and Canadian governments willfully fail to address them. With the entrenchment of Aboriginal rights in section 35(1) of the *Constitution Act, 1982*,⁹⁴ the role of judges will be of even more importance. Assuming that judicial intervention will be fair, will it be enough? Ironically, the strong position that Judge Garson took on the jurisdictional issue in this case did not return the children to the care of

⁹²H.B. Hawthorne, *Contemporary Indians*, 253, cited in the *Director of Child Welfare for Manitoba v. B.*, [1979] 6 W.W.R. 229 (Man. P.J.C.), 238.

⁹³*Ibid*, 238 (emphasis in original).

⁹⁴The Supreme Court of Canada at the time of original writing of this article had yet to provide any clear guidelines to assist lawyers and legal scholars with the meaning of this section. In May of 1990, the Supreme Court articulated its view of section 35(1) in *Regina v. Sparrow* (1990) 70 D.L.R. (4th) 385.

their mother (or her family). The mother's parenting skills were so deficient that not even preventative child welfare counseling and parental skill development would now help. One wonders whether this would have still been the case if the jurisdictional dispute had not prevented the provision of services since the birth of the child.

A second irony becomes apparent when the Manitoba case is put into historical perspective. The Hawthorne Report, commissioned by the federal government, was published in 1966. It condemned government policies which effectively precluded the First Nations from receiving child welfare resources that are available to all other Canadians. Some thirteen years later when this Manitoba case was decided, the jurisdiction issue was still not resolved and First Nations still did not receive child welfare services. This failure to provide child welfare services is an important historical fact which should not be easily forgotten or brushed aside. It would be a mistake to ignore the negative manner in which the jurisdictional dispute has shaped our present. In reality, it will take child welfare authorities many years to heal the damage created by the denial of jurisdiction by both levels of government, in both the minds of the First Nations and in the real lives of First Nations children.⁹⁵

⁹⁵For a similar type of analysis involving hunting and property cases, see Louise Mandell, "Native Culture on Trial", in *Equality and Judicial Neutrality*, ed. Sheila L. Martin and Kathleen E. Mahoney (Toronto: Carswell, 1987), 358-265. Perhaps the most eloquent rendering of First Nations understanding of law and legal relations is found in Oren Lyons, "Traditional Native Philosophies Relating to Aboriginal Rights", in *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights*, ed. Menno Boldt and J. Anthony Long (Toronto: University of Toronto Press, 1985), 19-23. It is interesting in child welfare matters to note that notwithstanding the jurisdictional dispute, provincial governments have very

First Nations distrust the child welfare system because it has effectively assisted in robbing us of our children and of our future. The distrust is further complicated by the adversarial process itself, which is antithetical to the First Nations consensus method of conflict resolution. Judicial decisions on child welfare reinforce the status quo by applying standards and tests which are not culturally relevant. This is a form of racism.⁹⁶

These racist standards and tests of child welfare law were developed by judges. The most important test is the "best interests of the child". The racist content of this test is not difficult to see. In *Racine v. Woods*,⁹⁷ Madame Justice Bertha Wilson wrote for the Supreme Court of Canada: "the law no longer treats children as the property of those who gave them birth but focuses on what is in their best interests."⁹⁸ This is the first level of misunderstanding in the laws regarding Canadian children. First Nations laws never were constructed on a view that saw children as property. What is viewed as progress in Canadian courts and law is a source of bemusement for First Nations.

willingly asserted their authority under section 88 to limit the hunting and fishing rights of the First Nations. This contradictory position has not previously been commented on in the legal literature, but it has not been missed by First Nations.

⁹⁶This article is not intended to be an ideological analysis of racism. I do not view racism as behaviour or attitudes which require intent or ill-will. Allegations of racism do not call into question the integrity of the individuals involved, but merely reflect a state of not knowing. My purpose is to expose racism and secure personal examinations of the privilege conferred by merely having white skin.

⁹⁷[1983] 2 S.C.R. 173.

⁹⁸*Ibid*, 174.

The case of *Racine* involved a status Indian child who was made a ward of the children's Aid Society of Manitoba with the consent of the mother. At the time of trial, the child was seven years old, and the non-Indian⁹⁹ foster parents had applied for her legal adoption - against her mother's will. Since the time the mother had given custody of her child to the Children's Aid Society, she had left an abusive relationship,

⁹⁹Since originally writing this article, I have learned in conversation with a relative of the adoptive parents that the one of the parents (the father) who adopted this child were Métis. It is more than curious to me that this is not apparent on reading the case. The race and culture of the adoptive parents is invisible in the case. It must be noted that there is a difference in culture between Indians and Métis. Indian and Métis cultures are more similar to each other than to "Canadian" (White) culture. I am not certain what conclusions to make regarding the disappearance of the adoptive parents culture and race. I do not know at what stage of the legal process this is dissappeared. It could have been a dceision of the adoptive parents or the adoptive parent's lawyers to not mention their cultural background or it may have been over-looked at any level of the court's decision making process. From reading the case, it is impossible to determine the connection the adoptive parents have to their cultural identity and this is one of my difficulties in processing this new information. I also have learned that the adoption was not a "successful" one. The child in question has had problems with substance abuse and has been in conflict with the law. I do not know if she is in contact with her mother or her home community.

I have thought alot about this disappearance of the cultural identity of the adoptive parents for a long time since first learning of it in the summer of 1994. It lends itself to two other very interesting discussions. In both Canadian culture and Canadian law, Métis peoples have been consigned to a half-existence. This is insulting. They are seen as half-Indian and half-White which amounts to never any more than half-person. This does no justice to the distinct position that the Métis hold in Canadian history (for example, as the founders of the province of Manitoba). This does no justice to the beautiful and distinct cultures of the Métis. The disappearance of Mr. Racine's Métis culture for whatever reason is a small reflection of a larger experience of the Métis as a nation.

The second discussion of the disappearance of Mr. Racine's culture is seen in a comparision of the structure of Canadian law against the structure of Aboriginal law. First Nations are story telling people. Our stories are more than oral history. Oral history is just one aspect of the stories of Aboriginal people. Stories also contain teachings of both morality and law. Stories as a process are complete. Canadian law also tells stories and the control for the process of story telling in legal circles is lifted away from those directly involved. The stories heard in court are never complete.

recovered from alcoholism, re-educated herself, established a home on her reserve, and begun a teaching career. The mother believed that her daughter should grow up within her own culture and tradition.¹⁰⁰ The Supreme Court of Canada effectively refused to take this belief seriously, and based their decision on the "best interests of the child" test.¹⁰¹

Psychological evidence was presented at trial. The position of the adoptive parents was advanced by testimony which concluded the child's best interests are met by the bonding which occurs with parents and the security of the established home. The natural mother's position was bolstered by psychological testimony which indicated the importance of cultural ties, especially during adolescence.¹⁰² After balancing both sets of interests, Madame Justice Wilson concluded:

In my view, when the test to be met is the best interests of the child, *the significance of cultural background and heritage as opposed to bonding abates over time*. The closer the bond that develops with the prospective adoptive parents the less important the racial element becomes.¹⁰³

¹⁰⁰Ibid, 175-177.

¹⁰¹Similar reasoning and reliance on the best interests test is followed in *Nelson v. Children's Aid Society of Manitoba*, [1975] 5 W.W.R. 45 (Man.C.A.), although no specific reference is made to the children's race (it is totally ignored) in relation to the best interests test.

¹⁰²Ironically, the mother's worst fears were realized, conflict with the law was the outcome in this case. This points to the fact that the issues in the "culture versus bonding" debate are greater than they initially appear. Culture without a connection to your First Nation community and place in the universe can alone be insufficient. The issues that are simplistically dealt with as First Nations culture are actually vast and complex. They can not be measured at a moment in a person's life.

¹⁰³Supra., *Racine*, 188.

There is evidence that the importance of heritage does not abate over time.¹⁰⁴ The assertion that the importance of heritage abates over time really reflects a belief in the value and certainty of the assimilation of First Nations. This belief is not grounded in First Nations tradition and culture, but is a reflection of both government policy and "White" values which are the values that Canadian courts are constructed upon.¹⁰⁵ It is a belief that conceptualizes and prioritizes the rights of individuals (adopting parents) over collective rights (the right to culture). And it is a test that effectively forces the assimilation and destruction of First Nations people. This issue is a larger issue than courts generally are willing to hear. It is not about the facts of the case or the narrow legal issues that arise. It is about the very process and structure of the courts and the way judges make their decision. It is systemic racism.¹⁰⁶

¹⁰⁴See for example, Ann McGillivray, "Transracial Adoption and the Status Indian Child", *Canadian Journal of Family Law* 4(1985), 437-467.

¹⁰⁵See, for example, Sally M. Weaver, *The Hidden Agenda* (Toronto: University of Toronto Press, 1981).

¹⁰⁶Mr. Justice Martland took a similar approach in a British Columbia case, *Natural Parents*, which involved the legality of inter-racial adoption. Not only did the Supreme Court rule that these adoptions are permissible, but Mr. Justice Martland actually seemed to suggest that they ought to be valued: "I do not interpret section 92(24) as *manifesting an intention to maintain a segregation of Indians from the rest of the community* in matters of this kind and, accordingly, it is my view that the application of the *Adoption Act* to Indian children will only be prevented if parliament, in the exercise of its powers under this subsection, has legislated in a matter which would preclude application", *Natural Parents*, supra, 148 at 164 (emphasis added). This position also amounts to racism. It is important to note that the best interest test as applied in the *Racine* and *Natural Parents* cases affects *all* children, regardless of their racial heritage. The test was developed in two cases which involve First Nations children and the unique circumstances they face. It is possible that a test developed on facts unique to First Nations children could also impact on First Nations children in negative way,

The evidence relied on in the *Racine* case to resolve the issue of race is instructive. Madame Justice Wilson relies on the expert testimony of Dr. McCrae to validate her position; the words she chose to rely on are very telling:

I think this whole business of racial and Indian whatever you want to call it... It doesn't matter if Sandra Racine was Indian and the child was white and Linda Woods was white... It has nothing to do with race, absolutely nothing to do with culture, it has nothing to do with ethnic background. It's two women and a little girl, and one of them doesn't know her. It's as simple as that; all the rest of it is extra and of no consequence, except to the people involved of course.¹⁰⁷

In her Supreme Court judgment, Madame Justice Wilson said essentially the same thing:

I believe that interracial adoption, like interracial marriage, is now an accepted phenomenon in our pluralist society. The implications of it may have been overly dramatized by the respondent in this case. The real issue is the cutting of the child's legal tie with her natural mother... While the Court can feel great compassion for the respondent, and respect for her determined efforts to overcome her adversities, it has an obligation to ensure that any order it makes will promote the best interests of her child. This and this alone is our task.¹⁰⁸

Compassion and respect does not excuse or make acceptable the court's inability to contextualize the decision made in *Racine*. The texture of

because the factual basis of the test is not shared. The test may therefore affect other children negatively as well.

¹⁰⁷*Supra.*, *Racine*, 188. It should also be noted the way in which gender and parenting responsibilities are also disappeared. The adoptive father is not mentioned.

¹⁰⁸*Ibid.*

the decision rests on a construction of the world which respects the culture and worldview of only one of the parents.

The *Racine* case is not an isolated instance of the suppression and misinterpretation of First Nations culture. In *Re Eliza*,¹⁰⁹ the court benevolently recognized the importance of recognizing "community differences". But the judge used ethnocentric stereotypes of the "drunken Indian" to shape the definition of "community differences". Provincial Court Judge Moxley referred to habits such as "acceptance of widespread drinking and even drunkenness" and "tolerance to violence while drunk."¹¹⁰ These are not "habits" that are "tolerated" by First Nations communities - they are some of the *realities* of racial oppression. Value judgments such as these reinforce the "blame the victim" approach to First Nations people. Yet judges treat these value judgments as self-evident truths.

Another scathing example of the devaluation of the First Nations tradition and the willingness to blame the victim is found in *John v. Superintendent of Child Welfare*:

Here we have a young Indian girl, born and brought up among her people. She became pregnant. She was upset, confused and worried. One would expect that she should be entitled to feel that she could turn to her own people for help, or at least for some understanding and compassion. But what happened? Her own mother was not interested. Her father did not lift a finger to help her. Her own sister gave no assistance. MacDonald's sister came to see her, but offered her no help. The father of the child was indifferent

¹⁰⁹[1982] 2 C.N.L.R. 47.

¹¹⁰*Ibid*, 54.

or worse. That was the time for him to show that he had fatherly instincts. There is no evidence that one single member of the Indian community offered her a helping hand. Not a relative, nor a counselor, not an Indian chief, no one. One has to feel very sorry for the girl.

If her plight is an example of what happens when one is in trouble, it leaves one considerably unimpressed with the value in such circumstances of the togetherness of the Indian community.

If it is true that an Indian child has a better chance in life by living among his relatives and among others of his race, then I should have thought that it ought to be possible to demonstrate that this is so, by way of some cogent evidence, with particular reference to this child.¹¹¹

The racism in this case stings. The judge has no idea of the context in which to place his judgment. He can see only the inadequacy of the response but does not recognize that the inability to take control is a learned response to racism, colonialism and oppression. There are many teen pregnancies in Indian communities, so many that they are not seen as unusual or a cause for particular concern. Part of this must also be contextualized in the value attached to children which is very different than the dominant society. The judge's understanding must be contextualized in the poverty and alcoholism that exist on reserves. When everyone is suffering and struggling, it is difficult to set aside your own struggle to assist another. It is clear that the judge uses as his standard that which is experienced in his community. This is particularly disturbing as he proceeds as though he understands the Indian community.

¹¹¹[1982] 1 C.N.L.R. 47 at 49.

A further line of cases applies the best interest test to justify the removal of special needs children from the reserve community when those needs cannot be met fully there. These children were found to be in need of protection simply because they had "special needs".¹¹² The health or education needs of children should not be denied on the basis of race. However, both medical and education needs are responsibilities of the federal government under Aboriginal rights, treaty rights, and section 91(24) of the 1867 *Constitution Act*. What is omitted from these discussions is any comment on the requirement of the federal government to meet these children's real needs, which would include the right to reside in their home community.

Judges seem to "regret" removing First Nations children from their communities.¹¹³ They express "compassion and sympathy" for the mother.¹¹⁴ Judges feel compelled to indicate that in previous cases they have ruled "that it was the best interests of the native child to be raised with his or her own native people".¹¹⁵ But these comments do not reach the real harm that is being done by forced assimilation and the removal of our children. Instead, they are patronizing¹¹⁶ and are

¹¹²*McNeil v. Superintendent of Family and Child Services*, [1984] 4 C.N.L.R. 41; *S.A.L. and G.I.L. v. Legal Aid of Manitoba*, [1982] 6 W.W.R. 260, [1983] 1 C.N.L.R. 157; *Wilson and Wilson v. Young and Young* (1983), 28 Sask.R. 287, [1984] 4 C.N.L.R. 185.

¹¹³*Tom v. Children's Aid Society*, [1982] 1 C.N.L.R. 172.

¹¹⁴*Supra*, *John*, 47.

¹¹⁵*Re C.J.W.S.*, [1982] 1. C.N.L.R. 47.

sure flags of racism.

Possibly because disproportionate numbers of First Nations children have been removed from their homes, legislative initiatives in Ontario have attempted to reconstruct the best interests of the child test.¹¹⁷ The legislative reform is described in a discussion paper published by the Ontario government as follows:

The *Child and Family Services Act* also represents a significant and historic break through in services to Indian children and families in Ontario. There are many provisions in the Act specific to Indian children and families. These are unparalleled by any other jurisdiction in Canada. No other province has so clearly recognized the importance of maintaining the cultural environment of children coming into care. The Act provides clear instructions to the court and other persons making orders or determinations in the best interests of the child, that where the child is an Indian person, the person making the order or determination shall take into consideration the importance of preserving the child's cultural identity. The Act also explicitly instructs the court and children's aid societies to place the child, if the child is an Indian person and removal from the home is necessary, with a member of the child's extended family, a member of the child's band, or another Indian family, unless there is substantial reason for placing the child elsewhere.¹¹⁸

These are innovative provisions. They are also intrinsically problematic. Certain protections are offered to "Indian" children and their families.

¹¹⁶I suspect there is a relationship between the patronizing tone of this judgment and the ideologies of the legal system (White, male, and middle class). The doctrine of *parens patriae* (the state as father) also contains the common elements of male superiority and protector of the common good.

¹¹⁷See *Child and Family Services Act*, S.O. 1984, c.55, section 37(2)-(4).

¹¹⁸Ontario Ministry of Community and Social Services, *Tentative Policies for Indian Provisions of the Child and Family Services Act, Parts I-IX* (Toronto: Ministry of Community and Social Services, 1985), 2.

But, the definition¹¹⁹ adopted is the *Indian Act* definition which excludes Métis, urban, and disenfranchised people.¹²⁰ This definition is unacceptable and it is another barrier to reuniting our families. This is the now familiar strategy of divide and conquer: First Nations people are separated from each other and are thereby unable to put forth a common political front. This is another way of perpetrating racism.

Under the auspices of the Ministry of Community and Social Services, Children's Services Branch, the provincial government is currently soliciting the comments of First Nation's groups on proposed amendments to the *Child and Family Services Act*. One of the suggested amendments will bring the definition of "Indian and Native" into line with section 35 of the 1982 *Constitution Act*. Other amendments suggested by the Ministry include funding, band representation, and status reviews.¹²¹ This Ministry has taken some initial positive steps, but further reviews of the implementation of this legislation, especially in the absence of reported court decisions, need to be conducted.

Legislative enactments require the cooperation of judges to facilitate the implementation of the intent of legislative reforms. The existence of the reforms alone is insufficient to secure change. This is

¹¹⁹*Child and Family Services Act*, S.O. 1984, c.55, section 2(15).

¹²⁰Interestingly, the academic literature does not discuss this issue or the new Indian provisions in detail. Personal experience and informal discussion with Native family court workers indicate that a concern that non-reserve residents are being excluded from the interpretation of these new provisions is valid.

¹²¹Ministry of Community and Social Services, *Amendments Proposed to the Indian and Native Sections in the Child and Family Services Act, 1984* (Toronto: Ministry of Community and Social Services, September 1988), 1-4

illustrated in the only reported case involving the amendments to the *Child and Family Services Act*, the provincial court judgment in *Re Catholic Children's Aid Society of Metropolitan Toronto and M.*¹²² In that decision, the judge merged sections 53(4) and 53(5)¹²³ of the legislation in order to emphasize the alternative of wardship over adoption in the case of Indians and Native children.¹²⁴ This has effectively shifted the burden in the best interests test¹²⁵ from bonding and forced it directly onto racial heritage. On appeal, the district court¹²⁶ set aside this wide reading of the child protection provisions even though it affirmed the decision of the lower court on the facts.¹²⁷

¹²²(1986), 57 O.R. (2d), 551.

¹²³These sections read as follows:

53(4) Where the court decides that it is necessary to remove the child from the care of the person who had charge of him or her immediately before intervention under this Part, the court shall, before making an order for society or Crown wardship under paragraph 2 or 3 of subsection (1), consider whether it is possible to place the child with a relative, neighbour or other member of the child's community or extended family under paragraph 1 of subsection (1) with the consent of the relative or other person.

53(5) Where the child referred to in subsection (4) is an Indian or native person, unless there is a substantial reason for placing the child elsewhere, the court shall place the child with,

- (a) a member of the child's extended family;
- (b) a member of the child's band or native community; or,
- (c) another Indian or native family.

¹²⁴*Ibid.*, 553-54.

¹²⁵There are no reported cases which review the meaning of sections 37(3) and 37(4) of the Act.

¹²⁶*Supra*, *Re Catholic Children's Aid Society*, 535.

¹²⁷*Ibid.*, 538.

If the legislative intent behind these amendments was to shift the balance in the best interests test, this judgment nonetheless relies on the old standards and thereby reaffirms the status quo. As such, it is just one in a long line of examples of a pattern familiar to First Nations people. Judicial reaffirmation of the status quo not only nullifies the intent of the new legislative regime, but also emphasizes that legislative reform is not in itself, sufficient to solve problems that have been caused by centuries of domination.

CHAPTER FOUR

A FIRST JOURNEY IN DECOLONIZED THOUGHT: ABORIGINAL WOMEN AND THE APPLICATION OF THE CANADIAN CHARTER

The reason for this chapter is to speak about equality. That is an odd thing for me to be writing about because I do not think in terms of equality. I have not found it to be a relevant or useful concept. Equality is not a word that describes my experience in Canadian society or as an Aboriginal woman. I want to share with you why I have come to that conclusion. I only reached this conclusion after following a long and winding path which often seemed to go uphill only. I intend to retrace my steps on my equality journey for you. For me, equality talk resonates a particular kind of emptiness. I cannot relate to equality because I do not know in my heart what it is. Hopefully one of the reasons I do not know what it is, is because I have been trained in law. Law serves as the place where I began my journey in search for a meaning of equality which reflected my experiences as an Aboriginal woman.

Some people may find that this approach is arrogant, presuming that I can or should be able to find my own image from within the *Charter*. No individual is that important. It is not my personal image I seek (after all, I am only one Mohawk woman). What I seek is the image of myself and my sisters, my aunties, my grandmothers, my daughters and my nieces. Individualizing this equality journey as a story about what I have learned also respects the Aboriginal way of teaching about life. I can only talk about what I know and that is only myself.

Law as a discipline is rigidly structured. This structure contributes to maintaining the general inaccessibility of Canadian law. It has a particular set of rules to be followed by any one searching for answers. Lawyers rely on two principal sources on which we base our knowledge. The first is the general written rules of law, including the constitution, statutes and regulations. The second source is also sometimes written and it is the previous decisions of judges. This is called the case law.¹²⁸ There is a clear relationship between these two sources of legal knowledge. The task judges are assigned involves the interpretation of the rules found in the constitution and statutes which are created by the legislatures. Students of law hear repeatedly that the first step toward answering any legal question is to read the statute.

In the case of my equality quest, several legislative instruments are important. All levels of Canadian government (provincial, territorial and federal) have enacted human rights codes. These codes guarantee against individual acts of discrimination.¹²⁹ Human rights codes protect against discrimination in the workplace or in housing, for example. Sexual or racial harassment are common examples of matters

¹²⁸The decisions of judges are not all reported. There are a number of journals which report these cases and usually they have prominent lawyers and law professors who do the editing. Usually these editors are White and male. What they select as important does not also reflect a diversified view of the world. For example, many cases involving First Nations child welfare matters have not been chosen to be in these journals. Historically, there are few if any reported cases of *Indian Act* offences such as convictions for dancing or attending other ceremonies. The reporting of cases is one way which law does not reflect an Aboriginal view on what is important.

