Aboriginal Peoples and Restorative Justice in Canada:
Confronting the Legacy of Colonialism

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> *Anyone in the justice system knows that lady justice is not blind in the case of Aboriginal people. She has one eye open. She has one eye open for us and dispenses justice unevenly and often very harshly. Her garment is rent. She does not give us equality. She gives us subjugation. She makes us second class citizens in our own land.*[1]
>
> Chief Allan Ross, Norway House

> *What I have come to understand is that justice is not a legal problem. It is a human problem. It is a women's problem and a men's problem. Every challenge and criticism that the legal system now faces, and there are many, is rooted in this reality. We have to carry that with us in both our minds and our hearts because if we do not, we do not have it together.*[2]
>
> Patricia Monture-Angus

Introduction

That the criminal justice system has long failed Aboriginal peoples in Canada is now a well-documented and widely accepted truth.[3] On the ground, this failure is most clearly manifested in the disproportional rates at which First Nations, Métis, and Inuit come into contact with the criminal justice system, as victims, as offenders, and as members of communities affected by crime. The problem of over-representation is just one aspect of the colonial legacy of dispossession, marginalization, and domination of Aboriginal peoples in Canada.[4] Yet it holds particular significance for indigenous peoples seeking fair and equal treatment within the Canadian federation both for what it reveals about the depth of social disadvantage experienced by indigenous people in Canada on a daily basis and for the questions it raises about the legitimacy of institutions that are often highly intrusive and limiting of individual freedom. The issue is further complicated by the law's historical entanglement with the assimilationist aspirations of colonial and contemporary governments; as Patricia Monture-Angus remarks, "All the oppression of Aboriginal Peoples in Canada has operated with the assistance and the formal sanction of the law."[5] Any endeavour to rethink or reframe Aboriginal peoples' relationship with the Canadian justice system must therefore begin with the recognition that many Aboriginal people have experienced that system as alienating and oppressive and are thus justified in regarding reform efforts with a good measure of apprehension.[6]

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[1] Aboriginal Justice Inquiry of Manitoba, *Report of the Aboriginal Justice Inquiry of Manitoba*, Vol. 1: The Justice System and Aboriginal People (Winnipeg: Aboriginal Justice Inquiry, 1991), 6 quoted in Royal Commission on Aboriginal Peoples (RCAP), *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (Ottawa: Minister of Supply and Services Canada, 1996), 2.

[2] Patricia Monture-Angus, "Myths and Revolution: Thoughts on Moving Justice Forward in Aboriginal Communities," in *Thunder in My Soul: A Mohawk Woman Speaks* (Halifax: Fernwood Publishing, 1995), 263

[3] RCAP, *Bridging the Cultural Divide*.

[4] RCAP, *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Indian and Northern Affairs Canada, 1996); RCAP, *Bridging the Cultural Divide*.

[5] Monture-Angus, "Myths and Revolution," 250.

[6] The Royal Commission on Aboriginal Peoples thus begins its report on Aboriginal people and criminal justice by describing the challenges it faced in writing its report, starting with the fact that "the overall perspective of an Aboriginal person towards Canadian legal institutions is one of being surrounded by

The emergence of restorative justice, in this context, comes across as a conspicuous moment of calm in the midst of a storm of disagreement over how best to remedy the problem of over-representation and repair the dysfunctional relationship between Aboriginal peoples and the criminal justice system. Both government reformers and "grassroots"[7] advocates of greater Aboriginal autonomy in the sphere of justice seem to support restorative justice as the way forward. Both sides appear to endorse restorative justice's heightened concern with the human dimension of justice—with the relational context in which wrongdoing occurs, the status of the offender as a three-dimensional moral agent receptive to both rational and emotional appeals, and the need to create spaces in which citizens can be directly involved in addressing conflicts that affect them. Yet a closer look at the usage of restorative justice discourse in each case reveals starkly different ideas about how these shared values should be interpreted and translated into practice, and about the role that restorative justice is to play in addressing the troubled relationship between Aboriginal peoples and the criminal justice system. These interpretive and strategic disparities, in turn, rest upon distinctive understandings of the nature of the problem restorative justice is supposed to remedy.