¹²⁹I am not satisfied with these definitions of discrimination. They do not fully capture what my experience has been.

brought before human rights tribunals. The system of human rights law is intended to work in a complimentary fashion with other sources of rights in Canadian law. In 1982, Canada repatriated¹³⁰ its constitution. Part of the repatriation package was the Canadian *Charter of Rights and Freedoms*. In section 15, the constitution guarantees a broad right to be free from discrimination.¹³¹ Understanding the general structure of Canadian rights law as well as locating the specific *Charter* provision is the first step in my equality journey.

When disputes about equality rights have been brought before them, Canadian courts have examined the provisions found in the *Charter* and in human rights codes. The courts' role is an interpretive one. It is often narrowly focused on a word or phrase found in a section of the legal provisions about non-discrimination. Because the work of judges is narrowly cast, what we as lawyers know about equality is understood narrowly. Only by patching together a series of narrow court decisions can a broad definition of equality be found in Canadian law.

¹³⁰The acquisition of full sovereignty for Canada was incomplete between the years of 1867 and 1982. For example, Canada could not independently (without Britain's approval) amend its constitution prior to the 1982 repatriation.

¹³¹ Section 15 reads as follows:

(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.

Searching for a definition of equality in Canadian law is complicated process involving the examination of many individual cases. This is another factor that contributes to the inaccessibility of Canadian law. Even the physical location of case law contributes to this inaccessibility. Law libraries are located in court houses, law offices and law schools. These places are both inaccessible places and foreign places to the majority of Canadians.

There is also a third layer of legal analysis that legally trained people recognize as important. Judges do not decide principles of law including equality in the abstract. The third layer of analysis is the facts of the particular case before the court.¹³² Although lawyers and judges treat the facts of the case as an objective third level of analysis, it is important to remember that those facts are the real life experiences of individuals. This is one of the primary sources of dysfunction and dissatisfaction with the legal profession. Lawyers deal with facts (stories about peoples lives) as objective and neutral (that is without emotion). This may work successfully in cases about corporations but does not work successfully when the stories are about the pain of discrimination.

The facts that contextualize judges' decisions in equality cases are usually painful and intense experiences of discrimination. This fact presents another complication for legal analysis. As litigation is costly, time consuming, and requires the engagement of experts (which means a certain amount of control over the individual's experience is given up),

¹³²There are a multitude of legal rules which help lawyers determine which are the relevant facts.

it can be assumed that usually courts hear only the most serious and offensive transgressions against equality standards. This negatively impacts on the courts' ability to define discrimination. Court cases do not provide detailed descriptions of the way individuals experience discrimination *throughout their lives*. Court cases examine the details of particular incidents only. These factors have a profound effect on how law, lawyers and judges are able to understand equality issues.

Equality issues will be litigated either under the *Charter* or human rights codes. Within the written rules of the law, there exists a hierarchy of sources where lawyers look to find the rules that guide their thinking and the arguments they place before judges. This rule will impact on the decision whether to litigate under a human rights code or under the *Charter*. The constitution of Canada is the supreme law of the land.¹³³ This means that all statutes must conform to the rules set out in the constitution or they are of no force or effect.¹³⁴ For example, if a Canadian law discriminates against a group of individuals this law's validity may be successfully challenged under section 15 of the *Charter*

¹³³The constitution has always been the supreme law of Canada but since the 1982 amendments fundamental individual rights and liberties have been protected as part of this supremacy. Section 52(1) reads:

The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

¹³⁴This is just one task that is assigned to the constitution. The constitution also provides for the structure of Canadian government. In sections 91 and 92 powers to legislate are assigned to either the federal or provincial governments. If the authority to legislate cannot be found in section 91, then the federal government has no authority to act and laws enacted without legal authority are not valid. Prior to 1982, constitutional rights and liberties were only found in these two sections.

of Rights and Freedoms. The *Charter* is about legal equality more than it is about individual acts of discrimination.

As the constitution is the supreme law of Canada, it is the obvious place to begin sharing my quest for a definition of equality. Perhaps this was not an obvious decision just an easy decision given my legal education. On the path I followed in search of a meaning for equality this is the second stage I reached. It really has become an uphill climb now. Section 15 has already been introduced as an important recognition of the broad right to live free from discrimination. If you look at the *Charter of Rights and Freedoms*, searching for a home for your equality vision you will likely first rest at section 15.¹³⁵ Most women already know section 15 exists. The heading that runs right above section 15 is "Equality Rights". I have reached a peaceful plateau in my journey.

Being a Mohawk woman, I understand something special about equality rights. And I understand that whatever protection exists in section 15 today, it is more than just a few words that are written. Section 15 has a history. When I was younger I got a teaching from the Elders that says you have to know your history. You have to know what is behind you in order to know where you are going. If you do not understand that history, you can never have any vision about where it is you want to go. When you think of the history of the section 15

¹³⁵Section 28 of the *Charter* provides that all rights and freedoms are "guaranteed equally to male and female persons". This is an important section for women, but offers no certain assistance to women who also locate themselves centrally within other oppressed collectivities such as Aboriginal people. Section 28, therefore, is not focused on in this discussion.

protection, remember women in this country, and the national political women's organizations, had to fight, some might suggest tooth and nail to secure the placement of women's rights within section 15 into the Constitution. It was in and out and back and forth and I think that experience was shocking for a lot of women.¹³⁶ I know it shocked me. It must be understood that we live in a country where women's equality rights were not automatic. Equality rights were something that women had to stand up and justify. The fact that section 15 did not grow out of a kind, caring and nurturing relationship is something that is very important to me. Furthermore it did not grow out of respect. Its seeds were planted in a fight. I find that very disturbing.

A quick reading of section 15 identifies that there are four types of legal equality listed. Every one in Canada has been guaranteed equality *before* the law and equality *under* the law. Also, everyone has equal *protection* of the law and equal *benefit* of the law. That is what section 15 says. This is the legal definition of equality. I suspect that these four forms of equality do not make much common sense. Each of the four parts to the definition of equality has been subject to the scrutiny of Canadian courts. Canada has lived with this style of non-discrimination since 1960 when very similar words were presented in a federal statute.¹³⁷ By examining two of the court's decisions under the

¹³⁶See for example, Bev Baines, "Women, Human Rights and the Constitution" in Audrey Doerr and Micheline Carrier (eds), *Women and the Constitution in Canada* (Ottawa: Canadian Advisory Council on the Status of Women, 1981), 45.

¹³⁷Section 1 of the *Canadian Bill of Rights* states:

It is hereby recognized and declared that in Canada there have existed and

Canadian Bill of Rights (which is the federal forerunner to the *Charter*) the meaning of these four types of equality can be understood.

As an Indian woman I remember very painfully the cases of Jeanette Lavell and Yvonne Bedard. Jeanette Lavell was from a community in Ontario located on Manitoulin Island. Yvonne Bedard is from my community, Six Nations. What happened to these two Indian women, one Ojibwe and one Iroquois, was they married non-status (white) men. That was their so-called offence or crime. I call their marriage a crime because they were punished for it. Both women were stripped of all their rights as Indian people because they were women who "married out".¹³⁸ The same thing did not happen to an Indian man who married out. Until 1985, his wife gained Indian status. Former section 12(1)(b) of the *Indian Act* specified that if as a status-Indian woman marries a non-status (not non-Indian) man, she loses her entitlement to be registered under the *Indian Act*. Without this entitlement, Canada considers you to be a non-Indian. Many "Indians"

shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,

- (a) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law;
- (b) the right of the individual to equality before the law and the protection of the law;
- (c) freedom of religion;
- (d) freedom of speech;
- (e) freedom of assembly and association; and
- (f) freedom of the press.

¹³⁸For a fuller discussion of the ramifications of the *Indian Act*, please see Kathleen Jamieson, *Indian Women and the Law in Canada: Citizens Minus* (Ottawa: Advisory Council on the Status of Women, 1978), 1-6.

by birth are non-Indians at law.¹³⁹ These two women took their cases to the Supreme Court of Canada. The judgment of the Supreme Court was reported in 1974.¹⁴⁰ Their struggle before the court started some years before that.

In the case of Jeanette Lavell, her complaint was first heard by Judge Grossberg of the Ontario County Court in June of 1971.¹⁴¹ The reasoning in this decision was very similar to the reasoning adopted several years later by the Supreme Court. Judge Grossberg found that Ms. Lavell had equal rights with all other married Canadian women. Such a conclusion is based on a faulty assumption that Indian status is status less than the status of other Canadian women. He saw an

¹³⁹What the *Indian Act* effectively did is that it disenfranchised many Indian people and I will give you an important example of that. Before you are considered an Indian in this country, you have to get into these specific little boxes which are articulated by the federal government in the *Indian Act*. These two women were in those boxes. They married out. They married non-Indians, non-status people, and thereby lost their status. So the minute Lavell and Bedard said, "I do", presto, like magic, they were not Indians anymore.

I said I would give you an example about how extreme the question of registration becomes. One of the Mohawk communities that I am familiar with is Akwesasne. You may have heard about it because it was in the news a lot during the spring of 1990 because of the struggles they had regarding gambling. That community, straddles an international border. If I lived on the Canadian side of Akwesasne, and I am marrying a man who lives three houses down, but he happens to live on the American side of Akwesasne, under that old *Indian Act* law, I am no longer an Indian. I would be married somebody from my community, I married a Mohawk man, but he is an American Indian so he does not have status under the *Indian Act*. The *Indian Act* only counts for Canadian Indians. The *Indian Act* has caused turmoil in our relations in our communities and this is just one example. I could rant about the *Indian Act* all day (but will resist).

¹⁴⁰*A.G. Can v. Lavell ; Isaac et al v. Bedard* (1973), 38 D.L.R. (3d) 481.

¹⁴¹(1971), 22 D.L.R. (3d) 182.

elevation in personal status as a result of the stripping away of her Indian status. He saw no cause for complaint. Jeanette Lavell had gained and not lost!

The decision of Judge Grossberg was appealed by Ms. Lavell to the Federal Court of Appeal in the fall of 1971.¹⁴² Heard by three judges, they concluded that different rights existed for Indians based on their gender when a non-status person was married. The judges found this to be a violation of the guarantee of non-discrimination in the *Canadian Bill of Rights*. The Federal Court of Appeal was able to reason through a situation of discrimination that was concurrently based in gender and race. This is encouraging. Unfortunately, the saga continued to the Supreme Court of Canada.

In 1970, after separating from her non-status spouse, Yvonne Bedard returned to Six Nations to reside in a house left to her by her parents. As she was not a registered band member any longer, she was not legally allowed to be in possession of a home on the reserve. Yvonne Bedard was evicted by the band council. This rule about property "ownership" exists to protect Indian lands from white encroachment and originally appeared in the *Indian Act* to protect against the white settlement of Indian lands. The history of the rule applied against Yvonne Bedard is very interesting to me. It reveals a familiar pattern in the oppression of Indian people. Many of the rules developed to protect Indians are now used by Indians against Indians, particularly against Indian women. This is an indication that the colonized have accepted

¹⁴²(1971), 22 D.L.R. (3d) 188.

their colonization. As a result of the internalization of colonization, the colonizers can step back from the devastation caused by their acts. In all of the articles which discuss the *Lavell* and *Bedard* cases, little attention is paid to the impact of colonialism on the issue.

The *Lavell* case had already been decided by the Federal Court of Appeal when Ms. Bedard filed her action in the Ontario High Court.¹⁴³ The decision of the Federal Court was followed in *Bedard* and the matter was easily decided. This is how the two cases were joined and were heard together by the Supreme Court of Canada in 1973. Immediately following the decision of the *Lavell* case in the Federal Court, the federal government announced it would appeal the decision to the Supreme Court of Canada. It is important to understand that it was the federal government that initiated the challenge to the highest court in the country, an appeal that should only be seen as allowing to continue the gender discrimination on the face of the *Indian Act*.

These women challenged the discriminatory provision of the *Indian Act* all the way to the Supreme Court of Canada. The women's challenge relied on the *Canadian Bill of Rights* and the guarantee made there, equality before the law. Chief Justice Ritchie gave the majority judgment in that Court. He broke a four-four tie amongst the other judges. And the Supreme Court of Canada held that Jeanette Lavell and Yvonne Bedard had not been discriminated against as Indian women. Ritchie's decision was based on his interpretation of equality before the law. Chief Justice Ritchie writing for the majority of the court states:

¹⁴³*Bedard v. Isaac et al.* (1971), 25 D.L.R. (3d) 551.

... 'equality before the law' as recognized by Dicey as a segment of the rule of law, carries the meaning of equal subjection of all classes to the ordinary law of the land as administered by the ordinary courts, and in my opinion the phrase "equality before the law' as employed in s.1(b) of the Bill of Rights is to be treated *as meaning equality in the administration or application of the law* by the law enforcement authorities of the ordinary courts of the land.¹⁴⁴

It was equality under the law (that is the result) that the two Indian women sought. Unfortunately only equality before the law was guaranteed under the *Bill of Rights*.

I have read this case "megazillions" of times. It still does not make any sense to me. The best I can do at explaining what the Chief Justice said was to direct you to look at who is being discriminated against. Look at all Indians. All Indians are not being discriminated against. The men are not being discriminated against. Therefore, there is no discrimination based on race. Look at women (in the same way Judge Grossberg did). All women are not being discriminated against because this does not happen to white women. Therefore, there is no gender discrimination. The court could not understand that this pile of discrimination (race) and that pile of discrimination (gender), amount to more than nothing. The court could not understand the idea of double discrimination. Double discrimination is not an acceptable legal category of equality. Grounds of discrimination are listed as separate entities.

¹⁴⁴*Lavell*, supra, at 495.

This is a central reason why I am dissatisfied with legal definitions of both equality and discrimination. My life experiences are as both a Mohawk and a woman. I cannot say when I can name an act as discrimination, that it happened to me because I am a Mohawk *or* because I am a woman. I cannot take the woman out of the Mohawk or the Mohawk out of the woman. It feels like all one package to me. I exist as a single person. My experience is "discrimination within discrimination".¹⁴⁵ It is wound together through my experiences. This is very different from this idea of double discrimination. But the court could not even get to the first step, they could not see that two grounds of discrimination were occurring at the same time. In the court's view, discrimination is competitive. One form of discrimination must triumph.

The *Lavell* case fundamentally influenced the women's lobby around the entrenchment of women's rights in the *Charter of Rights and Freedoms*, such that both equality before the law and equality under the law are now protected in section 15 of the 1982 rights document. The legal advancement of the position of all women in Canada has been based on the struggle advanced by Indian women for Indian women. The result of the struggle advanced by Indian women is the betterment of the legal position for all women. Indian women, however, walked away with nothing tangible. Indian women still had section 12(1)(b). This section was in force until June of 1985 when it was amended by the federal government without the consent of First Nations.

¹⁴⁵Verna Kirkness, "Emerging Native Women" 2(2) *Canadian Journal of Women and the Law* (1987-1988), 408-415 at 413.

The second case that profoundly influenced the women's lobby is similar to the "before/under" problem encountered in the *Lavell* and *Bedard* cases. It did not involve an analysis of race yet the outcome displays the same disturbing thought pattern. In *Bliss v. A.G. Can*¹⁴⁶, a denial of unemployment insurance benefits to a pregnant woman was challenged. The decision of the unemployment insurance was in effect to deny pregnancy benefits because of a short period of employment while also denying "regular" benefits because the woman was pregnant. Like the *Lavell* and *Bedard* cases, *Bliss* involved some special magic. Magic that erases obvious understanding. In *Bliss*, the court found that discrimination based on pregnancy was not gender discrimination. The court vanishes the knowledge that only women become pregnant because *not all* women are pregnant. There the Supreme Court of Canada held that the equal protection of law (the second *Canadian Bill of Rights* guarantee) did not extend to benefits of law but only to the imposition of penalties. The result of the *Bliss* case¹⁴⁷ is the knowledge that equal protection of law is insufficient to ensure a just result for women. The *Bliss* case is why benefits were also listed as one of the four types of legal inequality in the *Charter*.

Through the struggles of women such as *Lavell*, *Bedard* and *Bliss*, the four legal equality protections are more comprehensive than what was found in the *Canadian Bill of Rights*. In section 15, the stepping

¹⁴⁶[1979] 1 S.C.R. 183.

¹⁴⁷In 1989, even the Supreme Court of Canada had come to terms with the mistake in *Bliss*. See also *Brooks v. Canada Safeway Limited* (1985), 38 Man.R. (2d) 192 (Man Q.B.).

stone to equality is the guarantee to be free from discrimination. The courts have spoken to the meaning of discrimination in the case of *Andrews v. the Law Society of British Columbia*. This is what Justice MacIntyre says about the word, discrimination:

The words, without discrimination, require more than *a mere finding of distinction* between the treatment of groups or individuals. Those words are a form of qualifier built into section 15 itself. And limit those distinctions which are forbidden by this section to those which involve prejudice or disadvantage.¹⁴⁸

What discrimination means then, at law, is more than making a distinction. If you say men are different from women, that is not discrimination. That is a mere distinction. What the law requires for discrimination to exist, is some kind of action based on the distinction. There has to be an unequal provision of benefits or some other form of disadvantage.

Section 15 has a particular way of describing the distinctions the court was referring to in *Andrews*. It sets out a list of prohibited grounds, sometimes called protected grounds or enumerated grounds. Those are the fancy words that you will hear lawyers tossing around. The list of enumerated grounds provides the distinctions that you are not allowed to make. The list of distinctions that are named are "race, national or ethnic origin, colour, religion, sex, age and mental or physical disability". This list is not complete. The way that section is worded indicates that the grounds that are listed are important examples of common grounds of discrimination but they are also incomplete. The list of prohibited

¹⁴⁸*Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 141 at 145.

grounds of discrimination follows the phrase "in particular". It is those two words which give rise to the understanding that section 15 protects against forms of discrimination not itemized on the list. Lawyers call these new forms of discrimination non-enumerated grounds or analogous grounds.

It is as important to look carefully at the grounds of discrimination as it was to carefully consider the four types of legal inequality. The *Andrews* case that I quoted from earlier was a case that was based on citizenship. Citizenship is not on the section 15 list so this is a new ground of discrimination. It was about a man who wanted to be called to the Bar in British Columbia. British Columbia law requires that you must be a Canadian citizen to practice law in that province. Mr. Andrews was not. He was a British subject. In *Andrews*, the Supreme Court of Canada established the test that the courts will follow to determine if analogous grounds exists. Basically, the person complaining must compare whatever the form of discrimination they want to bring into the ambit of the *Charter* (be it sexual orientation or anything else) and show it is comparable to what is already on the list. The courts will ask certain questions. Is it similar to those grounds that are listed? Is the discrimination based on a personal characteristic? In other cases the courts have held province of residency is an acceptable distinction.¹⁴⁹ Murderers as a class of individuals are not a ground of discrimination.¹⁵⁰ These are not an analogous grounds. The reason the

¹⁴⁹*Algonquin College v. O.P.S.E.U.* (1985), 19 L.A.C. (3d) 81.

¹⁵⁰*R. v. Turpin* (1987), 60 C.R. (3d) 63 (Ont. C.A.).

court made these determinations is that province of residence or criminal conviction are not based on a personal characteristic. However, it is not sufficient to show the discrimination is based on a personal characteristic, there is also a need to show some history of disadvantage based on the personal characteristic. Defining legal discrimination becomes a complicated matter.

It will probably be helpful at this point to state what I have thus far described about section 15. Regarding the broad guarantee to freedom from discrimination, the *Charter* establishes two criteria that must be met before any legal discrimination is found to occur. This is despite the broad protection provided by section 15 that every citizen is equal and has the right to be free from discrimination. First, the *Charter* does not protect against all discrimination but only transgressions of law. The *Charter* only guarantees equality before and under the law as well as the equal benefit and protection of law. If the discrimination does not fit within one of these four categories it is not legal discrimination. The first component is the enumerated and the analogous grounds. The broad guarantee of equality will not operate unless the individual complaining can demonstrate both the first (the four types of discrimination) and second elements (the grounds) which create the broad guarantee to equality. This means that the legal definition of discrimination may very well be narrower than the definition of discrimination held by those who survive discrimination. This concludes the discussion on the general legal meaning of section

The next level of analysis is my own personal analysis of the *Charter*. This is the third stage in this journey. It is the discussion that is most important in this journey and depends on what has already been discussed about section 15. It focuses on the list of enumerated grounds. The list is the place where I can, hopefully, locate my own experience of discrimination as both an Aboriginal and a woman. When I read through the list of named grounds I see that several might apply to my experience. I see race on the list. I think I am a different race. I know I am different! My skin is a little browner than most people but who I am as a Mohawk woman does not stop at the end of this little brown nose. It is about who I am inside. Race does not capture the totality of the difference I live.

Colour is the next item on the list. Colour does not fully describe my experience as an Aboriginal person either. My concerns about the concept, colour, are similar to the ones I expressed about race. Both of these grounds have a biological inference. But, my difference is really about who I am inside and not my genetic composition. It is about what I believe and why. My difference is really about culture. Culture is not on the list. This discovery is not a surprise to me. It is not on the

¹⁵¹The discussion of the meaning of section 15 of the *Charter* is clearly not a full discussion of the scope, meaning and purpose of section 15. In 1989, the Canadian Advisory Council on the Status of Women released an analysis of 591 reported and unreported decisions based on section 15. This study considered decision made within the first three years of litigation under section 15 (1985 - 1988). Consider the vastness of the body of law the *Charter* has spawned if one section alone has initiated this many cases! Please see the work of Gwen Brodsky and Shelagh Day, *Canadian Equality Rights for Women: One Step Forward or Two Steps Back?* (Ottawa: Canadian Advisory Council on the Status of Women, 1989).

list because the drafter(s) of the section were probably white and male and have no experience of surviving discrimination. It is not well understood that race and colour are incomplete and sometimes inaccurate categories.

National or ethnic origin is also equally incomplete and incapable of describing my experience. My experience is not just about origins and heritage although this is a part of it. This ground troubles me for a second reason. This is again the trouble about who has the power to do the defining. If you think about it, the meaning of national or ethnic origin relies on the myth that Canada began in 1867 after the conquest by European nations. It is belonging to one of these European nationalities that grounds this phrase. European (and time adds ancestors of Europeans born and raised in Canada to that list) is the norm. Others who come from a non-European heritage have different origins. This is a negative construction of difference. Yet, because European conquest resulting in confederation in 1867 is the time reference, then Aboriginal experience of this country thousands of years before conquest is vanished fully. In this category, Aboriginal heritage is non-existent. It is rare that Aboriginal experience is described as Aboriginal heritage or origin which further demonstrates my position.

The next item on the *Charter* list is that little box called religion. This little box is conceptually different from the little boxes for race and colour that address only my biological differences. My people are a spiritual people. Maybe I can fit this concept of spirituality into religion. That does not work well either. Religion is more about

institutionalized forms of worship. The way that I was taught about respecting the Creator, I have to do every minute of every day. It is a total way of life. It is about how to walk through this world. You can not separate "religion" from any other way of experiencing life. This probably returns to a discussion on culture. I know that I cannot fit what I experience as sacred (spirituality) into the four corners of the little box called religion.

I want to provide one example of the way in which I find religion and race or colour to be unacceptable and incomplete. I am a Mohawk woman. That is the way the Creator chose to make me. That is who I am, that is the way I walk. I am a traditional woman, and try and live in respect of the laws that the Creator gave to the Haudenosaunee people when she put us here. And I use she on purpose when referring to the Creator and it is not just because I am standing in front of a group of women. I use she because when you make a lot of translations from Indian to English, it is very difficult. I do not speak, unfortunately, Mohawk fluently but our word for Creator is a word without gender. It is both male and female. When you have a respect for creation, you have a respect for both male and female energies. When you translate that into the English word and you get he, you are tipping creation to one side. Creation cannot be talked about out of balance all the time. I am trying to throw a little energy the other way. Whenever I refer to the Creator, I use she.¹⁵² This teaching about creation is an example of the

¹⁵²This is a teaching provided to me by Dr. Art Solomon, Ojibwe Nation. Art has written down many of his ideas in *Songs for the People: Teachings on the Natural Way* (Toronto: NC Press, 1990) and *Eating Bitterness: A Vision Beyond Prison*

way that the fragmentation in law (lists and boxes) creates an experience of law that is away from both the way I have been taught and experienced life.

The last ground of discrimination listed in the *Charter* that I might identify with is sex. I am a woman and obviously my experience can fit in here. Then I think of the *Lavell* and *Bedard* cases; how far am I going to get bringing a claim as a Mohawk woman under that box of sex? The way the list is constructed forces me to focus a complaint on gender to the exclusion of or prioritized over race, colour or national and ethnic origin or religion. In effect such a construction of my experience turns me upside down. I have a hard enough time walking on my feet without tripping over anything, without having to do life all upside down.

It is not just the *Lavell* and *Bedard* cases that have discouraged me about the way the courts interpret gender complaints. Early litigation under the *Charter* indicates that Canadian courts have continued to have difficulty defining issues of discrimination within discrimination. In *Casagrande v. Hinton Roman Catholic Separate School District*¹⁵³ an unmarried, pregnant school teacher challenged her dismissal. The court rejected her sex discrimination complaint as the "no intercourse" rule was equally applied to me and women.¹⁵⁴ The courts finding fails to consider the fact that only women are likely to be detected for breaching this rule. The court also decided that the section 15 equality rights were

Walls (Toronto: NC Press, 1994).

¹⁵³[1987] 4 W.W.R. 167 (Alta Q.B.).

¹⁵⁴*Ibid.*, at 179.

over-ridden by section 29. Section 29 guarantees that nothing shall abrogate or derogate from any rights or privileges "in respect of denominational, separate or dissentient schools". This case as it involves multiple forms of discrimination (competing forms) is an indication that courts are still sometimes unsuccessful at this form of analysis.¹⁵⁵

There is no single prohibited ground that captures my experience of life. I am forced to artificially separate my race (more appropriately my culture) from my gender. All of the categories within section 15 do not capture my experience. I have to twist and turn my understanding of the words to make my experience fit. This feels very much like one of the ways I experience discrimination - someone else does the defining presuming I fit. I am left with the contortions. I am not very happy with section 15. Section 15 feels very much like the same old thing that did not work for me in the past.

Now I do not want to be interpreted to say I prefer as a woman to totally discard section 15. As a woman, I would rather have some limited protection in section 15 than a total void. Perhaps legal complaints will not be successful but section 15 still establishes a general principle that Canada is a country now based on non-discrimination. But I do not want us resting around on our laurels, thinking our work is done. We have made the first step and it is a small baby step, just like a child learning how to walk. Maybe we are not even that far. We have

¹⁵⁵I am not suggesting that some courts have not gotten it right. As long as one court gets it wrong, it is a problem. See also the discussion in Brodsky and Day, *supra*, 52-53.

just gone a little way and our work is not done. We have to put what we understand now, some thirteen years after the entrenchment of 1982, into the law and the interpretation of the constitution.

This brings us to stage four in our journey. Section 15 must also be understood from within that *Charter of Rights and Freedoms*. There are a number of other things that trouble me greatly about that *Charter*. When it first came out in 1982, Canada was celebrating about this wonderful new document and about the rights we had. When I went into Indian communities, people were excited about these rights. I did not understand the excitement. I was interested in law (but had not yet gone to law school) and had tried to understand on my own what the *Charter* meant. Read section 1. Any rights that have been demonstrated can be *limited* by section 1 when the government can show such a limitation is reasonable and justified in a free and democratic society. The legal process is not complete when one has successfully met the standard in section 15 (discrimination against a prohibited ground). If you have a government action that discriminates on its face against women or against Indian women, if they find under section 1 that it is a reasonable limit on the right, in a free and democratic society, the right can be limited. Well in my way of thinking about rights, rights are not something that you put on a plate and you are going to do a magic trick and take away with the other hand. A right is a right. You have it. You carry it with you. It is not something that can be taken away. What the *Charter* does is it takes away everything it is going to give before it even gives it. Section one comes first. That is a lesson for me in how much I

will trust this new rights paradigm.

My position on the disappearing rights approach to issues of non-discrimination is a contentious one. Not everyone shares my opinion on section 1. I suspect some will find it harsh. My opinion is a result of my experience of Canadian law. It is based on a knowledge of the *Lavell* and *Bedard* cases. On the knowledge of Aboriginal over-representation in the criminal justice system. It is based on the knowledge that our ceremonies and dances were once prohibited by Canadian law. It is based on my understanding of the history of Canada and Canadian laws which is a history that has taught me to justifiably mistrust.

Other scholars have managed to overlook the shortcomings in the *Charter* and have the ability to trust. Writing about both the *Charter of Rights and Freedoms* and the recognition and affirmation of existing Aboriginal and treaty rights in section 35(1) - the first section directly following the *Charter*, Donna Greschner has this to say:

The interpretation of aboriginal rights that I use in considering aboriginal women and the Constitution - that the rights are a promise of constitutional space for aboriginal peoples to be aboriginal - is the one that best exemplifies the *spirit* of the provisions, the one most consonant with their underlying purpose and harmonious with the Constitution as a whole. The method is not radical or revolutionary, although its results will be: namely, taking aboriginal peoples seriously.¹⁵⁶

Part of this scholars' ability to trust in Canadian law is the fact that Canadian law is an experience of her own culture and not the experience of a foreign way of establishing relationship. Professor Greschner

¹⁵⁶"Aboriginal Women, the Constitution and Criminal Justice" Special Edition 1992 *University of British Columbia Law Review*, 338-359 at 342-343.

of a foreign way of establishing relationship. Professor Greschner recognizes the fact that she is a non-Aboriginal constitutional scholar and this impacts on her analysis. This is encouraging for me to see.¹⁵⁷

Continuing with contextualization of section 15 as just one Section of the *Charter*, there is also section 32 (as if section 1 was not enough). Section 32 talks about government.¹⁵⁸ The *Charter* is not an absolute document of rights. If someone discriminates against me because I am an Indian woman, and that someone is a private landlord and not the government, I cannot bring an action against the landlord under the *Charter*. (An action could possibly be brought under one of the human

¹⁵⁷In her own words:

As a non-aboriginal constitutional lawyer, I approach the topic of this paper - aboriginal women, the Constitution and the criminal justice system - aware of the limits of my cultural experience and the necessity of intense and detailed sensitivity to aboriginal peoples. My cultural experience as a non-aboriginal person precludes direct and intimate understanding of aboriginal cultures and gender traditions. I have also been spared the devastating experience of racism that injures aboriginal peoples daily and deeply. My responsibility is to understand aboriginal peoples as best I can, recognizing and attempting to overcome my cultural biases and accepting aboriginal understandings without misinterpretation or patronization. I may not fully succeed, but if I fail to try, I will not be showing the respect for aboriginal peoples that must underlie and permeate this study of the criminal justice system (Ibid, at page 339).

¹⁵⁸Section 32 reads:

- (1) This Charter applies
 - (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relation to the Yukon Territory and Northwest Territories; and
 - (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.
- (2) Notwithstanding subsection (1), section 15 shall not have effect until three years after this section comes into force.

rights codes.) What the *Charter* does, is that it only protects those rights that are given to you against intrusion by the government. The courts describe the *Charter* as a fence around individuals where the government cannot tread. That is it.

It is section 32 that really causes me to be ambivalent about the possibility of securing gain for Aboriginal women through the application of the *Charter*. As an Indian woman centrally concerned about issues of abuse in Aboriginal communities, I understand that the *Charter* cannot be fully effective as a tool in reaching this goal. First, it took international action after the *Lavell* and *Bedard* cases¹⁵⁹ and the passing of the *Charter* to get the federal government to take seriously the overt discrimination against Indian women in the *Indian Act*. If overt discrimination required such heavy sanction to remedy, what about some of the more subtle discrimination Indian women face such as the fact there are no matrimonial law regimes on reserve which apply to reserve lands.¹⁶⁰ Second, abuse in Aboriginal communities - domestic violence to sexual abuse - does not fall within the scope of the *Charter*. It is not Indian governments that inflict this specific harm directly, but certain individuals in Aboriginal communities.¹⁶¹

¹⁵⁹*Lovelace v. Canada*. U.N. Doc. CCPR/C/Dr (XII)/R.6/24, 31 July 1981; 2 *Human Rights Law Journal*, 158.

¹⁶⁰For a discussion of this topic please refer to Martha Montour, "Iroquois Women's Rights with Respect to Matrimonial Property on Indian Reserves" (1987) 4 C.N.L.R. 3 and Mary Ellen Turpel, "Home/Land". 32(1) *Canadian Journal of Family Law* (1991), 17-40.

¹⁶¹Indian governments have participated in silencing this issue. The act of silencing *as a government* could be a possible *Charter* challenge but it would

We are not done examining the *Charter* yet. Read section 33. This is one of my favourites. It is the notwithstanding clause. If the government of the Yukon, or maybe the province of Ontario decide to pass a law that knowingly will discriminate against somebody, all that has to be done is to state that this legislation is exempt from section 15 of the *Charter*. The federal government could choose to exempt the *Indian Act* from *Charter* review in a similar way that section 67 of the *Canadian Human Rights Act* exempts the *Indian Act* from those provisions. My ability to trust in and access *Charter* rights from this day forward is compromised by section 33. The supreme law of this land does not apply anymore. Section 33 is probably the biggest trap door I have ever seen in my life.¹⁶²

We are still not done examining the *Charter*. Read the preamble. This is another one of my favourites. The preamble talks about the rule of law and the supremacy of God (probably he only). The rule of law causes me more concern than the first phrase. Both of these principles give stature to a particular view of the world, a view which is contradictory to the cultural beliefs of many Aboriginal people. It is important to consider the impact of these two principles. The most difficult to understand is the rule of law.

be a very difficult one. Legal remedies usually direct that an action be stopped rather than directing any government to do something positive about abuse.

The issue of whether or not the *Charter* applies to Indian governments is a question that remains unclear. I am not convinced that such an application would be a positive one for First Nations people and/or First Nations women.

¹⁶²Now in fairness to section 33, there would be severe political consequence to the inappropriate use of section 33.

The rule of law means that both kings and beggars can sleep under bridges but cannot steal bread.¹⁶³ Think about that for a second and see if you notice any contradictions; kings and beggars. Where are the queens? This is an example of how male specific Canadian law is (and note how invisible the male preference is). Think about it some more. How many kings and queens do you know that need to steal bread and sleep under bridges? I do not know very many. Really it was a rule about how beggars would behave. It is, therefore, a rule which in effect has little impact on kings (and queens). It is a rule about entrenching inequality! That must be seen as troubling. The preamble to the document that creates equality as the supreme law of Canada begins with a principle that entrenches inequality. This is another reason I have great disdain for the *Charter*. It is dishonest. Which Charter statement on equality will be honoured by the courts? Both equality and inequality are options that are available.

The rule of law also stands for the principle that there shall be a uniform application of all laws. This is also apparent in the kings and beggars example. And as in that example, uniform application of law cannot be said to ensure equality. Furthermore, the principle of uniform application of laws is not absolutely applied in Canada. If I were to assert (and I do) that the law of treaties were to be uniformly applied, Canada would shy away from this application of the rule of law. But if I engage in an act of civil disobedience to protect a treaty right, I can be

¹⁶³Please see the discussion in J.M. Evans, H.N. Janisch, D.J. Mullan and R.C.B. Risk, *Administrative Law: Cases, Text, and Materials*, Second Edition, (Toronto: Emond Montgomery, 1984), 11 and 559-572.

sure that the criminal laws of Canada will be applied uniformly to me. The lack of implementation of treaty rights has been a central focus of Aboriginal litigation and this again demonstrates the rule about uniformity has always been selectively applied in Canada.

There is one thing in the *Charter* that I find pleasing. That is section 25.¹⁶⁴ Section 25 is a shield (again that is lawyer talk). It says that if a dispute arises between a *Charter* right and Aboriginal and treaty rights then section 25 clearly resolves the dispute in favour of Aboriginal and treaty rights in a similar way that section 29 operated in the *Casagrande* case discussed earlier. Aboriginal Peoples have a notwithstanding clause in the *Charter*. This is also a source of frustration for me. All through the most recent constitutional talks in 1992 (known as the Charlottetown Round), we heard few references made to this section which was placed in the *Charter* in 1982 to resolve conflict between the *Charter* view of rights and the Aboriginal view. The hot debate that resurfaced in 1992 was in fact (from a strict legal view) resolved before it was raised. Perhaps some people were dissatisfied with the resolution found in the application of section 25, they should have clearly said so.

¹⁶⁴Section 25 reads:

The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including
(a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
(b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

Now we can walk away from that document, the *Charter of Rights and Freedoms*, because I think you probably understand now that at least one person does not believe it is the delightful little legal gadget that many people originally thought that it was. It is a total field day for lawyers but I am not sure of what it offers to the average Canadian or the average Aboriginal person. After looking in detail at the Charter, I came to a fairly simple conclusion. I am not going to find the answer there. At least I am not going to find a full answer to the problems Aboriginal people face nor am I going to find a vision of equality that reflects my experience as an Aboriginal women. I can find maybe a few places to have a glimmer of hope. There are a few places where I can locate a partial image of myself (parallel to gazing in a fun house mirror). Enough to keep me saying yes, I can work as a law professor and I can work at that law stuff as long as you give me that glimmer of hope. But we have a very, very long way to go.

Since the entrenchment of the *Charter*, there has been continued discussion about its value in a number of communities. It has continued to amaze me. The question of *Charter* application has created great divisions in the Aboriginal community, not necessarily along gender lines. I am amazed by the *Charter* application question because I have yet to see any clear and detailed arguments presented about how the *Charter* will benefit Aboriginal women. I hear lots of empty political rhetoric about how important the *Charter* is and the need to protect Aboriginal women from abuse. I have neither heard nor read any concrete examples of how we will be protected. On the other

hand, I have seen some clearly articulated concerns about the negative consequences of *Charter* application.

The majority of arguments that are made regarding the necessity of *Charter* application are emotional pleas. These rhetorical demands are prefaced on a single fact, Aboriginal women have been victims of abuse. There is no denying this fact. The Native Women's Association of Canada describes their demand for *Charter* protection in just this way:

Since the release of the Canada package on the constitution, national Chief, Ovide Mercredi, has taken the position that the *Charter* ought not to apply to Native governments... Experience has shown Native women what life is like without human rights protection. Native women lived under the sex discriminatory sections of the *Indian Act* for 100 years! The twenty year battle by Native women for the repeal of those sections was not without a price, but women have shown that they are willing to fight for their rights against the federal government and against Indian governments.¹⁶⁵

What must follow such a line of reasoning is an accounting of the specific benefits that will accrue to Aboriginal women as a result of the *Charter* protections. Until the sound legal reasons about positive results from the application of the *Charter* are more than mere exceptions¹⁶⁶ then I will remain skeptical. I cannot imagine the way I would use the *Charter* to advantage Indian women's rights.

Equally disturbing is the way in which the Native Women's Association of Canada (and at least two of their members are legally

¹⁶⁵Letter to the Right Honourable Joseph Clark from Gail Stacey-Moore, Speaker, Native Women's Association of Canada.

¹⁶⁶*R. v. Daniels*, [1990] 4 *Canadian Native Law Reporter* 51 (Sask. Q.B.). This decision was overturned by the Saskatchewan Court of Appeal.

educated) passage reflects a fundamental misinterpretation of the role and scope of the *Charter*. The *Charter* is not human rights law. It cannot protect Aboriginal women from individual acts of abuse. The position of the Native Women's Association of Canada during the Charlottetown round troubles me for a number of reasons. It cannot be said that Indian governments are responsible for the discrimination within the *Indian Act*. The discrimination against Indian women was the result solely of the actions of the federal government. The problem of gender discrimination in the *Indian Act* is a problem of colonialism. I see no expression or denial of colonialism in the *Charter*.

All of this is not to say that I fully disagree with the position of the Native Women's Association of Canada. In fact, I understand the source of their position and respect the heart-felt emotion of their response. Indian women through the *Indian Act* have been abused, because discrimination is a form of violence and violence is clearly abuse. As an individual, I have not suffered the pain of loss of status. It must always be remembered that the author of the pain that results from a woman's loss of status on marriage was not Indian men but the federal government. For many years, band governments have been institutions whose offices have been occupied mainly by men (in the same way that provincial and federal governments are). Many of the band governments have followed the lead of the federal government and have joined in the abuse of Indian women.¹⁶⁷ Indian governments have never had the power to amend section 12(1)(b) of the *Indian Act*. That

¹⁶⁷For a discussion see Janet Silman(ed.), *Enough is Enough*

is a power of the federal government only. Powerlessness and frustration is not a healthy state of existence. It is also a consequence of colonialism and colonization. As women involved in the healing of our nations we must remember this reflects the political way of the dominant society. I am yet to be convinced that any form of traditional Aboriginal government was *ever* based on a notion of gender inequality. We must take care to think with decolonized minds no matter how difficult the task may be.

I am also concerned with the way that concerns such as the concerns of the Native Women's Association of Canada can be manipulated within the larger Canadian political sphere. These arguments take on a purpose that Aboriginal women never intended:

Concern for aboriginal women is piously invoked by closet opponents of aboriginal self-determination who reject the idea and practice of aboriginal sovereignty and use a new-found solidarity with women as an expedient and politically correct justification for their resistance. This belief in an inherent or irremediable chauvinism of aboriginal men, worse than the chauvinism of non-Aboriginal men, must be shown for what it is: false, pernicious and racist.¹⁶⁸

Issues surrounding the politics of self-determination are very complicated. There are complications that arise within our relationships with the dominant political structure of Canada as well as within our own communities. When these sets of complications collide, confusion and struggle can be the only result.

The result of any abusive relationship be it personal or political is

¹⁶⁸Greschner, *supra*, 339.

anger. I am not denying anyone's right to be angry. What has been done to Indian women is something to be angry about. I would in fact encourage the anger. Anger must be let before Aboriginal people can heal. Anger is a stage we must move beyond if we will ever again think as nations in a decolonized way. Remembering that anger is the reality of many Aboriginal women's experience, we must ask the men to respect our anger and work with us through it. We must collectively and individually move beyond this point if true progress toward self-government is to be made.

The anger that I carry as an Indian woman does not grow only in the abuse that women of First Nations have survived and continue to survive on a daily basis. The anger also grows from what I have learned about Canadian law. It is not the Aboriginal solution for many reasons. Discrimination in meaning or action in Canadian law does not reflect my experiences. I cannot be certain that a Canadian court will be able to successfully conceptualize a situation of discrimination within discrimination.

As an Indian woman, I am connected to that history of section 15 in a very profound way. The *Canadian Bill of Rights* was first passed in 1960. This is 1995. It has only been for thirty-five years in Canada that we have protected equality in the federal system of laws. It was the process of the civilization of our communities, largely through the *Indian Act*, forcing our people to a patriarchal style of government, where we women lost their status as well as the right to vote (until 1960 federally). It was only after contact with the European ways that women

in my community were denied the opportunity to be heard on issues of governance (that is the parallel to the "right to vote" in my culture). Not only did women lose the vote in my community, but until 1960, if you were a status Indian, period, male or female, you could not vote.¹⁶⁹ And I have asked myself many times, how I am supposed to recognize that as an advanced, progressive, democratic or equality seeking society? The federal government has thirty-five years of experience of aspiring toward equality. My people have hundreds and hundreds and hundreds of years of experience of successfully living in balance (you might call it equality).

I was so empty when I came to those understandings about Canadian law. And I had to think some more. And I had to think some more about what was the matter with the law and why Canadian law is not working for Aboriginal Peoples. It is simple why it is not working. It is because we have taken the *responsibility* out of it. Even more importantly, read some court judgments and hear them talk about impartiality and objectivity. It is not about your head. Where the answer lives is in your heart. Law is not about how you feel. And where is fairness? What is fairness? Fairness requires feeling. When you see something and it is unfair you get angry. It is in your heart the standard of fairness. If fairness is in your heart and the law is not about feeling, then how are we going to get to fairness? How are we going to get to justice? Ask yourself who wrote down that law. It was men who wrote

¹⁶⁹The court in *Edwards v. Attorney General of Canada*, [1930] A.C. 124 decided that the word persons was ambiguous and could include women.

down that law. They took women out of it. Our responsibility as the women of this land is to see that they put the heart back in the law so that it starts to work for all of us. Then our relationship can start to be about fairness, about justice. And that is the legacy that I pray that we leave for our children, no matter what color they are.

CHAPTER FIVE

CONSTITUTIONAL RENOVATION: NEW RELATIONS OR CONTINUED COLONIAL PATTERNS?