In what follows, I explore these two perspectives on the issue by examining the ways in which support for restorative justice has been articulated, first, in the context of the Canadian government's 1994 sentencing reform bill (Bill C-41) and its subsequent interpretation in the Supreme Court's *Gladue* decision and, second, in relation to Aboriginal peoples' efforts to develop more localized, community-based justice programs grounded in their own legal traditions. I argue that these two positions reflect distinct understandings of the significance of the problem of over-representation, which help explain why the practical prescriptions in each case diverge in important ways. Moreover, the shared discourse of restorative justice masks important differences in the conceptualization and treatment of the problem of over-representation, and Aboriginal peoples' relationship with the justice system more generally, in each case. While government reformers conceive of the problem in terms of *efficiency*—how to make the justice system work better for Aboriginal people—where cultural differences are seen as standing in the way of the effective implementation of a system that remains fundamentally just, advocates of greater Aboriginal autonomy in the sphere of justice see the problem as a matter of *legitimacy*, casting doubt on the structural integrity of the system as a whole. In the latter case, support for restorative justice (often closely associated or even equated with Aboriginal justice) is less about finding ways to improve the dominant justice system, that is, to shape it such that it fits better with Aboriginal values and conceptions of law, than about carving out jurisdictional spaces in which Aboriginal communities can govern themselves.

The paper begins with a discussion of the problem of over-representation—its magnitude and significance within a liberal democratic context. The next two sections present an analysis of the two positions discussed above, beginning with Bill C-41 and its interpretation. A final section summarizes the argument and raises some concerns about the appropriateness and utility of the Aboriginal justice-restorative justice alliance for responding to the needs of indigenous communities seeking to build their own paths.

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injustice without knowing where justice lies, without knowing whether justice is possible." Patricia A. Monture-OKanee and Mary Ellen Turpel, "Aboriginal Peoples and Canadian Criminal Law: Rethinking Justice," *UBC Law Review* special edition (1992), 249 quoted in RCAP, *Bridging the Cultural Divide*, 1.

[7] Aboriginal people themselves and their allies.

The Problem of Over-Representation

The past four decades have produced a plethora of reports and inquiries into the relationship between Aboriginal people and the Canadian criminal justice system, all documenting with striking clarity and consensus the ways in which the system has failed the indigenous peoples of this land.[8] The word "failure," which appears time and again in these accounts, is hardly incidental. It captures both the troubling reality of Aboriginal people's encounters with the justice system—their nature and frequency—and the sense in which this situation, far from being accidental,[9] is the product of actions, policies, institutional arrangements, and practices that have consistently placed Aboriginal citizens at a disadvantage relative to other Canadians. The term "failure" in this context also seems to imply that there are certain obligations or commitments to Aboriginal people that have been somehow neglected or left unfulfilled. Hadley Friedland, for example, ties these obligations to the justice system's larger function in the maintenance of social order, which forms the justificatory basis for its monopoly on the domestic use of coercive force.[10] She argues that "the system is a failure because it creates disorder, rather than order, for Aboriginal people," which greatly weakens its legitimacy in the eyes of those it is supposed to protect.[11] Putting the point still more strongly, she asserts, "To the extent that the justice system does not deliver to certain individuals the benefits its claim to coercive force promises, the use of this force on those individuals must be seen as oppression."[12] If the justice system—or, more precisely, the state, since the justice system is a mere vehicle for the application and enforcement of the state's law—has indeed failed the indigenous peoples of Canada in this sense, then finding an effective remedy is not only a matter of good politics; it is a pressing requirement of justice.

In concrete terms, the troubled relationship between Aboriginal people and the criminal justice system is most clearly manifested in the data on over-representation. Over-representation can be observed when the proportion of members of a particular group found in a given institutional setting, such as the correctional system, disproportionately exceeds that group's share of the overall population.[13] The numbers, in the case of Aboriginal Canadians, are staggering. In Canada, "Aboriginal offenders are consistently over-represented at all stages of criminal justice processing," a situation mirrored in Australia, New Zealand, and the United States.[14] An early investigation of the issue by the Canadian Bar Association reported that in 1988, while "native" people represented only about 2 percent of the population, they constituted almost 10 percent of

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[8] See e.g., Aboriginal Justice Inquiry of Manitoba, *Report of the Aboriginal Justice Inquiry of Manitoba* (Winnipeg: Aboriginal Justice Inquiry, 1991); Canadian Corrections Association, *Indians and the Law* (Ottawa: Canadian Welfare Council, 1967); Law Reform Commission of Canada, *Report on Aboriginal Peoples and Criminal Justice: Equality, Respect and the Search for Justice* (Ottawa: Law Reform Commission of Canada, 1991); RCAP, *Bridging the Cultural Divide*; Saskatchewan Indian Justice Review Committee, *Report of the Saskatchewan Indian Justice Review Committee* (Regina: The Committee, 1992).