I am often asked to conferences to speak about Aboriginal women and Canadian law including the constitution. Such a venture always make me nervous. I speak only for myself as a Mohawk woman, one woman. There are many Aboriginal women with a multiplicity of views. My views are often in opposition to the views held by political organizations of Aboriginal women. This is a difficult place to negotiate. I also recognize that my legal education is a privilege and this education plays a central role in shaping my views on constitutional amendment. I do, however, have a purpose in sharing this paper in this collection. My legal education is a privilege but the understanding that it brings about Canadian laws is a skill that needs to be shared in Aboriginal communities. Canadians also need to begin to understand how and why their laws have not been the solution for Aboriginal Peoples but are a very real part of the problem. Canadian laws are a central source of the oppression Aboriginal Peoples continue to survive.

There exists a fundamental contradiction in the way I experience law. This contradiction has many sides and many angles. Examining the constitution of Canada exposes one face of the contradiction. Others seem to have a regard for the constitution as the supreme law of the land and accept that it is a good place to begin a discussion on the inclusion of Aboriginal Peoples within Canadian state relations. This constitutional conversation usually proceeds along a path that assumes we all share a single definition of law. Much of my work has involved

explaining how this single shared definition of law is really a myth. Many Aboriginal Peoples do not share the Canadian view.

In my presentation at the Edmonton conference, I attempted to dispel this myth about the universality of law. After my presentation, a Métis woman brought me a gift, a collection of Elder's stories. I sat in the hallway and read this book for a while, rather than returning to the conference room immediately. I was still unsettled and not entirely happy with my conference presentation. Here, I had gone on and on and on during my conference presentation, about Aboriginal women and the constitution, constructing what I hoped to be a compelling argument to equitably remedy Canada's historic constitutional failure(s). I argued that we must set aside current political choices such as federalism and parliamentary sovereignty, and instead determine what Aboriginal Peoples' visions are. What I had done in forty five minutes, Rolling Thunder expressed in a few words. Rolling Thunder captured the essence of the contradiction that I had only been able to talk all around it. Rolling Thunder said:

To bring about the healing of an individual or nation depends on respect for all things that have life including the rocks, the mountains and the waters. We should show our respect for all things and all people. And we should respect the differences. We call on the animals, the four-leggeds, the two-leggeds, the lightning, the thunder, the wind, the eagle - we call on all these spirits in order to attain these healing powers.¹⁷⁰

The contradiction is about the unspoken constitutional aspirations and

¹⁷⁰Karie Garnier, *Our Elders Speak: A Tribute to Native Elders* (White Rock, B.C.: Karie Garnier, 1990), 64.

dreams of both Aboriginal Peoples and this country. Aboriginal people seek healing and health. Aboriginal people seek a return to balance in our relationships. This is, perhaps, a new expectation for Canadian law. This chapter examines the process I followed to come to understand the constitutional dilemma Canada continues to try to resolve.

I quite like the phrase "constitutional renovation", but have forgotten whose words I am borrowing. First, I am attracted to the phrase because it does not commit us to the notion of merely amending Canada's constitution. I am not concerned (yet) with the structural process of amendment¹⁷¹ or what form it would take because I do not believe that we are properly prepared for the process of renovation. I think we require fundamental change to both the constitution as a document but also to the principles which ground Canadian constitutional law. It is only in this way that Aboriginal Peoples will be able to choose to confederate (or not) with the rest of Canada. Second, I like the phrase because what we usually renovate is houses (and consider here what makes a house a home). Homes are safe places. Creating a place for each individual should be the fundamental nature of a constitution. But it is not enough to create a place. We must create a place that is safe - a place which respects the fundamental worth of each individual, both man and woman. A place where every individual has the opportunity to be who they are and to become all that they can be.

¹⁷¹Several possibilities exist including amendments such as those contained in the federal proposals, *Shaping Canada's Future Together*; or composite amendments or a national treaty (to list but a few options). I firmly believe that the process of renovation must be equally as creative as the vision of Canada that Aboriginal People's possess.

What is important to consider in this context, is who exists in the family of Canada's constitution and who does not? The more important question arises when we honestly confront the obvious constitutional exclusions; how do we make the constitution a home for all?

It is not difficult to determine who has been excluded from full participation in the constitution of this country. Clearly, Aboriginal Peoples and women have both been excluded. The contours of the exclusion are not identical for women and for Aboriginal Peoples. The contours of the exclusion for Aboriginal Peoples are not identical either. Aboriginal Peoples are legally recognized as the Indian, Inuit and Métis. Indians have the *Indian Act* regime which grants a number of rights (which often feel like a series of burdens). For example, registered Indians did not receive the federal franchise until 1960. The Métis exist at the opposite end of this legal spectrum. They survived as people and as nations within a full constitutional exclusion. The Inuit exist somewhere along this legislative continuum of complete exclusion to oppressive statutory inclusion. These exclusions operated expressly until 1982.

The exclusion of women from Canadian political relations was challenged by a group of women in 1930. In that year, the Privy Council¹⁷² considered whether women were persons capable of being summoned to the senate¹⁷³. The highest Canadian court had decided

¹⁷²Until 1949, the Privy Council was the last court of appeal for Canada. Since 1949, the Supreme Court of Canada has been the court of last resort.

¹⁷³*Edwards v. Attorney General of Canada* , [1930] A.C. 124.

that women were not persons. The Privy Council overturned the Supreme Court of Canada and decided that persons was an ambiguous term and could include women. Both Aboriginal Peoples and women have struggled against their constitutional exclusion since confederation in 1867. From the two examples I have cited, it is obvious that the history, timing and the amelioration of the exclusions have not been identical. Nor will the future solutions be identical.

Once the initial recognition about exclusions is made, it begins to get complicated. As a Mohawk woman, the exclusions that shape my reality are grounded in both my gender and my race/culture. The experience is not as simple as my own bifurcated experiences of race/culture and gender. Aboriginal women also experience discrimination based on their sexual orientation and their disability. Language is also an area of concern. Canada is a bilingual country that is French and English. Anyone speaking an Aboriginal language really faces a requirement that they become trilingual. This failure to recognize the contribution of Aboriginal languages to the development of Canadian society is not acceptable (just consider the names given to many Canadian cities and the impact of Aboriginal languages in Canadian development becomes apparent). We must not only recognize all the exclusion but must make meaningful efforts to overcome *all* obstacles to participation. Exclusions of identifiable groups occur in a variety of ways. Encouraging participation means more than ending legal obstacles.

It does not appear to me that the goals of Canada and Aboriginal

Peoples are harmonious when engaged in processes of constitutional amendment. Rolling Thunder speaks to us about healing. Part of the healing that Aboriginal men and women must do is to heal the wounds of exclusion (that is oppression and colonialism). This is the reason that healing is a constitutional issue for Aboriginal Peoples. Healing is an issue that Canada has never had to deal with as a matter of constitutional discussion. However, Canadian constitutional scholars respect that the constitution "must recognize and reflect the values of a nation".¹⁷⁴ The recognition and reflection of new and agreed upon constitutional values represents what I consider the content of creating the ideal of a "constitutional family". The challenge that lays before this country, is to respect that any constitutional amendments which hope to end the historic exclusion of Aboriginal people must have the effect of embracing our central value which is to heal our nations. I think this asks Canadian parliamentarians and legal scholars to twist their thinking around significantly. This means that the most important constitutional question is not "what do Aboriginal Peoples want" but "what is Canada doing to end the constitutional exclusion of Aboriginal Peoples?" because this is a significant source of the pain that Aboriginal people seek to heal from. The answer to this question is disturbing. Canada has not been willing to fully examine either their role or assume their responsibility for the state of Aboriginal communities today.

Aboriginal people understand that our legal relationships under

¹⁷⁴ Peter W. Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 1985), 1.

Canadian law are a significant contributing factor to our experience of oppression and colonialism. This understanding is finely developed as a result of surviving an oppressive legislative regime (the *Indian Act*) for more than one hundred years. The link between the *Indian Act* and Canada's constitutional arrangements does not necessarily present itself clearly to all people. The *Indian Act* is seen as colonial and oppressive in many Aboriginal communities but somehow the constitution is not always seen in this same light.

The *Indian Act*, a single statute, controls almost every aspect of the life of a registered Indian person. For all other Canadians, there is no parallel experience. No single statute controls every aspect of non-Indian life. Canadians can therefore look first to the constitution for a vision of what Canada means to them. For Indian people the *Indian Act* obscures our access to the supreme law and the vision we see of ourselves there. It is almost as though the *Indian Act* replaces the authority of the supreme law in our daily experiences and eclipses the legal order that operates for all other Canadians. This entrenches inequality and the subordinate status of Aboriginal people (that is to say oppression and colonialism).

Several times in recent history, the choice has been made to place the constitution at the centre of our attempts to re-define Aboriginal legal relationships with Canada. This is not the only available course of action for Aboriginal Peoples. We can re-claim our old laws and live in a self-determining way in our communities. This choice can be exercised at either the individual or community level. This action can have a serious consequence. This choice often incurs the wrath of the federal

Indian Affairs bureaucracy and funding to your community is likely to be jeopardized. The ways in which colonial relations are continually forced on Aboriginal people are numerous.

I have been examining the constitutional legal framework of Canada while searching for my own vision or reflection in the text of the Canadian constitution and/or the current constitutional discussions. I undertook a similar journey through the Canadian *Charter of Rights and Freedoms* in the previous chapter. Finding my vision or my reflection within the constitutional text, even though such a task strikes me as a strange kind of venture, seems to be important for at least one reason. Constitutional amendment is one significant way of re-casting history in a way that includes Aboriginal Peoples.¹⁷⁵ The notions of two founding nations obliterates Aboriginal Peoples, our histories, and our relationship to the development of this country. Our absence is not solely due to our absence from the constitutional text. Even when we are expressly mentioned such as in the case of the Métis in the act¹⁷⁶ which brought the province of Manitoba into confederation, the country managed to govern in such a way that Métis involvement, contributions and lives are marginalized. The truth is the Métis were the founders of the province of Manitoba. What Canadians have written in their constitution does not necessarily ensure that they will live by these values.

¹⁷⁵My preference has previously been to speak of First Nations. Here, as I am focusing on the Canadian constitution alone, I have adopted the language of the constitution in the interests of clarity. Unlike the constitution, I pay my respects to the citizens of the many First Nations, by capitalizing the words Aboriginal Peoples.

¹⁷⁶*Manitoba Act 1870.*

It is worth remembering that the constitutional exclusion results from both the fact that Canadian leaders over the decades have chosen to vanish Aboriginal Peoples from the constitutional text but it has also been the choice of Aboriginal Peoples to remain outside the Canadian constitutional fold. This is more true of some Aboriginal nations, such as the Mohawk, than it is for others. This recognition is important because it identifies that the solution is greater than simply having those who are in positions of recognized Canadian political power deciding to write us in. This may not be sufficient to secure the consent of Aboriginal Peoples to the inclusion. A constitutional inclusion of Aboriginal Peoples without consent is just as oppressive as the exclusion. The offer to include must be meaningful to Aboriginal People as well as satisfactory to Canadians. This dual standard of acceptability must always be maintained.

The threshold issue for many Aboriginal Peoples in the quest for constitutional renovation is the recognition of the inherent right to self-government. A right that is inherent simply means respecting that Aboriginal Peoples have always been self-governing. Self-governing simply means that "we are able to carry ourselves."¹⁷⁷ Inherency is the Aboriginal standard and can be contrasted with the federal view which seems to always favour delegated powers. Delegated simply means that the source of the power is Canadian sovereignty. Canadian sovereignty has historically operated as a way to deny Aboriginal experience and

¹⁷⁷This is a literal translation of the Mohawk work for self-government. In my language the word is *tewatatha:wi*.

understanding of our rights to self-determination. The extent to which the Aboriginal understanding is reflected in Canada's present constitution is subject to continued controversy. There is not a single Aboriginal view about how to proceed. The simplest way to share the understanding I have come to is to examine the existing provisions in Canada's constitution.

In Canada, 1982 was a remarkable year. The country repatriated its constitution. This action began more than a decade of intense constitutional struggles in this country. These are struggles which are likely to resurface again in Canada. The repatriation ended the dependency on England's parliament for matters requiring constitutional amendment. Included in this package were a *Charter of Rights and Freedoms*, an amending formula,¹⁷⁸ a commitment to move from parliamentary supremacy to constitutional supremacy¹⁷⁹, and a protection of existing Aboriginal rights and treaty rights.¹⁸⁰ The new

¹⁷⁸Section 38(1) states:

An amendment to the Constitution of Canada may be made by proclamation issued by the Governor General under the Great Seal of Canada where so authorized by

- (a) resolutions of the Senate and House of Commons; and
- (b) resolutions of the legislative assemblies of at least two-thirds of the provinces that have, in the aggregate, according to the then latest general census, at least fifty percent of the population of all the provinces.

It is important to note that Aboriginal Peoples or governments have no constitutional certainty that their consent will be required to any amendment (even if the amendment fundamentally affects Aboriginal lives). The amending formula agreed upon in 1982 is another example of the way inequality is entrenched in Canada's constitution.

¹⁷⁹Section 52 is fully discussed in the previous chapter.

constitutional recognition of Aboriginal rights is a logical place to start examining the impact of Canada's constitution on Aboriginal Peoples. It is the high point in my analysis.

Section 35(1) of Canada's constitution recognizes and affirms existing Aboriginal rights and treaty rights. This section is broadly worded. It provides no specification about what the contents of Aboriginal rights or treaty rights might be. Both Aboriginal rights and treaty rights are separate legal categories of rights possessed by Aboriginal Peoples. This uncertainty is what leads to the generation of hundreds of thousands of words of academic comment and judicial reasoning on the meaning of this section. The constitutional package of 1982 provided for a process to reach agreement about the scope of the rights recognized in Aboriginal Peoples. From 1982 to 1987, four First Minister's Conferences¹⁸¹ were held. Little was accomplished that clarified the meaning of Aboriginal and treaty rights (such as self-government) during these four meetings. Two amendments were made in 1983. Section 35(3) provides the certainty that land claims agreements negotiated in the future are "treaty rights" within the meaning of the constitution. Section 35(4) protects gender equality.¹⁸² Notwithstanding the failure

¹⁸⁰Section 35(1) states:

The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

¹⁸¹Prime Minister and premiers.

¹⁸²This section states:

Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed

of the talks from 1982 to 1987, sound legal arguments can be made that the inherent right to self-government for Aboriginal Peoples is already recognized and respected in the Canadian constitution. This is my firm position.

Although the section has generated thousands of words regarding its application, the legal argument about inherency is very simple. The words found in the constitution which protect Aboriginal rights and treaty rights are Canada's "solemn promise"¹⁸³ to "*recognize and affirm*" the rights. Guarantees (such as the rights found in the *Charter*) are sourced in the authority of Canadian governments to legislate.¹⁸⁴ *Charter* rights are granted not recognized and affirmed. The *Charter* is a guarantee of rights from Canada to Canadians. Section 35(1) is not a grant of rights. The wording of section 35 is vastly different. To understand this difference, the meaning of the phrase "recognized and affirmed" must be considered. Both a recognition and affirmation when understood in their common usage imply that whatever is being recognized or affirmed already exists. In the case of section 35 that is Aboriginal and treaty rights. As section 35 implies these rights were pre-existing rights, the section affirms the inherency of Aboriginal rights. The

equally to male and female persons.

¹⁸³*R. v. Sparrow*, [1990] 3 C.N.L.R. 163-188 at 163.

¹⁸⁴Canada has a federal system of government. It is comprised of two distinct levels of government, the federal and those of the provinces. The full sovereign powers of Canada are shared between these two levels of government under the parameters set out in sections 91 and 92 of the *Constitution Act, 1867*. The federal powers are found in section 91 and the provincial powers in section 92. Canada also has territorial governments and municipal governments. Their powers are not constitutional but delegated.

recognition and affirmation made in section 35 strongly suggests that Aboriginal and treaty rights are pre-existing rights and do not come from any order of Canadian sovereignty. Therefore, they are not granted rights. This is so important as it entrenches in Canada's constitution a respect for the way Aboriginal Peoples see ourselves, a respect that has been missing from the Canadian legal and political perspective since confederation.

Immediately following the failure of the 1987 Aboriginal talks which were intended to "codify" or list the specifics of Aboriginal and treaty rights, Canada, under the direction of then Prime Minister Brian Mulroney, turned its attention to another pressing constitutional problem. It was a problem of relationships which is as old as the country itself. Quebec¹⁸⁵ failed to ratify Canada's new constitution in 1982. Immediately following the failed Aboriginal talks, Canada negotiated a package that would gain Quebec's signature. The package gave to Quebec greater powers in relation to immigration, senate appointments, courts and spending, as well as recognizing the francophone population as belonging to a "distinct society". The phrase "distinct society" was undefined.

Canada's willingness to accommodate Quebec's distinctiveness just weeks after the fourth failure to implement Aboriginal Peoples distinctiveness (that is to define self-government) raised the ire of many Aboriginal people including the leadership. Canada's politicians could

¹⁸⁵Quebec is one of Canada's ten provinces. It houses the largest francophone population in the country and operates under a system of civil law. The rest of the country follows the common law tradition.

not agree to a meaning of the term Aboriginal self-government and insisted that it be clearly defined. A cynic would suggest that the process of defining self-government was really a process of limiting the broad recognition of Aboriginal and treaty rights that had been placed in the constitution in 1982. Within a few weeks of the failed Aboriginal talks, Canada could agree not only to recognize the distinctiveness of Quebec society but also hand out only to Quebec new provincial powers. The irony was immense and could be seen in the immediate Aboriginal resistance to the Meech Lake Accord which was the document that proposed the new changes. The Meech Lake Accord was defeated in June of 1990 largely due to the resistance of Manitoba politician Elijah Harper, a Cree MLA from Red Sucker Lake.¹⁸⁶

The empowering resistance to the Meech Lake Accord and its failure to recognize Aboriginal Peoples in any substantive form signifies that constitutional recognition must be important to Aboriginal Peoples. It is also testimony to the strength and resourcefulness of Aboriginal people. Aboriginal people are no longer willing to accept exclusion or marginalization. This is not to deny the importance of the issues that Quebec brings to the constitutional table. However, in a search for a specific constitutional recognition of any constituency's inherent, linguistic or human rights, the rights of others cannot be vanished.

¹⁸⁶Please refer to M.E. Turpel and P.A. Monture, "Ode to Elijah: Reflections of Two First Nations Women on the Rekindling of Spirit at the Wake for the Meech Lake Accord", 15 *Queen's Law Journal* (1990), 345-359. Also see, Pauline Comeau, *Elijah: No Ordinary Hero* (Vancouver: Douglas & McIntyre, 1993). Public discussion was initiated by the release of the federal proposal, *Shaping Canada's Future Together*.

Aboriginal people cannot be asked to wait in turn for their opportunity to "negotiate." This is the point of principle at the heart of Aboriginal People's resistance to the Meech Lake Accord. The resistance was not a rebuke of Quebec desires but an affirmation of the respect we have for ourselves as nations. The fact that Quebec's desires are pitted against Aboriginal aspirations is a consequence of how Canadians have chosen to proceed on constitutional questions. It is not necessarily inherent in the relationship between Quebec and Aboriginal people. The fact that Aboriginal people have been forced to carry the consequences of the federal approach to constitutional amendment is important and should not be disappeared.

Constitutional renovation was necessary prior to 1982 and it may still be necessary. The rights affirmed in section 35 remain to be specified. Furthermore, there is a great gap between the position of Canada and the position of Aboriginal nations to the itemization of those rights. The implications of amending Canada's constitution to include Aboriginal Peoples are still uncertain. Some of the uncertainty is being resolved through litigation initiated by Aboriginal people. Engaging the courts as the principal process of reaching a certainty about the meaning of Aboriginal and treaty rights is an incremental one and it will be slow. That is the nature of the judicial process.

What I understand about the constitution must be filtered through how I understand myself as a Mohawk woman with a legal education. I cannot deny that my desire to even seek an image of my people within the principal document of Canadian nationhood is shaped by my

personal experience which includes my legal education. I do not believe that the majority of Aboriginal people would engage in such an activity. I still believe that real change can be affected through Canadian law (although on some individual days this is a difficult belief to maintain). This discussion is, therefore, not one that focuses on the merit of any general constitutional renovation, as it appears we are already committed at least to having the constitutional discussion. This is easy to say as I believe it is legally possible to create a constitution which respects the true Canadian national identity. That identity is not only about two founding peoples, but also about the original peoples and more recently, a commitment to multiculturalism.¹⁸⁷ To accomplish such a constitution will require all the wisdom and creativity that we as a country possess.¹⁸⁸

That much said, a caution also seems necessary. The Canadian constitution is founded on principles such as the rule of law, parliamentary sovereignty, federalism, separation of governmental powers between two levels of government, and so on. Some of these political choices (and they were choices in 1867 or perhaps earlier), foreclose certain recognitions that Aboriginal Peoples may seek. For example, because Canada is a federal state, it seems impossible to imagine a construction of Aboriginal self-government that is not affected

¹⁸⁷This commitment is recent *only* on the part of the founding nations. Aboriginal Peoples have always welcomed all races and all nations to the shores of what we call Turtle Island.

¹⁸⁸Although I do not consider myself to be a Canadian, in the interest of unity, I am using language in this chapter which suggests that we have already accomplished the difficult task of meaningful inclusion of Aboriginal Peoples.

or compromised by the fact that the federalist choice has already been made. The federal government has certain powers as do the provinces. In all of the constitutional discussions with Aboriginal people the federal nature of the Canadian state has never been put on the table for negotiation. This means Aboriginal people have always been required to shape our relationship with Canada in any gaps between federal and/or provincial powers. This is not an ideal choice but it has been the only choice (assuming that the delegated powers route is rejected).

The majority of Aboriginal nations proceed to any constitutional discussion with the view that our rights are inherent. Aboriginal Peoples believe that our right to self-determination is not just an issue of human rights but is a right that involves our unique cultural beliefs. The Creator is the one who established the legal order that we follow long before the Canadian state was ever imagined. Our respect for our inherent view of Aboriginal rights is a respect for the source of our Creator-given rights. These rights to self-determination exist completely independent to the Canadian state and its right to self-determination sourced in a way that seems right to that state.

In the past Canada has only been willing to delegate rights of government to Aboriginal Peoples (primarily registered Indians living on reserve). Delegated rights to self-determination are really rights to a minimal form of self-government that does not challenge the existing Canadian state relations. Delegated rights of Indian government are sourced in Canada's sovereignty, a sovereignty that prior to 1982 did not recognize inherent Aboriginal rights. Delegated rights to self-government

are an affront to the beliefs and values of Aboriginal Peoples. It requires Aboriginal people to compromise our principles in an unconscionable manner. Delegated rights are a modern way to ensure that colonialism continues to be reproduced in Canada. This is a pattern which Aboriginal people seek to disrupt.

It is important to understand the agreements that Canada is already committed to and that we can learn about by examining other sections of Canada's constitution. The nature of Canadian federalism and the manner in which federal/provincial relations are defined is a necessary consideration in any discussion about constitutional reform. It is a union of a national government and regional governments called provinces. The totality of Canadian sovereignty is divided between these two levels of government, federal and provincial. How these powers have been shared since 1867 is itemized in sections 91 and 92 of the constitution. The parameters of this division of powers has a profound impact on the choices available to Aboriginal Peoples. More importantly, the way Canadian sovereignty is divided causes a barrier to be erected around the application of section 35. This barrier can only be understood by thinking about sections 91 and 92 together with section 35.

All of the major concerns that Aboriginal People have such as education, child welfare, justice relations, already exist as either a federal or provincial power¹⁸⁹. Many of the issues that Aboriginal people are

¹⁸⁹I am not overlooking the territorial governments. The source of their exclusion is constitutional, based on the status of those territorial governments. Under the *Northwest Territories Act*, R.S.C. 1970, c. N-22 and the

concerned about are already provincial spheres of legislative activity. These powers of the federal and provincial governments generally operate to the exclusion of the other level of government. The existing structure of the division of governmental powers (found in sections 91 and 92) must likely be challenged if Aboriginal People's governments will be any greater than a delegated power. This does not require a re-ordering of existing federal and provincial relations. It merely requires the recognition that this ordering does not affect Aboriginal people unless Aboriginal people consent to that ordering. Such a simple solution has not been introduced in any proposed constitutional reforms.

The manner in which sections 91 and 92 structure the political powers of federal and provincial governments obviously cannot escape amendment if the aspirations of Aboriginal Peoples are to be met. This problem is a simple one. It only requires constitutional amendment that states sections 91 and 92 do not apply to Aboriginal governments. This suggested amendment is required in the wake of the *Sparrow* decision. Prior to *Sparrow*, it could be strongly argued that section 35(1) constitutionally mandated the re-ordering of section 91 and 92 in such a way that the inherent right to self-determination of each Aboriginal nation was recognized. In a paragraph with too many themes, the

Yukon Act, R.S.C. 1970, c. Y-2, both of the territorial governments legislative powers are subordinate to the federal parliament. Effectively, there are four tiers of government in Canada; federal, provincial, territorial and municipal. It is only the federal and provincial powers that are constitutional. The powers of territories and municipalities are subordinate, a fact that territorial governments are not satisfied with. It is *not* the will of the majority of Aboriginal People to secure subordinate legislative powers. This violates our principle of inherent rights.

unanimous Supreme Court states:

There is no explicit language in the provision that authorizes this Court or any court to assess the legitimacy of any government legislation that restricts aboriginal rights. Yet, we find that the words "recognition and affirmation" incorporate the fiduciary relationship referred to earlier and so import some restraint on the exercise of sovereign power. Rights that are recognized and affirmed are not absolute. *Federal legislative powers continue, including of course the right to legislate with respect to Indians pursuant to s.91(24) of the Constitution Act, 1867.* These powers must, however, now be read together with s.35(1). In other words, federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights. Such scrutiny is in keeping with the liberal interpretive principle enunciated in *Nowegijick, supra* and the concept of holding the Crown to a high standard of honourable dealing with respect to the aboriginal peoples of Canada as suggested by *Guerin v. The Queen, supra*.¹⁹⁰

Since the Supreme Court has affirmed the power of the federal government in section 91(24) to legislate over Indians a fundamental contradiction exists with the powers entrenched in section 35(1). As it stands now, section 35(1) protects an inherent right, but there is no mechanism to channel this right into actual government powers.

This is not the only reason that sections 91 and 92 are of paramount importance. Prior to 1982, one of the most significant constitutional references to my people¹⁹¹ was to be found in section 91(24) of the *British North America Act* (as it was then). This is a section

¹⁹⁰*Supra, Sparrow*, 181.

¹⁹¹For Métis people, the same cannot be said. Their vision and image was disappeared within the constitutional document up until the 1982 entrenchment of "Aboriginal rights".

of the constitution where I cannot locate a healthy image of myself. That section provided the federal government with the authority to pass laws regarding "Indians and Lands Reserved for Indians".¹⁹² Effectively, Aboriginal status in Canada is as a subject matter of federal authority. We are numbered 24 in between "copyrights" and "naturalization and aliens". We are not equals, merely subject matters.¹⁹³ This must be disturbing for a country that asserts it prides itself on a respect for principles of equality. Section 91(24) is unacceptable as it entrenches inequality.

It is section 91(24) that provides the authority for the federal government to pass laws pertaining to Aboriginal Peoples. This is the constitutional basis for laws such as the *Indian Act*. One of the many problems with the *Indian Act* regime is that it denies basic democratic rights to Aboriginal Peoples. Elected Band officials are responsible to the Minister of Indian Affairs and his¹⁹⁴ Department¹⁹⁵. Responsible

¹⁹²The meaning of the word Indian shifts when the discussion moves from the *Indian Act* to section 91(24). "Indians" in the *Indian Act* definition is a narrow term and refers to only those Indians entitled to be registered. This is not the same "Indian" that appears in section 91(24). As the constitution is the supreme law, its authority is greater than any statute. The constitution cannot ever be changed by unilateral political action (such as any legislature passing a statute). This rule of constitutional interpretation is the first legal indication that there are different legal meanings for the word "Indian" (which confuses matters of language even more). In section 91(24) Indians includes Inuit people (see *Re: Eskimos* [1939] S.C.R. 104). Similar arguments are easily made to show that Métis are Indians within the meaning of section 91(24).

¹⁹³I owe the clear articulation of this concept to my legal colleague Moses Okimaw.

¹⁹⁴The use of the male pronoun is intentional. I have only heard tell of one female Minister of Indian Affairs. This post never been held by an Aboriginal person.

government demands that elected officials be answerable to their electorate *directly*, not to another body or individual. And it makes sense not to forget that the Department of Indian Affairs is *not* a system which operates on or reflects Aboriginal cultural values. Quite the opposite is true historically, it operates on the principle that these Aboriginal values are worthy of only extinction.¹⁹⁶ When section 91(24) is understood to be the source of authority for the *Indian Act*, then the oppressive nature of Canadian constitutional law is in full view.

It is more than the government structure established by section 91(24) and the way the federal government has exercised their authority over Indians that causes me concerns. One of the essential elements required to understand the Aboriginal view of our rights is our relations to the land. I am of the land and it is of me. Section 91(24) seems, ironically, to envision this as it recognizes both "Indians" and "Indian Lands". This is an odd twist of fate because the Indian lands referred to are not lands envisioned in an Aboriginal way. The irony lies in the fact that the connection in s.91(24) between Indians and land is not a

¹⁹⁵Section 3(1) of the *Indian Act* provides that the *Act* is to be administered by the Minister who is the superintendent general of Indian Affairs. Section 81 provides for making of band by-laws only when they are *not* inconsistent with the Act or any regulation. Section 82(2) specifies that every band by-law must be forwarded to the Minister and comes into force forty days after forwarding. Further, the same section provides that the Minister may disallow any by-law within the forty day period. No by-law can come into force until the Minister's approval is secured!

¹⁹⁶By this I mean, that the Department as well as all current "Indian" legislation was established to meet the purpose of first controlling and then assimilating Indian people. For a discussion see, James S. Frideres, *Native Peoples in Canada: Contemporary Conflicts* (3rd Edition), Scarborough: Prentice Hall, 1988 at pages 25 - 38.

recognition of how we see ourselves as being of this land. Section 91(24) does not envision any relationship between Indians and the lands. It merely creates two *separate* subjects of federal authority to legislate. It is also important authority to legislate does not require that any level of government exercises that authority or exercises it in a particular way. Rather, the relationship exposes the reason why we gained constitutional recognition was because the land *not* the Aboriginal People were of central importance to the settlers. This recognition is obviously *not* based upon respect .

Some Aboriginal people have tried to creatively interpret section 91(24) and believe that it entrenches the “nation to nation” relationship Aboriginal people have with the Government of Canada (to the exclusion of provincial governments). I understand that the “nation to nation” belief is a fundamental principle of the treaty view of Aboriginal/Canadian relations. I understand that the desire to read section 91(24) broadly as a protection of the “nation to nation” relationship is located in a desire to protect an important Aboriginal belief in the nature of Canada’s relationship with Aboriginal nations. There was no other constitutional source to protect this view prior to 1982. I know that this view is also located in the vulnerability that Aboriginal people feel in our relations with Canada. While I respect the “nation to nation” position and the need to protect this view, such a construction of section 91(24) is based on a total reconstruction of Canadian constitutional arrangements contained in the two division of powers sections. It is a dangerous construction when the legal purpose of

section 91(24) is understood. Section 91 only authorizes federal legislative authority. This authorization is in fact contrary to the nation to nation view. Sections 91 and 92 do not define the nature of those powers or any form of relationship other than the relationship between the federal government and the provinces.

What I have learned about the law in turns effects the way I am able to understand who I am within the structure of Canadian society. I recognize that I am Mohawk. But I must also recognize that the world understands my Mohawk identity as being capable of being controlled (governed) by a foreign and colonial state (the federal government). It is this section of the constitution that is a paramount source of the denial of my people's beliefs that we are self-governing. Perhaps many people without legal education or an interest in constitutional law have never recognized that this is one of the seeds from which the subordinate status of Aboriginal Peoples flows. Although the affect of Canada's constitutional structure on the oppression of Aboriginal Peoples as individuals is not direct, it is in my mind a relationship of great importance. The Canadian constitution establishes the possibility that Aboriginal Peoples can be viewed *as less than* (as opposed to distinct but equal) other residents of this territory.

It may seem crazy to some people to try to locate an Aboriginal vision or image in Canada's constitution. What I am really trying to accomplish on this guided journey through the constitution of Canada is to discover the ways in which and the extent to which the constitution is a tool of the colonization of Aboriginal Peoples. 'Primitive', 'sub-human',

'uncivilized', 'savage', 'backwards', 'without law or government', and so on is still the language of the courts in Canada when discussing Aboriginal rights and claims. Section 91(24) is part of the problem as it reinforces the subordinate status and inequality accorded Aboriginal nations. Section 91(24) creates that possibility. The first step that Aboriginal litigants are forced to make is to prove to the court that they exist and then show that they lived in "organized societies".¹⁹⁷

The philosophical underpinnings of section 91(24) rest on the European doctrine of discovery. Aboriginal Peoples were less than human because the territory "discovered" was then "terra nullas" (empty lands). The European state could then claim title by virtue of their discovery. Section 91(24), as long as it stands as part of Canadian constitutional law, entrenches an ethnocentric (at best) view of the history of this country. It is all of these historical myths that must be corrected if we are to proceed as a country, from here, in a good way.¹⁹⁸

¹⁹⁷See, for example, *Delgamuukw et al v. The Queen* [1991] 3 W.W.R. 97 (B.C.S.C.).

¹⁹⁸No where in the federal package, *Shaping Canada's Future Together*, are there any express recognitions for the need to amend section 91 and 92 in such a manner that the types of concerns that have been thus far articulated in this chapter are addressed. Furthermore, there is an eerie silence with respect to Aboriginal nations in the section of the report that deals with sections 91 and 92. It is clear that the federal proposal does advance amendment of these two sections. In particular, the report suggests that the federal government is willing to turn over responsibility to provincial governments a number of heads of federal power, such as tourism, forestry, mining, recreation, housing and municipal/urban affairs. Some of these matters are of deep concern to Aboriginal Peoples and Aboriginal Peoples will be profoundly affected if these matters are turned over to provincial governments. Yet, no where in the federal proposal do I see this recognition let alone respect for a transfer of powers that holds the potential to have a negative relationship on Aboriginal lives.

And it must be considered who clings to these myths. It is difficult being colonized, but it is more difficult to be a decolonized colonizer.

Sections 91 and 92 are essentially a part of the discussion we must have for a number of reasons. The powers divided between federal and provincial governments cannot be a component of the constitution which escapes our notice in the current (or any future) constitutional discussions. I have provided six reasons for why it is essential to amend sections 91 and 92 of the constitution. I would simply categorize these reasons, as follows: dispelling historical myths including the doctrine of discovery, ending the denial of Aboriginal participation in the creation of this country, recognizing the historical reality that Aboriginal peoples were historically and continue to be self-governing, a violation of Aboriginal self-image and a denial of equality, dispelling the narrow view of the relationship between people and land, removing the source of the divide and conquer strategy, and ending the legitimacy for legislative regimes such as the *Indian Act* which are non-democratic. It must be recognized that sections 91 and 92 as they now stand are a major obstacle to Aboriginal aspirations, both our aspirations for equal status and for governmental powers that are anything greater than delegated

The thinking in the *Canada Package* about Aboriginal Peoples remains hauntingly familiar. The report makes it clear that the federal government will continue to recognize its own responsibilities. Aboriginal Peoples are recognized as one of those responsibilities (that is subject matter only). I trust this means that Aboriginal People will remain a head of federal power. This means Aboriginal people will continue to be subjugated and oppressed. This remains an unacceptable way to entrench what we believe is a historical relationship based on a principle of "nation to nation" respect. This is haunting because it is not the first time that Aboriginal People have seen proposals that do not go to the heart of Aboriginal concerns. The federal proposal was only a reorganization of Canada's existing colonial relations with Aboriginal Peoples.

powers.

Failure to address any one of these individual reasons precludes recognizing and respecting the inherent nature of the rights of Aboriginal Peoples - a commitment in 1982 that received the status as the supreme law of the land. Canada has not made significant process since 1982 in implementing this commitment. In the pages of discussion on the meaning of section 35 little mention is made of the impact that section 35 necessarily has on the established Canadian ways of doing business with Aboriginal Peoples. The beauty of section 35 is that it creates a new way of viewing the responsibility of Canada to Aboriginal Peoples.¹⁹⁹ Since 1982, this means that Canada is failing to govern itself in a constitutional way with regard to its dealings with Aboriginal Peoples.

This is not meant to be a full discussion of the Canada Package. Unless the proposal is changed through the process of negotiation, it is obvious at the outset that the federal proposals are clearly unacceptable to Aboriginal Peoples. It seems to be more logical to create our own proposals and not merely react to someone else's agenda. The fact that Aboriginal involvement in constitutional negotiations has always occurred in response to Canada's initiation of such talks for a purpose other than resolving the relationship with Aboriginal people, is disturbing. Canada's constitutional discussions have only occurred as a collateral package attached to another goal that Canada sees as worthy.

¹⁹⁹Only nominal attention has been paid to examining the impact of the fiduciary relationship that exists between the Crown and Aboriginal Peoples. Even less litigation has occurred under this legal concept.

CHAPTER SIX

THE ROLES AND RESPONSIBILITIES OF ABORIGINAL WOMEN: RECLAIMING JUSTICE

LOCATING ABORIGINAL THOUGHT IN MAINSTREAM ACADEMIA:

Storytelling is the way in which knowledge is shared in traditional Aboriginal²⁰⁰ relations. I wish to begin this conversation on justice by sharing my story as a Mohawk woman (mother and wife) who accommodates academia on a daily basis as the way in which I support myself and my familial obligations. Often we hear the Elders²⁰¹ tell us, this is how "I have come to understand it". Through my experiences of both the academic world and the Aboriginal world, this is what I have come to understand about justice²⁰² from the perspective of one Aboriginal (Mohawk) woman.²⁰³

²⁰⁰I use this term to refer to the "Indian, Inuit and Métis".

²⁰¹When the words of Elders and grandmothers are cited in this thesis their nations and clans will also be referenced where possible. This is *not* a way of credentialing these well-respected individuals. In fact any such attempt would be a grave insult. I offer this information for the reader, in order to assist them in understanding and organizing the information that is presented. It is one way of addressing the false homogeneity that seems to exist when the term Aboriginal Peoples is used.

²⁰²Although my original intention was to focus solely on justice within the criminal law paradigm, this has not been possible, at least in the introduction of this chapter. I believe that this is a reflection of the way in which justice is constructed in the Aboriginal world view. The focus on criminal justice will develop as the chapter proceeds.

²⁰³My experience of the culture to which I was born has often been an experience of negation as I was raised in cities away from the Mohawk people. I am also influenced in my understandings as a result of my parentage, one

Speaking to the Manitoba Aboriginal Justice Inquiry, Elijah Harper said:

With so much discrimination occurring against our people, it is often amazing how accepting we are of our situation. We know that without tolerance there can be no justice. Without understanding there can not be justice. Without equality there can be no justice. With justice we can begin to understand each other. With justice we can work and live with each other. Aboriginal people want a judicial system that recognizes the native way of life, our own values and beliefs, and not the white man's way of life.²⁰⁴

These words summarize, shape, and conclude my own thoughts on the matter of Aboriginal justice systems. The concepts of justice, truth, tolerance, understanding, and equality are the themes that weave themselves in and out of my thoughts as I consider what justice would have been traditionally²⁰⁵ to Aboriginal women. These are the concepts that we must re-capture in our search for healing.

A fundamental difference between Aboriginal and non-Aboriginal

Mohawk and one White. Over the years, I have come to respect that I was put down in the middle and this is where my work is. I have also "married into" a different nation. My understandings now also reflect the teachings my Cree husband and his people share with me.

²⁰⁴Supra., *Aboriginal Justice Inquiry*, 251.

²⁰⁵A word of caution is necessary regarding my use of the word traditional. This word is frequently misinterpreted in the mainstream discourse. It does *not* mean a desire to return through the years to some historic way of life. Aboriginal traditions and cultures are neither static or frozen in time. It is not a backward looking desire. Traditional ways have not been lost as some would assert, but the right to have recognized, respected, and to exercise these distinct ways of being have been overtly and covertly oppressed. Traditional perspectives include the view that the past and all its experiences inform the present reality.

societies is the way in which truth is located. Truth in non-Aboriginal terms is located outside of the self. It is absolute and may be discovered only through years of study in institutions which are sanctioned as sources of learning. In the Aboriginal way²⁰⁶, truth is internal to the self. The Creator put each and everyone of us here in a complete state of being with our own set of instructions to follow. Truth is discovered through personal examination, not through systematic study in state sanctioned institutions.²⁰⁷ In the Ojibwe language truth is "niwii-debwe". "Truth", however, is not the literal translation. This Ojibwe word more fully means "what is right as I know it".²⁰⁸ Leila Fisher, an Elder of the Hoh nation in what is now known as Washington state, tells this story which helps to underscore the importance of both truth and introspection:

"Did you ever wonder how wisdom comes?" Without taking her hands from her weaving or even looking up to see if we're listening, she continues: "There was a man, a postman here on the reservation, who heard some of the

²⁰⁶Although I frequently speak of a single Aboriginal way, this is misleading. Aboriginal Peoples are not homogeneous. We are recognized in law as the "Indian, Inuit and Métis". Even within these three legal references there exists great diversity based on our experience and membership in specific nations, our place of residency (including north/south; reserve, settlement, rural, urban experiences), our gendered understandings, and so on.

²⁰⁷I am not suggesting that we throw away the structure of mainstream education (and in particular post-secondary education), but that our distinct ways of learning must be equally respected.

²⁰⁸*Supra.*, Aboriginal Justice Inquiry (Volume One), 41.

Elders talking about receiving objects that bring great power. He didn't know much about such things, but he thought to himself that it would be a wonderful thing if he could receive such an object - which can only be bestowed by the Creator. In particular, he heard from the Elders that the highest such object a person can receive is an eagle feather. He decided that was the one for him. If he could just receive an eagle feather he would have all the power and wisdom and prestige he desired. But he knew he couldn't buy one and he couldn't ask anyone to give him one. It just had to come to him somehow by the Creator's will."

"Day after day he went around looking for an eagle feather. He figured one would come his way if he just kept his eyes open. It got so he thought of nothing else. That eagle feather occupied his thoughts from sunup to sundown. Weeks passed, then months, then years. Every day the postman did his rounds, always looking for that eagle feather - looking just as hard as he could. He paid no attention to his family or friends. He just kept his mind fixed on that eagle feather. But it never seemed to come. He started to grow old, but still no feather. Finally he came to realize that no matter how hard he looked he was no closer to getting the feather than he had been the day he started."

"One day he took a break by the side of the road. He got out of his little jeep mail-carrier and had a talk with the Creator. He said: 'I'm so tired of looking for that eagle feather. Maybe I'm not supposed to get one. I've spent all my life thinking about that feather. I've really hardly given a thought to my family and friends. All I cared about was that feather, and now life has just about passed me by. I've missed out on a lot of good things. Well, I'm giving up my search. I'm going to stop looking for that feather and start living. Maybe I have time enough left to make it up to my family and friends. Forgive me for the way I have conducted my life'."

"Then - and only then - a great peace came into him. He suddenly felt better inside that he had in all these years. Just as he finished his talk with the Creator and started getting back in his jeep, he was surprised by a shadow passing over him. Holding his hands over his eyes, he

looked up into the sky and saw, high above, a great bird flying over. Almost instantly it disappeared. Then he saw something floating down ever so lightly on the breeze - a beautiful tail feather. It was his eagle feather! He realized that the feather had come not a single moment before he had stopped searching and made his peace with the Creator. He finally learned that wisdom comes only when you stop looking for it and start truly living the life the Creator intended for you. That postman is still alive and he's a changed person. People come to him for wisdom now and he shares everything he knows. Even though now he has the power and the prestige he searched for, he no longer cares about such things. He's concerned about others, not himself. So now you know how wisdom comes."²⁰⁹

Individuals of Aboriginal ancestry who try to walk in both the academic world and the Aboriginal world are confronted by the profound cultural differences in the ways in which truth, knowledge, and wisdom are constructed. The instructions we receive through institutionalized education indicate that we must locate truth and knowledge outside of ourselves. Introspection is not a proper research method. It is improper to footnote the knowledge that my grandmother told me. Yet, more and more frequently Aboriginal academics are asked to explain our unique cultural ways of being. It is expected that the objective style of academic writing ought not to be changed to accommodate the new understandings that Aboriginal academics bring to various disciplines. These two understandings of truth are, perhaps,

²⁰⁹Steve Wall and Harvey Arden, *Wisdomkeepers: Meetings with Native American Spiritual Elders* (Hillsboro: Beyond Words Publishing, 1990), 74.

diametrically opposed. Yet, these two ways of knowing co-exist within my experience. My experience is then one of negotiating the contradictions. Justice requires that this accommodation not be negotiated solely on an individualized basis but also must be embraced institutionally. This understanding must come to form part of the basis that we recognize knowledge to be built upon.