[9] Note that the fact that something was not produced by chance does not necessarily mean that it was deliberate.

[10] Hadley Friedland, "Different Stories: Aboriginal People, Order, and the Failure of the Criminal Justice System," *Saskatchewan Law Review* 72 (2009).

[11] Ibid., 108.

[12] Ibid., 114.

[13] This definition draws on, and deviates slightly from, Jane Dickson-Gilmore and Carol La Prairie's in Jane Dickson-Gilmore and Carol La Prairie, *Will the Circle Be Unbroken? Aboriginal Communities, Restorative Justice, and the Challenges of Conflict and Change* (Toronto: University of Toronto Press, 2005), 29.

[14] Ibid., 30.

the federal penitentiary population, including 13 percent of women prisoners.[15] This imbalance was further exaggerated at the provincial level, where the prairie provinces, particularly Manitoba and Saskatchewan, fared the worst. Michael Jackson, author of the study, used the following, telling words to describe the findings of a Saskatchewan report on provincial prison admissions:

> The Saskatchewan study brings home the implications of its findings by indicating that a treaty Indian boy turning 16 in 1976 had a 70% chance of at least one stay in prison by the age of 25… The corresponding figure for non-status or Métis was 34%. For a non-native Saskatchewan boy the figure was 8%. Put another way, this means that in Saskatchewan, prison has become for young native men, the promise of a just society which high school and college represent for the rest of us. Placed in an historical context, the prison has become for many young native people the contemporary equivalent of what the Indian residential school represented for their parents.[16]

A decade after the Canadian Bar Association produced its report, Jackson's prediction that without radical intervention, the problem would only intensify was easily confirmed. By 1998-99, the proportion of Aboriginal people admitted to federal custody had risen to 18 percent, while their share of the general population remained at just over 2 percent.[17] While the rate of Aboriginal admissions to federal custody appears since to have levelled off, Aboriginal admissions to provincial and territorial sentenced custody have continued to increase, rising from 13 percent in 1998-99 to 18 percent in 2007-08.[18] Despite a significant increase in the population of self-identified First Nations people, Métis, and Inuit between 1996 and 2006,[19] the rate of incarceration of Aboriginal people in Canada continues greatly to exceed what one would expect based on their share of the general population. A breakdown of these figures by jurisdiction finds significant regional variation in the rates of custody (including remand) and community (probation and conditional) sentences across the country, with over-representation at its lowest in PEI and Quebec, and highest in the West, the territories, and in Newfoundland and Labrador—regions where Aboriginal people make up a larger segment of the population. In Quebec, for example, Aboriginal offenders represent 2 percent of admissions to sentenced custody, 4 percent to remand, and 6 and 5 percent of those on probation and serving conditional sentences, respectively, where Aboriginal people constitute only 1 percent of the adult population. The Prairies, in contrast, show the greatest disparity between the number of Aboriginal people in the criminal justice system and their share of the population, with Saskatchewan as the worst culprit: Aboriginal people make up an astounding 81 percent of admissions to sentenced custody in Saskatchewan, 80 percent of those on remand, 70 percent of those on probation, and 75 percent of those serving a conditional sentence, as compared with an adult Aboriginal population of about 11 percent in the province.[20]

Taken as a whole, the body of quantitative research on Aboriginal people's contact with the criminal justice system, both as victims and as offenders, suggests a persistent and, in many cases,

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[15] Michael Jackson, "Locking up Natives in Canada," *UBC Law Review* 23, no. 2 (1989): 215.
[16] Ibid., 216.
[17] Samuel Perreault, "The Incarceration of Aboriginal People in Adult Correctional Services," *Juristat* 29, no. 3 (2009).
[18] Ibid.
[19] According to the 2006 Canadian Census, the Aboriginal population in Canada grew by 45 percent in that ten-year period (at a rate almost six times that of the non-Aboriginal population), rising to 1,172,790 people or almost 4 percent of the country's population.
[20] These are figures from 2007-08. Perreault, "The Incarceration of Aboriginal People in Adult Correctional Services," Table 4.