As I come to the topic which is currently under review in this paper, my mind is first turned to these questions of construction. It must be recognized that there are few academic sources to refer to substantiate the answering of the questions that an analysis of Aboriginal justice from the woman's perspective requires.²¹⁰ Usually, the negotiations I go through to produce an academic paper are not visible in the final product. However, as we look to the future, little is accomplished when these contradictions are faced only on an individualized level. The contradictions, although confronted on a personal level, are *not* personal inadequacies located within the self, but

²¹⁰This is partially a result of the covert and overt exclusion of Aboriginal people from educational institutions. For example, there are only three Aboriginal people who have tenure track teaching appointments in Canadian law schools. There are several others who have "special" positions relating to Native Law programs in several faculties and at least two others teaching on contract. Of the three tenure track professors, all three were only appointed in July of 1989. This is a very recent occurrence, and the void in the academic writing of Aboriginal Peoples (note not writing on) must be seen in light of this realization. I would be remiss if I did not also point out that of the three, we are all women (Ojibwe, Cree, and Mohawk).

contradictions that exist between the two cultures. The contradiction exists in the way that knowledge and truth are constructed and sanctioned in each culture. The contradictions exist in the way that knowledge and truth are constructed and sanctioned in each culture. The contradiction is compounded when the knowledge is implemented in the corresponding institutions or belief structures of mainstream life. By failing to publicly label and address this contradiction, it is perpetuated.

A similar contradiction exists when asked to write or speak from the experience of a woman who is Aboriginal. The historic oppression of women and our subsequent powerlessness in mainstream society has been challenged through the creation of bureaucracies, organizations, ministries, which focus solely on women's experience.²¹¹ We see the same structure within academia with the creation of women's studies programs and women's courses within other departments, faculties and programs. The problem of exclusion from mainstream thought is not remedied through the creation of programs that hold the potential for women's experience to be marginalized. The conclusion is simple enough. Although many institutions of the dominant society claim to

²¹¹I am *not* suggesting that these developments are *not* necessary or valuable. They are just incomplete as they do not challenge the existing structure or foundation of the institution.

be objective or value free, they actually reflect a male construction of reality. The solutions we advocate must be seen to challenge the male-dominated structure.

Law is a particularly good example of the way in which the male construction of reality is implemented in such a way that the gender specificity of legal relations is vanished. Sherene Razack, drawing on the work of Ann Scales²¹², explains:

The legal test cases that constitute feminism applied to law in Canada are fundamentally projects of naming, of exposing the world as man-made. Men, Ann Scales writes, have had the power to organize reality, "to create the world from their own point of view, and then, by a truly remarkable philosophical conjure, were able to elevate that point of view into so-called 'objective reality'" Women working in law find themselves demystifying that reality and challenging its validity in court, substituting in the process their own description of reality. In law, the issues that preoccupy women, Scales notes, are all issues that emerge out of a male-defined version of female sexuality. Abortion, contraception, sexual harassment, pornography, prostitution, rape, and incest are "struggles with our otherness" that is, struggles born out of the condition of being other than male.²¹³

²¹²"Militarism, Male dominance and Law: Feminist Jurisprudence as Oxymoron?" *Harvard Women's Law Journal* 12 (1989), 25-73.

²¹³Sherene Razack, "Speaking for Ourselves: Feminist Jurisprudence and Minority Women" 4 *Canadian Journal of Women and the Law* (1990-1991), 440-458 at 441.

I am clearly not suggesting that the current construction of sexuality is the central aspect of the way in which Aboriginal women view their gender oppression. This topic will be fully canvassed later in the chapter.

The construction of woman as "other" must be the fundamental focus of any analysis which hopes to significantly end the oppression of women. When one gender is constructed as "other", then the goal of equality will continue to be elusive.

The examination of the creation of roles of "otherness" must not conclude in the construction of a definition of equality prefaced on sameness. This is equally problematic. Equality when constructed as sameness perpetuates race and gender oppression. Again, an analysis of legal relations illuminates this point:

There is also a reluctance to record and acknowledge differences when everyone is supposed to be treated the same. In theory, race and sex are irrelevant to being a good lawyer. The "Myth of Equality" is a culturally sanctioned belief that everyone in our society is legally and socially equal and that any differences in their situation are attributable to factors personal to them, such as effort, responsibility, and honesty. This "Myth of Equality" is superimposed on our inherently biased institutions and social systems, hiding from the view the pervasive nature of racism and sexism.²¹⁴

The identification of the similarities between race²¹⁵ and gender oppression is essential to the development of comprehensive theories of equality and justice which can be applied in a meaningful manner to

²¹⁴Shelina Neallani, "Women of Colour in the Legal Profession: Facing the Familiar Barriers of Race and Sex", 5 *Canadian Journal of Women and the Law* (1992), 148-165 at 151.

both Aboriginal women and mainstream individuals.

The same way in which women's programs are marginalized within mainstream institutions is paralleled in the marginalization of Aboriginal Peoples.²¹⁶ Over the last two decades, "Native" studies departments and courses have been created in a way which parallels the contradiction I have already presented in the development of women's studies departments. A second example worthy of note is the criminal justice system. The move to embrace Aboriginal experience within the existing mandate of the Correctional Service of Canada is well-documented in the many reports of recent Aboriginal Justice inquiries.²¹⁷ The Canadian correctional system is a further demonstration of the process of marginalization of those individuals who do not occupy mainstream status and/or share a respect for the notions of incarceration and rehabilitation. This process does not

²¹⁵This is not to suggest that racial oppression is a single experience. It vastly varies based on the individual's cultural and national identity.

²¹⁶Again, I am *not* suggesting that these developments in "Native" programming and departments have been unnecessary or serve no purpose. They are just incomplete in that they do not fully challenge the dominant structures. The marginalization of "Native" studies is also a real danger. Such marginalization fits very neatly into the historical construct of European superiority. I also recognize that the creation of departments of "Native" studies is effective in that it can foster an environment where Aboriginal Peoples feel safe. I also fully support the creation of an Aboriginal Law School.

²¹⁷For a discussion of the many justice inquiries from a woman's perspective please see Patricia A. Monture-Okanee, "Discussion Paper: Aboriginal Women

require the actors in the system to question the status quo or how systemic constructions of race and culture affect their behavior and/or the institution's structure. Again, the conclusion is simple enough. Although many institutions of the dominant society claim to be objective or value free, they actually reflect a specific cultural (that is "White"²¹⁸) construction of reality.

My point is *not* to suggest that the development of Aboriginal specific programs or women specific programs is wrong and should be discontinued. To the contrary, these programs are both essential and necessary, particularly in the short term. However, if the goal of women, or Aboriginal Peoples is to change the structure of society we must also develop new ways of challenging the philosophies and beliefs of the mainstream. To not encourage structural change is to continue to accept the marginalization of any perspective that is not White or male and so on. Structural change is the only way in which meaningful and substantive long term change can be secured.

The systematic review of the Aboriginal experience of oppression in this country now called Canada is essential to the reclamation project I

and the Justice System", unpublished manuscript prepared for the Royal Commission on Aboriginal Peoples, 1992.

²¹⁸Just as Aboriginal cultures are not homogeneous, neither are European cultures. We must keep in the backs of our minds the specificities of the Canadian reality.

support.²¹⁹ The result of this review must be the creation of a detailed understanding of our oppression and the oppression of others. We must understand exactly how oppressive relations operate and are perpetuated. Language is one such condition.

Language is the mechanism by which we communicate what knowledge is. Language is a powerful tool which reinforces mainstream cultural meanings and insights. Language²²⁰ invisibly incorporates culture into our communications:

... "descriptions of People of Colour include their race, while descriptions of White People do not." For example, one reads: "A black woman crossed the street' when had the woman been white, the sentence would have read 'A woman crossed the street'." This use of language reinforces the view that everyone is White unless defined otherwise, that White is the norm, and the People of Colour are outside the norm.²²¹

²¹⁹As part of my personal commitment to "unlearn" colonization, I refuse to think of this land as Canada, Ontario, Quebec, and so on. When I travel I think in terms of whose territory I am visiting - the Cree, the Algonquin, the Dene and so on.

²²⁰Obviously, the reference to language here is a specific reference to the english language. This specificity should be express. The relationship between language and culture is not unitary. For Aboriginal Peoples, I believe, we experience both english and french in similar ways. Both are the languages of our colonization. However, there is also a relationship of domination between english and french. Within the francophone experience there are also relationships of dominance between residences of Quebec and Acadian or Franco-Ontarians, or Franco-Manitobans, or the Métis. For a fuller discussion of the way in which language operates see, Patricia A. Monture-OKanee, "Ka-Nin-Geh-Heh-Gah-E-Sa-Nonh-Yah-Gah" (french translation), 6(1) *Canadian Journal of Women and the Law* (1993), 119-123.

²²¹*Ibid.*, 155.

As we develop a knowledge of justice, we must also illuminate the many other manifest ways in which gender, racial and cultural "otherness" is reinforced.

As we approach the question of Aboriginal justice systems, we must take extreme care to challenge existing structures so that the end result is greater than a mere accommodation of Aboriginal people, or the creation of a "safe" corner for Aboriginal Peoples. Thus far, the majority of reforms to the existing system of Canadian justice have attempted to change Aboriginal people so we fit that system (while the system is encouraged to structurally maintain the status quo). The challenge to do more than just accommodating the needs of Aboriginal Peoples in the existing justice system is not important to Aboriginal Peoples alone. It is not something to be done just for us. Relegating Aboriginal Peoples to a removed corner of experience also fundamentally denies the mainstream the opportunity to benefit and learn from the culture and ways of the Aboriginal nations. This point cannot be over-emphasized.

The way we shape our aspirations is doubly important to Aboriginal women. If the existing remedial process is not questioned then the result will be to create a safe place for Aboriginal women inside the safe place for Aboriginal Peoples. This will marginalize Aboriginal women twice. This result must not be satisfactory to either Aboriginal Peoples or to the mainstream culture.

In recent years, I have begun to assess the meaningfulness of Aboriginal justice initiatives against a two-pronged standard. First, will the conditions of Aboriginal criminal justice "clients" be ameliorated in the short-term? Second, in what way will the long-term needs of Aboriginal communities²²² be positively affected? I see this two-pronged standard as the optimum criteria. We cannot forget the painful realities Aboriginal individuals face today in the criminal justice system any more than we can forget the faces in the sand, the faces of the children yet to come. We must change today's reality of individualized oppression at the same time we create a vision for the future. Similar approaches have been adopted by the Aboriginal Justice Inquiry of Manitoba and the Law Reform Commission of Canada. Furthermore, to repeat the previous point, both of these Commissions also recognize the contribution to mainstream society that will be lost if Aboriginal experience continues to be denied and/or marginalized and/or merely accommodated.

This paper proceeds on the assumption that the solution to the over-representation of Aboriginal Peoples in the criminal justice system and the systemic discrimination in that system requires the re-creation of Aboriginal justice systems. It is not just over-representation that

characterizes the experience of Aboriginal people within the justice system. This is merely the best known and most spoken to aspect of our involvement in the Canadian system. Aboriginal people are also drastically under-represented as people with authority in the Canadian justice system. Few Aboriginal people are police officers, lawyers, judges, prison guards or correctional workers.²²³ Aboriginal communities are both over and under policed. Over-policing is a partial explanation of the over-representation of Aboriginal people as "clients" of the criminal justice system.²²⁴ Under-policing occurs mainly in remote communities where the nearest police detachment may be a day away in good weather.²²⁵ Both over and under policing contribute to the negative way many Aboriginal people view the police. To suggest that the problem Aboriginal people have with the justice system is one of over-representation alone is a drastic simplification of the situation. Understanding the full scope of the difficulties in respecting this foreign system of justice further substantiates the need for the re-creation and legitimization of Aboriginal social control mechanisms.

²²²I use the word, community, to refer to any collection of Aboriginal people, from a small and remote reserve to those living in major urban centres.

²²³*Supra*, *Aboriginal Justice Inquiry*, 249,409, 620.

²²⁴*Ibid*, 595.

²²⁵*Ibid*, 596.

The Aboriginal Justice Inquiry of Manitoba also proceeded to this same conclusion after lengthy discussions. The Commissioner's state:

In the face of the current realities confronting Aboriginal people, we believe that it is important to recognize that the greatest potential for the resolution of significant Aboriginal social problems lies in Aboriginal people exercising greater control over their own lives.

The dependency on alcohol, the increasing rates of suicide, homicides and criminal charges, and the high rates of incarceration are problems that we believe can be dealt with best by Aboriginal people themselves.

These social conditions, we believe, are indeed the products of dependency and powerlessness, created by past government actions and felt deeply by the majority of Aboriginal people. This dependency will not disappear, we are convinced, until Aboriginal people are able to re-establish their own sense of identity and exercise a considerable degree of self-determination.²²⁶

This regeneration of Aboriginal cultures must occur through the healing of both Aboriginal men and Aboriginal women. Justice as the Canadian system of law understands it is too narrowly constructed to allow the opportunity to fully reconstruct Aboriginal social control methods. For this reason, the entire criminal justice debate that has to-date occurred in Canada is misleading. It is this justice vision that sees nominal accommodations made within the existing system such as sentencing circles (the correct Aboriginal term is healing circles), *Indian Act* courts, courtworkers, Aboriginal recruitment initiatives and so on, appear more

Aboriginal than they really. These ideas might change the experience of the justice system for particular individuals currently before the system. However, they do not create a significant or complete amelioration of the experience of injustice that we experience within Canadian justice systems.

"Justice as healing" is a better phrase but the concept may still be incomplete. Healing of individuals alone will not be sufficient. Healing eradicates the effects of the multi-dimensional oppression Aboriginal Peoples have faced. Healing creates a "clean slate", and from this place the new beginning Aboriginal Peoples dream about may be built. Healing approaches only prepare us for the new vision, they are *not* the new vision. Healing is merely a different way of stating the two roads on which our efforts must travel.

The relationships among Aboriginal women and Aboriginal men must also be restored and this may require more than just the healing of individuals. Aboriginal justice discussions which do not focus on women (at the same time that the men are remembered) are also incomplete. In fact, I suspect that an Aboriginal justice system (or project) without women is not Aboriginal at all. There is a story which may help us understand the balance between women and men that we are trying to achieve:

²²⁶Supra., *Aboriginal Justice Inquiry* (Volume One), 263.

"Power" in an Indian sense is understood according to a different set of values. In Aboriginal terms, "power" or empowerment is individual and can be equated with self-determination: the right to have control of your life and future, as an individual and as a community. Power is relational but not dichotomous or hierarchical. It is balanced and complementary. Marie Wilson of the Gitskan Wet'suwet'en Tribal Council helps me here. She has compared the relationship between women and men to the eagle. An eagle soars to unbelievable heights and has tremendous power on two equal wings - one female, one male - carrying the body of life between them. Women and men are balanced parts of the whole, yet they are very different from each other and are not "equal" if equality is defined as being the same. Marie Wilson's metaphor of equality is the contribution of both wings to the flight. "Power" in an Indian sense is understood according to a different set of values.²²⁷

Actively pursuing the goals of justice re-created, I believe, is one way of facilitating the regeneration of Aboriginal nations including the healing of the women and men of these many nations.

It is essential not only to regenerate Aboriginal nations from within but also to establish meaningful external relations with the mainstream communities that surround us.²²⁸ Essential to this development is the necessary construction of an analysis of race which is inclusive of the Aboriginal world view. Frequently, race is constructed merely as

²²⁷Winona Stevenson, Rhonda Johnson, and Donna Greschner, "Peekiskwetan", 6(1) *Canadian Journal of Women and the Law* (1993), 153-173, at 164.

²²⁸In the absence of *true* Canadian political will to change this relationship, then Aboriginal energy is best spent in our own communities.

biological difference. This grossly over-simplifies the Aboriginal world view. Culture, tradition and spirituality also influence fundamentally the world view of Aboriginal Peoples. Just as much as I turn myself around to fit my cultural understandings into the English language, I also must undertake a form of intellectual gymnastics to fit myself into the manner in which racism theory has developed. Reliance on the current academic construction of racism may not as completely advance our understanding of the issues that confront our conversations as need be. One analysis of the Marshall Inquiry provides this example:

In the absence of critical examination of racial beliefs and information, the Inquiry validated the immigrants' view of the *Indian*. It accepted the racial tool of colonialism: the European invention of Aboriginal "reality" and their names for that reality. For example, not once did testimony of non-Mi'kmaq in the Inquiry ever mention the particular tribe of *Indians* to which Junior Marshall belonged. He was always considered an *Indian*, a member of a certain race of people, probably primitive in nature. There was no mention of nationality or ethnicity - only his race. Nationality, like ethnicity, is primarily a subjective phenomenon, a sense of social belonging reinforced by common language, culture, custom, heritage, and shared experience. The difference between being *Indian* and Mi'kmaq is the frontier between racial existence and being human.²²⁹

Justice requires us to embrace all humanity without constructions of superiority and inferiority. It is this recognition that must shape our

²²⁹James Youngblood 'Sakej' Henderson, "The Marshall Inquiry: A View of the Legal Consciousness" cited in Joy Mannette, *Elusive Justice: Beyond the*

efforts in dealing with issues of race and culture; spirituality and tradition.

Concurrently, the valuing of cross-cultural understanding and racism theory (for lack of a better phrases) in a way that is sensitive to gender considerations must also be paramount. The experience of all so-called minority women is not the same. One simple example is worthy of consideration:

... women of colour differ in our races, cultures, class, and our experiences of racism and sexism. A woman of colour of Asian heritage may have experienced membership in a dominant group before coming to Canada. She may be economically wealthy and from a privileged class. Her experiences in Canada may differ from the experiences of a First Nations woman whose people have lived in a White dominated society for generations. Each woman encounters different stereotypes directed towards her. Each has her own strategy for coping with discrimination.²³⁰

This particular danger in the construction of alternatives may be characterized as the danger of over-inclusiveness, that is, assuming that all individuals who experience "otherness" share the same understandings.

There is one particular way in which the over-inclusiveness of race theory disadvantages Aboriginal aspirations in the field of justice. Many of the so-called racial and cultural minorities who have come to Canada,

Marshall Inquiry (Halifax: Fernwood Publishing, 1992), 35-61 at 39 (emphasis in original text).

fled here, or who have been brought here are satisfied with the existing structures of Canadian society and in particular with the criminal justice system. Their dissatisfaction stems from the fact that they are not represented in the positions of power, status and influence. Their goals focus around equitable access to the existing structures and positions of power. For Aboriginal Peoples, this is not seen as a full or final solution. At most it is seen as a step along the way. We do not want into the existing system in greater numbers or in higher places, we want *out*! Aboriginal people dream of systems where we are able to do things in our own ways. Wanting in would only amount to supporting the mere indigenization of existing systems. Aboriginal aspirations, therefore, isolate us from the "mainstream" of anti-racism collectives.²³¹

Before developing this discussion in a way which focuses on Aboriginal women and justice, one further comment about education is required. The relationship between Aboriginal Peoples and the education system must also be understood as having been about the oppression of Aboriginal Peoples. In many ways this oppression remains central to the Aboriginal experience of educational institutions today. For example,

²³⁰Supra., Neallani, 149.

²³¹I want to thank Susan Zimmerman for sharing with me the insights she gained while working on the Law Reform Commission of Canada projects regarding Aboriginal Peoples, Visible Minorities and the criminal law. Her insights have helped me understand and verbalize my own experiences.

the removal of Aboriginal children from their homes and their placement in residential schools was one of the paramount factors in the oppression of Aboriginal languages and cultures. As a result, education alone, and especially academia, cannot be seen to be *the* solution as once perceived, and remains to be one of the central problems. The solution to the justice conundrum does not lie in better research, or better researchers, but within Aboriginal communities themselves. We must rely on the knowledge of the people of the many Aboriginal communities, both reserve and off-reserve (including rural, urban, or settlement experiences), if we expect meaningful progress to be made. We must rely on our ability to deconstruct a colonial history. Especially, we must rely upon the Elders and their wisdom.

MOVING JUSTICE FORWARD:

It was 1992 several year ago and Aboriginal Peoples celebrated 500 years of resistance to colonial oppression. The context of resistance is very important to understanding justice on Aboriginal terms. To understand that Aboriginal Peoples are resisting is to understanding that Aboriginal Peoples have been reacting to powerful colonial forces outside of themselves. To resist, means to push away. To resist, means to never be able to be in control of your own life or the destiny of your community. To resist, means to be ever focused on the past and the roots of our oppression. It means living a life of re-action (challenging

backlash) as opposed to action and empowerment. Dreams for the future remain illusive.

Looking to the criminal justice system, which houses so many of our people, reform must include the rejection of the very basis on which the non-Aboriginal system is constructed. This system turns on the value of punishment, in other words, coercion. It is coercion that binds both the individuals in mainstream society, as well as the institutions, in a seemingly cohesive pattern. James Youngblood 'Sakej' Henderson is a Chickasaw man who married into the Mi'kmaq family. This is his legal analysis of the role coercion plays in mainstream society:

The generality of the criminal laws and formal equality before the law are two principles that reflect the artificial nature of an immigrant state. It is a voluntary association of individuals from various circumstances around the globe. To equalize individuals' social circumstances and perpetual struggle for their interest in comfort and honour, all individuals are viewed and treated by the law as fundamentally equal.

The general criminal laws enacted by the federal parliament are viewed as somehow above the antagonism of private interests. The rules are imperatives of the state. They are commands of an artificial political order over individuals, who have no inherent social or cultural order. By acts of a national institution the contending private interests are reconciled; rather than embody any factional interest in Canadian society, an impersonal criminal justice is established.

Given the fact that the criminal laws are an artificial compromise between various interests in Canadian society, the greater is the importance of force and punishment as the bond among individuals to guide human conduct. *Coercive*

*enforcement takes the place of a natural community of culture. It is seen as the best way to guarantee order.*²³²

Can the same be said for Aboriginal social order? Aboriginal people have maintained both a sense of community and culture that is related to the natural order. The conclusion is logical. The criminal justice options available for guaranteeing order (obviously a value in both cultures) are not limited within Aboriginal nations in the same manner that they are limited within mainstream society. The central question which must be answered is also simple. Should Aboriginal Peoples be forced to forego these opportunities because they are no longer available to mainstream individuals and institutions?

This analysis of Sakej Henderson is contextualized in his discussion of the Marshall Inquiry. He notes:

If the law appliers in Nova Scotia could justify their actions to the Commissioners, the concept of the uniform application of the law would be upheld. If not, the uniform application could be rejected as a sham. If the law appliers cannot rationally justify their decisions according to established procedures, then those to whom the criminal law is applied are subjected to arbitrary exercise of local power. Legal justice becomes transparent; no decisions can be said to be uniformly applied.²³³

The findings of the Marshall Inquiry are well known. Justice was not done and innocent Mi'kmaq man was convicted of a murder he did not

²³²Supra., Henderson, 35-36 (emphasis added).

²³³Ibid., 36.

commit. For many Aboriginal Peoples, the Marshall Inquiry only affirmed what we already knew - justice is not applied uniformly in Canada. This is substantiated by the real life experiences of too many Aboriginal individuals at the hands of the criminal justice system. It is, again, minimally demonstrated through our over-representation in that system.

If the principles of uniformity and coercion which preface the operation of criminal law in Canada are inappropriate in their application to Aboriginal individuals, then the end result must be that the entire system of criminal law will fail Aboriginal Nations (notwithstanding that some individuals who are Aboriginal still advocate the reliance on that system). Yet many mainstream individuals continue to refuse to confront this obvious conclusion. If the principles are wrong, then the system they support must also be misinformed. Reform is, from the Aboriginal perspective, seen to be not only essential but obvious. The failure to recognize and create a climate of commitment in which the inappropriateness of the application of mainstream values to Aboriginal Peoples will be addressed. The result is seen in the necessity of Aboriginal people who continue to resist the dominant culture and its institutions. A climate of resistance cannot foster the development of equality or justice.

When this climate of resistance is recognized as the overwhelming force in Aboriginal people's lives, then we must accept that justice will remain an elusive goal. To have justice means to be in control of one's life and relations in terms of either individuals or communities. To address justice, we must therefore, address the realities of colonial oppression and the forces which create the situation that Aboriginal Peoples are not able to be central actors (as opposed to the re-actors) in our own lives. Although Aboriginal men and Aboriginal women as groups experience this colonial oppression in different ways, I believe the end result remains to be the same - the denial of the basic right to be in control of your own life.

The experience of Aboriginal women, as that of "double disadvantage"²³⁴, exposes the consequences of resistance in even more fundamental terms, if only because it is more extreme and therefore more obvious. The goal that we set for ourselves should be to eliminate the disadvantage that Aboriginal women face because it is more startling

²³⁴I am not fond of this term because it does not embrace the reality that I have experienced. In this society, being Mohawk and being women is not disadvantage that can be measured by adding one to the other. It is disadvantage that is wound within disadvantage.

Sherene Razack proposes, "if male domination is the prism through which gender oppression is viewed, race and class enter the picture as background scenery" (Supra., 441). Serious methodological problems arise when the multifaceted forms of oppression are presented in an additive and/or hierarchical form.

than the experience of either race or gender alone. Eliminating this disadvantage is the greatest of the challenges that face Aboriginal people. By confronting the disadvantage that women face as both women and as Aboriginal, we will also be confronting the discrimination, disadvantage, oppression and dependency faced by our fathers, uncles, brothers, sons, and husbands. We must also accept that in some circumstances it is no longer the descendants of the European settlers that oppress us, but it is Aboriginal men in our communities who now fulfill this role. In particular, we have the *Indian Act*, the Indian Affairs bureaucracy, and residential schools to blame for this reality, but any form of blaming will not solve the problem.

It is not enough to recognize that Aboriginal Peoples must be afforded the opportunity to be actors in their own lives. It is not enough to reject resistance and reject compartmentalized justice. All Aboriginal Peoples have been influenced by colonial oppression, dependency and powerlessness - obviously to varying degrees. The first step must be to recognize that we must unlearn our own individual as well as our community responses that are based on the philosophy of resistance.²³⁵

²³⁵This has been, perhaps, the most difficult lesson in understanding the politics of resistance that I have personally had to face. The belief that if I just struggled hard enough up someone else's ladder of success, studied hard in university for years, then one day mainstream society would accept this Mohawk woman as an equal. This has not been my experience of either academia or mainstream society. In many ways, I lead a very privileged life

Only then, when we are able to think and see with de-colonized minds and hearts, can forward progress be honestly made.

The words of Oren Lyons, a member of the Haudenosaunee Confederacy, inspires my own thoughts on this matter:

Sovereignty - it's a political word. It's not a legal word. Sovereignty is the act. Sovereignty is the do. You act. You don't ask. There is no limitation on sovereignty. You are not semi-sovereign. You are not a little sovereign. You either are or you aren't. It's simple.²³⁶

Healing is the answer. Aboriginal action is the answer.

WITHIN A LEGAL PARADIGM: ABORIGINAL WOMEN AND FEMINISM:

Feminist²³⁷ academics have challenged the way in which experience has been separated from knowledge in mainstream social institutions. This feminist challenge has benefited many individuals and collectives who share the robes of "otherness" with women. Standpoint theory²³⁸ exposes the fact that knowledge is socially

(based on so-called socio-economic variables) and this has been very difficult to reconcile against the experiences of discrimination that I still face. What I now understand is that I do have a limited amount of control regarding my personal circumstances (or the individual experience of oppression), but I still remain powerless to eradicate the effects of systemic oppression of First Nations people.

²³⁶Cited in Richard Hill, "Oral Memory of the Haudenosaunee: Views of the Two Row Wampum" in Jose Barreiro (ed), *Indian Roots of American Democracy*, (New York: Akwe:kon Press, 1992), 166-175 at 175.

²³⁷Although I will discuss feminism as though it is a single unified theory, this is a simplification. The subtleties of feminist thought are beyond the scope of this thesis.

constructed. The location of the "knower" is as important as the understanding that is put forth. This principle has a further application:

... "outsiders", those who are excluded from dominant systems of knowledge, are "able to see patterns of belief or behavior that are hard for those immersed in the culture to detect."²³⁹

It is the status of "otherness" or "outsider" and the corresponding consequences where the feminist mind and the perspective of Aboriginal women is shared. This shared reality does not amount to a shared totality of experience such that the "commonality of all women" becomes a fact. The experience of Aboriginal women is minimally²⁴⁰ based on an experience of "otherness" that is layered and involves both race and culture, as well as gender. However it has also been part of

²³⁸Standpoint theory is articulated by (and continues to be developed) in the work of the following authors: Linda Alcoff, "Cultural Feminism versus Poststructuralism: the Identity Crisis in Feminist Theory", cited in Micheline R. Malson (ed), *Feminist Theory in Practice and Process* (Chicago: University of Chicago Press, 1989), 295-326; Sandra Harding, "The Instability of Analytical Categories of Feminist Theory", cited in Malson (Ibid.); Sandra Harding, *Whose Science? Whose Knowledge? Thinking From Women's Lives* (Ithaca: Cornell University Press, 1991); Nancy C.M. Harstock, "The Feminist Standpoint: Developing Ground for a Specifically Feminist Historical Materialism", *Feminism and Methodology*, 157-180; and Dorothy Smith, *The Everyday World as Problematic: A Feminist Sociology* (Toronto: University of Toronto Press, 1987).

²³⁹Susan Harding, "Starting Thought" (Ibid.) cited in Colleen Sheppard and Sarah Westphal, "Equity and the University: Learning from Women's Experience", 5 *Canadian Journal of Women and the Law* (1992), 5-36 at 7.

²⁴⁰Aboriginal women's experience may also be compounded by class, disability, and sexual orientation.

Aboriginal culture to pick up the good things and simply walk by those things that will harm our people. It is within this teaching that feminism must be placed.

Much energy within the feminist praxis has been devoted to understanding the way in which patriarchy is reproduced in modern society. For example, criminal law is seen to reinforce patriarchy in the following way:

It is essential to understand that Western law, of which Canadian criminal law is a part, has been constructed out of male experience. Law is both a support for and a means of exercising patriarchal domination. One of the problems that feminists confront is that patriarchal dominance has existed for so long that male experience under patriarchy is perceived as the "norm". Thus concepts which have a particular importance in law such as "bias", "neutrality", "objectivity", "reasonableness", and "common-sense", are all interpreted from within a masculinist social construction of reality. When feminists question this masculinist experience, they are immediately perceived as "biased", "non-objective", "subjective", "unreasonable", and "irrational".²⁴¹

Although I do not want to disturb the conclusion of many renowned feminists regarding their experience of patriarchy and the legal system, I do wish to question the totality of this approach as a solution when it is applied to Aboriginal women.

As indicated, Aboriginal women's experience of mainstream criminal justice is an experience of "otherness" based on gender. It is

equally an experience of "otherness" based on both culture and race. For Aboriginal women, experiencing the criminal justice system as masculinist is not more profound than the way this system violates our cultural beliefs and understandings. Both are problematic. In fact, it is next to impossible to separate the experience I have as woman from the experience I have as Mohawk. It is not just Mohawk women²⁴² who have rejected the totality of feminist analysis.²⁴³ A Cree colleague, Winona Stevenson, states:

I do not call myself a feminist. I believe in the power of Indigenous women and the power of all women. I believe that while feminists and Indigenous women have a lot in common, they are in separate movements. Feminism defines sexual oppression as the Big Ugly. The Indigenous Women's movement sees colonization and racial oppression as the Big Uglies. Issues of sexual oppression are seldom articulated separately because they are part of the Bigger Uglies. Sexual oppression was, and is, one part of the colonization of Indigenous peoples.

I want to understand why feminists continue to believe in the universality of male dominance, the universality of sisterhood, and why they strive so hard to convert Aboriginal women. I want feminists to know why many Aboriginal women do not identify as feminists. I perceive two parallel but distinct movements, but there

²⁴¹Marguerite Russell, "A Feminist Analysis of the Criminal Trial Process" 3 *Canadian Journal of Women and the Law* (1989), 552-568 at 552.

²⁴²For a more complete discussion, please refer to supra., Kane and Maracle, 3.

²⁴³This recognition should *not* be constructed as a suggestion that Aboriginal women share a commonality of experience based on either or both our culture and/or gender. Our experiences are not homogeneous and are filtered by our experiences of our national identities, our residence, northern versus southern geography, education, and so on.

ought to be a place where we can meet to share, learn, and offer honest support without trying to convert each other.²⁴⁴

Many Aboriginal women are aware of this basic contradiction which exists between their experience and the constructs of feminist thought. This contradiction does not foreclose the sharing of our experience with the feminist movement any more than it forecloses the borrowing of feminist analysis to inform our own consciousness. However, caution must be exercised before any complete embracing of feminist thought or feminist analysis occurs. The consequences of the feminist analytical structure contains serious barriers for the scope of social change as defined as desirable from the Aboriginal perspective.

It is worth noting that the history of the feminist movement is a history which has been informed by Aboriginal women's experience. American feminists in the 1880's such as Elizabeth Cady Stanton and Matilda Joslyn Gage drew on their exposure to Aboriginal experience prior to the Seneca Falls Convention.²⁴⁵ In particular, they studied the position of women within the Iroquois Confederacy (I would say the Haudenosaunee).²⁴⁶ To separate the Aboriginal history from the

²⁴⁴Supra., Stevenson et al, 12.

²⁴⁵The first women's rights convention.

feminist history is to re-write the past. In particular, early American feminists were influenced by the political power and ownership of property maintained by the women of the Haudenosaunee. To fully reject feminism, means to reject part of my own Mohawk history²⁴⁷ and the influence of my grandmothers. It is important for both Aboriginal women and feminists to reclaim our histories and to note that our histories are, in fact, shared. It is equally important to see how parts of this shared history have been erased.

More recent history does expose the reality that Aboriginal women and other racial minority women have frequently been written out of both the history and action of feminist undertakings.²⁴⁸ In studying the Women's Legal Education and Action Fund (hereinafter LEAF)²⁴⁹, and the involvement in litigating so-called women's issues, Sherene Razack concludes:

Along the path to a more inclusive feminist theory and practice, it is tempting to reduce the theoretical and practical tasks at hand to merely "adding" on layers of

²⁴⁶Sally Roesch Wagner, "The Iroquois Influence on Women's Rights" in Jose Barreiro (ed), *Indian Roots of American Democracy* (New York: Akwe:kon Press, 1992), 115-134 at 115.

²⁴⁷The Mohawk are one of the six nations which comprise the Haudenosaunee Confederacy.

²⁴⁸*Ibid.*, 115.

²⁴⁹LEAF is the most visible Canadian women's organization that is involved in litigating women's issues before the courts.

oppression by grafting racism on to sexism, as understood by white women...

If whiteness remains unproblematized, that is if white privilege remains unexamined, and feminist analysis continues to "universalize otherness" so that sexism and racism are not seen as interlocking systems of domination, there is little chance that women of colour will be able to ask "what is true for us?" There is still less chance that minority women will be in a position to reshape their answers into forms acceptable in court. ... when sexuality is identified as central to women's oppression, as it is in cases involving rape, there is little room left for understanding the experience of women equally oppressed by racism and, I would add, little space for understanding how sexuality itself is constructed along racist lines.²⁵⁰

Feminist thought can inform attempts to understand Aboriginal women's reality. But, feminism must be seen as only one tool which may or may not accurately inform our developing understanding.

A second example of the way in which feminist praxis may invalidate Aboriginal women's thought is found in the work of Zuleyma Tang Halpin.²⁵¹ Halpin suggests that there is a relationship between the domination of women and the domination of nature by a patriarchal structure, such that women and nature are both seen as "other". Nature (and all spirit beings except humans) are seen to be inferior to the

²⁵⁰Supra., Razack, 454-455 (footnotes omitted). If unfamiliar with any notion of difference in the way sexuality is constructed, the reader should examine the murder of Helen Betty Osborne as examined in Volume II of the *Aboriginal Justice Inquiry of Manitoba*.

²⁵¹As cited in Razack, Ibid., 455.

human condition. Thus, the belief is that man²⁵² can control nature. I will not fully dispute the validity of this conclusion here, but I would suggest when man (or woman) can keep the sun from coming up nature is under control! However, the cultural relationship between nature and humans in an Aboriginal construct is vastly different from the way this relationship is viewed in mainstream thought. Harmony with nature and with natural law is essential to the Aboriginal perspective. Oren Lyons explains how this natural world view informs all aspects of Aboriginal thought:

What are aboriginal rights? They are the law of the Creator. That is why we are here; he put us in this land. He did not put the white people here; he put us here with our families, and by that I mean the bears, the deer, and the other animals. We are the aboriginal people and we have the right to look after all life on this earth. We share land in common, not only among ourselves but with the animals and everything that lives in our land. It is our responsibility.²⁵³

²⁵²Gender specificity is intended.

²⁵³Oren Lyons, "Traditional Native Philosophies Relating to Aboriginal Rights" cited in Menno Boldt and J. Anthony Long (eds), *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (Toronto: University of Toronto Press, 1985), 19-23 at 19.

It should be noted that in Aboriginal languages there is no gender referencing. The word for Creator is both he and she. Only when we pick up the colonizers language does a perversion of our culture occur. Some, Elders, such as Dr. Art Solomon, consciously chose to use the word she to describe the Creator to make noticeable the gender discrimination as well as to restore the balance.

This difference in how the human is positioned in the social order is easily recognized and understood, but only once it is express. Until all the contradictions and differences are express, then it is the oppressed view of the world that is vanished, the consequences of difference and contradiction will be disproportionately carried by Aboriginal women.

The way in which issues are first named and then sanctioned as important is also a necessary consideration when applying feminist thought to Aboriginal women's realities. Feminist²⁵⁴ accounts have documented and criticized the way in which rape laws have protected the "sexual property" of a husband in his wife. An examination of child custody laws exposes that prior to the nineteenth century, fathers were almost always awarded custody of their children as children were also seen to be the property of the man.²⁵⁵ The following quotation illuminates the way in which the law condoned (and many would suggest still condones) the husband's "right" to batter his wife:

Where they were forced to confront such cases, the judges searched scrupulously for particulars that would justify a husband's violent response. Many probed for

²⁵⁴This is not to suggest that a single cohesive theory of feminism has been articulated. See for instance, Christine Boyle, "A Feminist Approach to Criminal Defences" cited in Richard F. Devlin (ed), *Canadian Perspectives on Legal Theory* (Toronto: Emond Montgomery, 1991), 273-290 at 273.

²⁵⁵Connie Backhouse, "Nineteenth Century Judicial Attitudes Toward Child Custody, Rape, and Prostitution" cited in Sheila L. Martin and Kathleen E. Mahoney (eds), *Equality and Judicial Neutrality* (Toronto: Carswell, 1987), 270-274.

evidence about the battered wife's behavior or character, speculating that her shortcomings might "excuse considerable severity" on the part of her husband. Ruling that it was all a question of degree, they meticulously weighed the amount and nature of the violence. Before a court would "sanction her leaving her husband's roof," the law laid "upon the wife the necessity of bearing some indignities, and even some personal violence." "Danger to life, limb or health" was necessary to "entitle the wife to relief".²⁵⁶

The history of law is very much a loud history of sanctioning women's oppression and violence against her.

Our current thoughts must recognize that Aboriginal women do not share the history of legally sanctioned violence against women with Canadian women. The laws of our people sanctioned only respect for women. Perhaps it becomes more easily understood, why Canadian law has so fully attacked traditional Aboriginal systems and provides another reason why Aboriginal Peoples have such little faith in the dominant system of laws.

Without careful consideration, it cannot be (and should not be) concluded or assumed that Aboriginal women will construct a response to rape, battering and other instances of abuse, incest, child welfare laws, and abortion in the same way that the mainstream feminist movement has. Nor can it be assumed that the dispute resolution mechanisms that

²⁵⁶Constance Backhouse, *Petticoats and Prejudice: Women and Law in Nineteenth-Century Canada* (Toronto: Women's Press, 1991), 176.

Aboriginal women will advance will look the same as those advanced by the mainstream women's movement. All of these are presumptions which must be questioned first, prior to any assumptions being made about the general applicability of the solutions.

One example should clarify any confusion regarding the seriousness of this discussion around consequences. In the child welfare field, feminists have studied the impact of parental custody proceedings on women's lives.²⁵⁷ In particular, the way in which domestic violence is relevant to these disputes is exposed. For most Aboriginal people, disputes over the custody of children are not actualized as disputes between parents. Rather, the two parties are the parents and the state: father and mother "fight" against the state to maintain custody. If the mother is involved in a situation of domestic violence she cannot expose it because her right to custody of her children is dependent on the man who batters her. She and the batterer are *one* party in the court proceedings. If she does tell, it is used against her to demonstrate that the home is not a safe one. Feminist analysis of children's law, because of the choices made to focus narrowly on custody battles, has yet to

²⁵⁷See for example, Susan Boyd, "Child Custody and Working Mothers", cited in Sheila L. Martin and Kathleen E. Mahoney (eds), *Equality and Judicial Neutrality* (Toronto: Carswell, 1987), 168.

examine the special disadvantage that Aboriginal women face within the legal system. Failing to examine the situation, in fact, perpetuates it.

Some Aboriginal women have turned to the feminist or women's movement to seek solace in their (common) oppression. The implications of this choice have some devastating effects on Aboriginal constructions of reality. Many, but not all, Aboriginal women reject the rigors of feminism as the full solution to the problems that Aboriginal women face in both the dominant society and within our own communities. One further consequence of relying on feminist analysis without first searching the landscape for the crevices, is found in the way in which rights are conceived. In the recent constitutional debates, the media emphasized the alleged chasm which exists between Aboriginal men and women as exemplified by the position on individual and collective rights. The traditional understanding that has been shared with me indicates that this construction is false. Individual rights exist within collective rights and the rights of the collective exist in the individual. Any hierarchical ordering (that is giving a preference to either the individual or the collective nature of rights) of either notion will fundamentally violate the culture of Aboriginal Peoples. It must also be remembered, especially by Aboriginal individuals, that the roots

An excellent critique of race and feminist legal theory exists in the work of Marlee Kline, "Race, Racism, and Feminist Legal Theory", 12 *Harvard Women's Law Journal* (1989), 115.

of our oppression lie in our collective loss of memory.²⁵⁸

There are several particular examples of law and legal practices which turn the social relations of Haudenosaunee (Iroquois) women completely upside down. These particular examples are easily identified and should not be seen to be a complete construction of all the ways in which our Aboriginal realities are turned inside out. This turning of our Aboriginal relationships inside out illustrates an important consequence of oppression. As already noted, at the time of European contact, it was the European fathers who had custody of their children (perhaps this is more accurately expressed as ownership). Writing in the late 1800's, Matilda Gage notes:

If for any causes the Iroquois husband and wife separated the wife took with her all the property she had brought into the wigwam, the children also accompanied their mother, whose right to them was recognized as supreme.²⁵⁹

For the Haudenosaunee, the children followed the mother's line. It was the right of the children to be with their mother. The selected quotation is the fact that Haudenosaunee women also had control over their

²⁵⁸Paula Gunn Allen originally speaks of this need to remember in *The Sacred Hoop: Recovering the Feminine in American Indian Traditions* (Boston: Beacon Press, 1986), 213-214. This idea of collective memory loss is also discussed by Sally Roesch Wagner, "The Root of Oppression is the Loss of Memory: The Iroquois and the Early Feminist Vision" in W.G. Spittal (ed), *Iroquois Women: An Anthology* (Ohsweken: Iroquois Reprints, 1990), 223-228 at 223.

personal property.²⁶⁰

Since the early 1900's the historical relationship between Aboriginal women and the feminist movement has been disappeared from the mainstay of feminist discourse. Today, the relationship between many Aboriginal women and the feminist movement is strained, if not fully estranged. Recovering our shared history is perhaps one way in which feminists and Aboriginal women can begin again to respectfully share our experiences, dreams, and challenges -- in a space that respects both culture and gender.

In conclusion, then, feminism is one source of analysis that Aboriginal women may be able to borrow from in our search for our own answers. In the end, however, the answers that are developed must be our own. Working in co-operation with other collectives will ensure that the knowledge that is developed by Aboriginal women will be shared across collectives in a positive way.

WHAT IS KNOWN ABOUT TRADITIONAL JUSTICE SYSTEMS AND THE ROLE OF FIRST NATIONS WOMEN:

Indian people must wake up! They are asleep!... Part of this waking up means replacing women to their rightful place in

²⁵⁹Cited in Sally Roesch Wagner, *supra.*, 122. Please note that my people lived in longhouses and not wigwams.

²⁶⁰This relationship also extended to realty, although it would be a mistake to characterize the Aboriginal view of the relationship to land as one of ownership. For further discussion see Judith K. Brown, "Economic Organization and the Position of Women Among the Iroquois" cited in Spittal, *supra.*, 182-198.

society. It's been less than one hundred years that men lost touch with reality. There's no power or medicine that has all force unless it's balanced. The woman must be there also, but she has been left out! When we still had our culture, we had the balance. The woman made ceremonies, and she was recognized as being united with the moon, the earth, and all the forces on it. Men have taken over. Most feel threatened by holy women. They must stop and remember, remember the loving power of their grandmothers and mothers.

*Rose Auger²⁶¹

This paper began with a recognition that little documentation and discourse exists within mainstream academic understanding about the ways in which justice was traditionally constructed by Aboriginal Peoples. This is true for First Nations²⁶² generally, but it is even more

²⁶¹Cited in Diane Meili, *Those Who Know: Profiles of Alberta's Native Elders* (Edmonton: NeWest Press, 1991), 25.

²⁶²At this point in time my discussion is to become, unfortunately, more focused. This is reflected in my purposive change in language from Aboriginal Peoples to First Nations. I use the term First Nations to refer to the people who the government of Canada would refer to as "Indians". I, however, refuse to adopt the on-reserve/off-reserve dichotomy artificially created by the federal government. I also do not embrace the distinction of status/non-status. How a human being can have no status is a construction that my mind is not able to comprehend. In earlier articles, I have used the term First Nations to include the Métis and the Inuit; that however, is not my intention here. I think it is worthwhile to point out that the general usage of the term First Nations has become more specialized over time, perhaps more specialized than is my intent, to refer primarily to "Indian bands".

In the course of writing this chapter I have been forced to come to terms with just how particularized my understanding about traditional justice relations is. My understanding does more accurately reflect what First Nations understand.

Although I do not wish to shirk my personal responsibilities for the exclusion of Métis and Inuit that I have just made, I do believe that there are some structural justifications for this exclusion. The Métis trace their history to

true for the perceptions of First Nations women. Most historic accounts are polluted by beliefs that First Nation societies were absolutely inferior to European societies. The historic material is also undulated with European perceptions of the inferiority of women. One example, from the archival materials in the New York State Library, provides all the illumination that is necessary:

Women are admitted to the Council fire and have the liberty of speaking, which is sometimes used; when the nature of the Education of this tribe is considered, the difference of the instruction of the girls and boys is so small, the sources of knowledge are so inconsiderable that I see no reason why a Woman with strong natural sense should not acquit herself in the Council with general Satisfaction...²⁶³

This individual sees the Haudenosaunee as so very inferior that it is no surprise that the women can be seen as equally inferior! This is a very telling description which advises us on just how little status the European woman had. It must be emphasized that this diminished view on the status and contributions of women is *not* the view of the

"nine months after the arrival of the first European man in this country". First Nations trace their histories to "time immemorial". The Inuit also trace their histories to "time immemorial", however, their experience is unique in their experience of the north. Therefore, the process used to properly trace the traditional relations to justice of each of these distinct peoples must necessarily be different. I set the Métis and the Inuit apart in an attempt to do justice to their distinct ways of being.

²⁶³Charles M. Johnston (ed), *The Valley of the Six Nations: A Collection of Documents on the Indian Lands of the Grand River* (Toronto: University of Toronto Press, 1964), 28-29.

Longhouse people.²⁶⁴ In fact, they would be quite insulted by the comment.

This historic construction of both women and First Nations as inferior to the European settlers has been carried forward through time and is the root of some distressing consequences for First Nations today. The consequences are even more harsh for First Nations women:

Women in our society live under a constant threat of violence. The death of Betty Osborne was a brutal expression of that violence. She fell victim to vicious stereotypes born of ignorance and aggression when she was picked up by four drunken men looking for sex. Her attackers seemed to be operating on the assumption that Aboriginal women were promiscuous and open to enticement through alcohol or violence. It is evident that the men who abducted Osborne believed that young Aboriginal women were objects with no human value beyond sexual gratification...

It is intolerable that our society holds women, and Aboriginal women in particular, in position of such low esteem. Violence against women has been thought for too long to be a private affair. Assaults on women have not been treated with the seriousness which they deserve. Betty Osborne was one of the victims of this despicable attitude towards women...

There is one fundamental fact: her murder was a racist and sexist act. Betty Osborne would be alive today had she not been an Aboriginal woman.²⁶⁵

The construction of First Nations as inferior cannot be viewed solely as a historic construction that we have moved beyond. Although no longer

²⁶⁴This is another way of referring to the Haudenosaunee.

expressly accepted, this construction of First Nations as inferior still influences our legal relationships in subtle ways today. This is the legacy of colonialism. All of the ways in which the historic belief of European superiority infiltrates our present reality must be discovered, exposed, and clearly rejected.

The history of the criminal justice system must also be carefully scrutinized. Its relationship to Aboriginal People must be understood to be a relationship of violence. The criminal justice system, the police and other authorities, by their omissions, have perpetuated and perhaps even encouraged the violence²⁶⁶ that First Nations and particularly First Nations women have endured. The death of Helen Betty Osborne is but one example. Any initiative constructed in the future must take into direct account the histories, both personal and collective, that First Nations women have faced. This is a principle which must guide the construction of future justice initiatives. First Nations do not trust that the existing justice system can in fact deliver justice to our people. (Re)gaining the trust of Aboriginal Peoples must become a guiding principle of future justice related efforts.

Of particular interest to First Nations women is the fact that many

²⁶⁵Supra., *Aboriginal Justice Inquiry*, 52.

²⁶⁶For a full discussion please refer to supra., Sugar and Fox, 465-482.

historical accounts of the ways of our people note that violence and abuse against women or children was not tolerated in our societies.²⁶⁷ In fact, there were strong cultural taboos against such behavior which were enforced by the women's family members.

... the wife never becomes entirely under the control of her husband. Her kindred have a prior right, and can use that right to separate her from him or to protect her from him, should he maltreat her. The brother who would not rally to the help of his sister would become a by-word among his clan. Not only will he protect her at the risk of his life from insult and injury, but he will seek help for her when she is sick and suffering²⁶⁸

This realization must bring us back to the earlier discussion that from the First Nations perspective the root of our oppression is in collective memory loss. The men must be re-educated about what their responsibilities are in our efforts to abolish the experience of violence against women in our communities. Of necessity, this re-education should be occurring within our aspirations to take control over our own relations of justice. However, it is interesting to note that if the men of our communities at this time reconstructed their traditional responsibilities they would likely be vulnerable to the imposition of current Canadian law which prohibits the "taking of law into one's own

²⁶⁷For a discussion please refer to Rayna Green, *Women in American Indian Society* (New York: Chelsea House Publishers, 1992), 24-26.

²⁶⁸These are the words of Alice Fletcher who wrote in the late 1800's as cited in Wagner (1992), *supra.*, 125.

hands". The criminal laws of the dominant system have played an express role in the collective loss of memory of our men.²⁶⁹

When I am trying to understand traditional ways of being, I have found that learning the word in my own language and the literal interpretation facilitates my own understanding of the matter in question. When I first queried about the word for justice in Ojibwe, I was told "ti-baq-nee-qwa-win".²⁷⁰ When literally translated, it means "to come before a system for something that has already been done wrong". The reference to "a system" is a reference to the Euro-Canadian system of law. It became obvious that this Ojibwe word was used to describe justice after the period of contact with European society's justice system. During our conversation, the grandmother repeated many times to me that there really is no word for justice in the Ojibwe language. I found

²⁶⁹I would recommend that further research be undertaken in this area. For example, I am of the firm belief that one of the reasons why violence against women and children was seen to be a crime among the Haudenosaunee was that women played a central role in the definition and administration of justice in our communities. I know of no current or historic academic source that fully substantiates this position. See also the preliminary discussion in Patricia Monture and Mary Ellen Turpel, "Aboriginal Peoples and Canadian Criminal Law: Rethinking Justice", *Aboriginal Peoples and the Criminal Law: Report 34* (Ottawa: Law Reform Commission of Canada, 1991), 1-39.

²⁷⁰This understanding was shared with me by Shirley O'Connor. Ms. O'Connor is a grandmother and is from the Lac Seul reserve in Northern Ontario. She is Ojibwe. Currently employed as a counselor in the child welfare field, Ms. O'Connor now resides in Sioux Lookout.

Any error in the recording or understanding the teaching Ms. O'Connor shared with me is my own.

our conversation interesting because it was most obvious the effect on the people and the language that contact had. The reference point for this word in the Ojibwe language was a system not their own.

Intrigued by what I had learned about Ojibwe, I began to ask other people who spoke their language how to say justice. Professor Leroy Little Bear of the Native American Studies Department at the University of Lethbridge and a citizen of the Blackfoot nation, also affirmed that there was no word in his language for justice. "Justice is not a concept but a process", he stated. Chief George Guerin of the Musqueam First Nation, a member of the Salish people, also confirmed that they too had no word for justice. And in Mohawk, the closest word that we have for justice is one that means "it is fitting".²⁷¹ Several of the people that I spoke to found humour in my question. This indicated to me the importance of the information I had come upon.

For me, recognizing the impact contact had on the Ojibwe word for justice, as well as the discussions with other traditional language speakers, was a profound reminder of the nature of the work of regenerating traditional justice mechanisms in our communities. We are attempting to recover a concept for which there is no word in our own languages to describe! This realization must make us suspicious about

²⁷¹Elder Ernie Benedict, Akwesasne, shared this information with me.

our desire to focus on that concept, justice. Justice for me has become a concept which is not my own, but that we have begun to borrow from another's way. This must not be taken to mean that Aboriginal systems are less fair or less well-developed than non-Aboriginal systems.

The principle of respect must guide our efforts to reclaim traditional mechanisms of dispute resolution. Respect must be manifest in several ways. We must respect the uniqueness of Aboriginal ways of being, but must equally respect the separate responsibilities of women and men. We must also respect the realization that decolonization is both a painful and long process.

This realization leads to some conclusions about the involvement of First Nations individuals in the current criminal justice system. A First Nations person does not understand that system. In the First Nations system, you do not admit guilt, but you admit honesty. "I have done wrong". This understanding must be connected to the realization that coercion and punishment are not the "glue" that holds the First Nations system of dispute resolution together:

In the Mi'kmaq worldview, individual behavior faithfully accommodates collective culture; there is a firm consensus of proper respect of inherent dignities. The mechanism by which individual passions are prevented from wreaking havoc on society is deference to shared values, reinforced by family opinion and rewarded with honour and respect. Order in society presupposes and evokes order in the soul. Order is a matter of kinship, education, and personal self-control. Every family is equal

and every Mi'kmaq has an equal right to be heard and heeded by others. Coercive institutions are generally absent, if not vigorously opposed. Aggressiveness is considered wrongful and contrary to human dignity.²⁷²

The first understanding that Kjikeptin Alex Denny shares with us is the need to accept that the current system is non-sensical from a First Nations perspective. This realization is the realization upon which decolonized thought will come to rest. Secondly, we are provided with some of the reasons why options exist in Aboriginal communities that are not as easily available to mainstream citizens. If more options exist for Aboriginal communities, then bringing crime into control in our communities ought be attainable. The truth is that crime in our communities should never have gotten so out of control.

When I asked Shirley, the Ojibwe grandmother I had been speaking to, if her understanding of justice was based on gender, my question made little sense to her. However, when I asked her if there was a difference between how men and women would understand the concept of justice in a tradition sense, then she was easily able to respond.²⁷³

²⁷²Kjikeptin Alex Denny, "Beyond the Marshall Inquiry: an Alternative Mi'kmaq Worldview and Justice System" cited in Joy Mannette (ed), *Elusive Justice: Beyond the Marshall Inquiry* (Halifax: Fernwood Publishing, 1992), 103-108 at 103.

²⁷³This is an important comment on research methods and the nature of the pitfalls when Aboriginal people are the objects of research.

She told me to go and ask a grandfather and see what he would say.²⁷⁴ When pressed, Shirley thought that a man's answer would in fact be different. A man's perspective, she thought, would focus around what happened in the bush. Justice was the offering you made when you took an animal's life. For Shirley, the women's view of justice is the respect that women receive because they are women. The conclusion is that justice initiatives must respect experiences - the totality of an individual's experience - not just incidents or alleged offenses. This comes back to a principal difference in the systems of justice. Further, the experiences of women and men cannot be presumed to be the same.

We know that First Nation social relations, including relations of justice, were and remain holistic. This means a variety of things. First Nations recognize that our relations and institutions must address the well being of individuals in a complete way. This means that the body, mind, and spirit all must be well to have a healthy individual.²⁷⁵ Communities cannot be healthy if the individuals who comprise those communities are not healthy. Within recent years, First Nations have

²⁷⁴Shirley was not trying to avoid my question. The structure of gender relationships in traditional Aboriginal societies does not mirror the gender relations as we understand them today. It is wrong for a women to address men's understanding as we have never experienced life from their point of view.

also been recognizing that to have a healthy body, mind and spirit may not necessarily be enough. The emotional well-being of individuals has also gained prominence in the teaching of Elder's on holistic ways of being.²⁷⁶ Perhaps this new emphasis on the emotional realm did not require a great deal of attention in historic societies because First Nations were not surviving oppression and abuse. It is the emotional well being of women, children *and men*²⁷⁷ that are most significantly affected by physical and sexual violence in the home and in the streets.

It is also well-documented that the structure of First Nations societies were based on kinship systems. If justice, or the settlement of disputes, was based on kinship - that is familial relations - then obviously women were integrally involved in these systems. Alex Denny, Kjikeptin²⁷⁸, of the Mi'kmaq nation states:

²⁷⁵This is a very common traditional teaching, one of the first I learned after I sought out the red road. It is more fully discussed in *Supra.*, *Aboriginal Justice Inquiry* (Volume One), 19.

²⁷⁶Although it was several years ago, I believe the first person I heard share this teaching in a workshop that I attended was Edna Manitowba. Edna is of the Bear Clan, Ojibwe nation. She is a member of the Medewin Society.

²⁷⁷The perspective of many traditional First Nations women does not allow for the condemnation of the men who are the abusers in their communities. This is quite complicated to understand. It is based on the mistrust Aboriginal Peoples have of the justice system as it presently exists. It also partially arises, I believe, from the different conceptualization of justice within First Nations communities. It is also sourced in a different gender construction. A detailed discussion is found in *supra.*, *Aboriginal Justice Inquiry* , 475-485.

The Mi'kmaq did not have any adjudicative institution, no inquisitional system, no specialized professional elite, because they did not conceive of "public" wrongs. There were only private wrongs, and families themselves were the courts. This remains our vision of a fair and equitable system.²⁷⁹

Historical records also indicate that women had many different responsibilities in First Nations societies. In Iroquois tribes, the government established by the clans was firmly controlled by the women, who enjoyed the right to select and even depose chiefs, and had competence in such matters as land allotment, supervision of field labour, the care of the treasury, the ordering of feasts and *the settlement of disputes*.²⁸⁰ Establishing kinship relations (or the equivalent structures which operate on the same premises and values) is necessary to restore women's respected position in First Nations society and is an important key in understanding traditional justice mechanisms.

What were the mechanisms of dispute resolution in First Nations societies? Again, I turned to Shirley O'Connor who shared her understanding with me. Justice starts from childhood.²⁸¹ Children are

²⁷⁸This Mi'kmaq word indicates that he is the Grand Captain, Grand Council of the Mi'kmaq Nation.

²⁷⁹Supra., Denny, 104.

²⁸⁰J.A. Noon, *Law and Government of the Grand River Iroquois* (New York, 1949), 39 (emphasis added).

taught about respect, honesty, and the truth life. This is taught to the child by way of example and by lecture, that is the telling of legends. The teaching stressed to the child is that he or she must always be mindful of doing what is right. "This generation will know and will understand", are the words of Shirley's own grandparents to her. "Justice was a part of everyday living and how you were good to yourself. Every individual knew why this was beneficial both spiritually and emotionally." This is where we must begin to understand what justice is in a First Nations sense.

When a "wrong-doing" had occurred, the Ojibwe treated males and females in different ways. When the "wrong-doer" was male, male members of the extended family would speak to him. If he did not listen to these men then eventually he would be taken to a very old grandmother.²⁸² At that time, everyone in the community knew what this action meant, being spoken to by that old woman. Shirley questioned: "How many men today still respect and understand this traditional way of being? How many of our men even remember?"

²⁸¹This reminds me of the day my son Blake, aged two, was presented with an eagle feather. We were at a celebration and he was dancing pow-wow. The Elders were all smiling that such a young man knew all the right moves to the sneak-up dance. When presenting the feather for his dancing, the Elder explained that what the little boy had been teaching was the true law.

²⁸²This is not the man's grandmother by blood relation. The name grandmother is assigned to the old women of the community and the

The grandmother would give the man the entire history and all the teachings on why it is that we must respect each other. It seems quite important to emphasize that the "offense" did not lie in the incident itself but for the lack of *respect* that had been displayed for self and community. The grandmother will begin by explaining why we respect all living things. She talks about why we respect our bodies. And finally, she will tell him all about the things that are men's and why they happen (such as when the young man's voice changed). Nothing will be said about the so-called wrong doing. What is important to teach, or perhaps re-emphasize to the man, is the reason why he is on this earth. The grandmother is so kind. She has no resentment or anger. Always that grandmother assumes that the man has not learned certain things in his life and it is her responsibility to teach him now.²⁸³ Eventually that man is humiliated. He understands. When the man walks away it is his choice on how he will fix things. He may fast, or just meditate in a quiet place. He is not required to confess to any person, but he could talk to the Creator or a tree or a plant or a spirit. It is the job of all the other living things to take away the "garbage" that the man

grandmother in this instance will usually be the oldest woman in the community. She is the court of last resort - so to speak.

²⁸³This is very different from the Canadian justice system. The Ojibwe system does not place any value on the individual wrong-doer's intent or purpose. If an assumption is to be made, it will be assumed that the person does not understand the way in which he or she is expected to behave.

has been carrying around with him.

If the "wrong-doer" is a woman, then the process is slightly different. It may be her grandmother by kinship and/or mother who speaks to her first. Because women are very close to their grandmothers and mothers so maybe this will not help, particularly if the "wrong-doing" is serious. Her great aunties may be called upon to speak to her in this situation.²⁸⁴ The woman who speaks to the female "wrong-doer" will give the woman the teachings that are required. A woman who has done wrong may also end up sitting before a grandmother from the community. This grandmother is the oldest woman in the community. It will be a woman who no longer can conceive children. Such a woman is believed to have the ultimate "power". Woman is the only one who is the giver of life. Once a woman has entered her advanced years (that's past menopause), she has almost walked a full circle. She can now turn around and look at life, her own but also at where you have come from. Disciplining is therefore the responsibilities of the grandmothers. It is a greater responsibility than the responsibility that parents have to discipline. It is not punishing this kind of discipline, but nurturing. To

²⁸⁴It is important to note that unlike the male wrong-doer, the men of the extended family do *not* speak to the woman. Shirley also explained to me that the woman will never be sent to speak to a grandfather.

the Ojibwe, "justice is teaching about life".²⁸⁵

Justice must be seen to be a process not a concept, and particularly not a concept that is once removed from the process of dispute resolution as it is currently known in Canadian law. One final story will expand on this point. During a conference on justice held in 1986, the participants play acted an informal dispute resolution mechanism involving a store that was vandalized in the belief that they were mimicking a non-adversarial process that was akin to the First Nations system of dispute resolution. This is a very common misunderstanding, if a system is non-adversarial it is close to being Aboriginal. In the conclusion of the session, Charlie Fisher, an Ojibwe man from Whitedog was asked if the exercise bore resemblance to what might have occurred in traditional times in his community. The strength of his resounding "no" jarred the participants. As a result, Mr. Fisher reconstructed the exercise:

He began by getting rid of the chairs and tables; everyone sat on the floor in a circle, as equals. He then asked for two other people to act as "Representing Elders", one each for the boy and the store manager. As he continued, it became clear that our little experiment in non-adversarial mediation was flawed in virtually every respect. In Charlie's version, the boy and the store manager never spoke in the presence of the panel of Elders. There was no

²⁸⁵I am indebted to Shirley O'Connor for trusting me with her culture and her insights into the way in which justice is constructed within the Ojibwe community traditionally.

discussion whatever about the break-in, the damage, the feelings of the disputants, or what might be done to set matters straight. There was no talk of compensation or restitution, much less the actual imposition of such measures.

Once we understood what was not going to take place, we had only one question left: "Why, then, is there a panel at all?"

Charlie Fisher tried to answer us in this way. The duty of each Representing Elder, he explained, was not to speak for the young man or the store manager, but to counsel them in private. That counseling was intended to help each person "rid himself of his bad feelings". Such counseling would continue until the Elder was satisfied that "the person's spirit had been cleansed and made whole again". When the panel convened, an Elder could signify that such cleansing had taken place by touching the ceremonial pipe. The panel would continue to meet until both Elders signified. At that point, the pipe would be lit and passed to all. As far as the community was concerned, that would be the end of the matter. Whether the two disputants later arranged recompense of some sort was entirely up to them. Passing the pipe signified, as Charlie phrased it, that each had been "restored to the community and to himself".²⁸⁶

After considering Charlie's story and listening to Shirley, I wondered if, perhaps, approaching this paper through the concept of justice was in itself an error. I take seriously that there is no word in many First Nation languages to express this concept, justice.

Alex Denny stated that: "Harmony, not justice, is the ideal".²⁸⁷

²⁸⁶I have respectfully borrowed this story from Rupert Ross, *Dancing with a Ghost: Exploring Indian Reality* (Markham: Octopus Publishing Group, 1992), 8-9. I would also add that Mr. Ross is a non-Aboriginal, legally educated man. The understanding that he has developed, although not always perfect or exact, gives me hope and inspiration for our collective futures.

What we as a people have lost over the last five hundred years is our ability to live in harmony with each other. We have survived oppression, colonization and abuse. Now we seek recovery. Recovery and healing will only come when we learn to walk in balance again, with the men, with the leaders, with the children, with the Elders, and with the many nations that have come to this land. For me, seeking harmony is striving to reach a higher standard than mere justice.

²⁸⁷Supra., Denny, 104

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