worsening level of over-representation, although the intensity of the problem varies considerably by region.[21] Recent survey data have helped to fill out this picture by offering insight into Aboriginal people's experiences with and perceptions of the criminal justice system. A 2010 Environics Institute study of Urban Aboriginal Peoples, for instance, found that more than half of city-dwelling Aboriginal people[22] had little or no confidence in the criminal justice system and were more than twice as likely as Canadians in general to feel this way.[23] Among those surveyed who had been in contact with the justice system in the past ten years (half of the respondents), 57 percent felt that they had been treated fairly in that encounter, while 39 percent felt otherwise. Half of those who believed that they had been treated unfairly attributed that treatment to their Aboriginal identity. Of course, these figures alone cannot tell us whether the latter were indeed victims of negative discrimination; however, the fact that four out of ten Aboriginal people who come into contact with the justice system *perceive* that system to be unfair and/or discriminatory, combined with troublingly low rates of confidence in the system among urban Aboriginal people, should generate concern in a society committed to principles of fairness and equality before the law. Indeed, since the late 1960s, public inquiries into the relationship between Aboriginal peoples and the criminal justice system have cast considerable doubt on the legitimacy of a system experienced by many Aboriginal people as insensitive, foreign, and imposed by outsiders with little knowledge of or concern for indigenous peoples' values, traditions, and interests.[24] Building on the findings of previous commissions of inquiry, the authors of the Royal Commission on Aboriginal Peoples' report on criminal justice, *Bridging the Cultural Divide* were direct in attributing this sense of alienation from Canada's institutions of justice to the history of domination, marginalization, and exclusion associated with colonialism and its aftermath: "We have concluded that over-representation is linked directly to the particular and distinctive historical and political processes that have made Aboriginal people poor beyond poverty."[25]

Much more might be said here about the present forms and colonial roots of the problem of over-representation as experienced by indigenous peoples in Canada today. For the present purposes, however, I wish only to draw attention to the magnitude of the problem and to the persistence of patterns of inequality over time. I have already suggested that we have good reasons to be concerned about the justice of a scenario in which a particular socially identifiable group is unfairly burdened by, or fails to receive the full benefits of, a political institution created to ensure the safety and well-being of all citizens. One might venture to add that, in the case of an institution that purports to enhance individual liberty by curbing that liberty under carefully delineated circumstances, the requirement of fair and equal treatment ought to be especially great. At this point, I wish to make the further suggestion that the over-representation of Aboriginal people in the criminal justice system presents a challenge to the legitimacy of our institutions of justice on a wider scale—that the problem of over-representation presents obstacles to the advancement of the

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[21] These findings are amplified in the case of Aboriginal women, who made up between 25 and 29 percent of female offenders admitted to provincial sentenced custody between 1994-95 and 2003-04, while Aboriginal men represented 15 to 18 percent of male admissions during that same time period. Jodi-Anne Brzozowski, Andrea Taylor-Butts, and Sara Johnson, "Victimization and Offending among the Aboriginal Population in Canada," *Juristat* 26, no. 3 (2006), 13.

[22] According to the 2006 Canadian Census, 54 percent of Aboriginal people now live in urban areas.

[23] Environics Institute, "Urban Aboriginal Peoples Study: Main Report," (2010), http://www.cbc.ca/news/pdf/uaps-report-april5.pdf, (accessed April 6, 2010), esp. 96-102.

[24] See, esp. Aboriginal Justice Inquiry of Manitoba, *Report of the Aboriginal Justice Inquiry of Manitoba*; RCAP, *Bridging the Cultural Divide*.

[25] RCAP, *Bridging the Cultural Divide*, 46.

interests of Aboriginal people that, in light of the evidence of the problem's rootedness in historical and institutional patterns of discrimination and domination, can only be termed *structural*. As such, it demands a remedy grounded in a deeper and more comprehensive view of the historical, institutional, political, and social context in which Aboriginal peoples' troubled relationship with the justice system developed.

Iris Marion Young's guidelines for identifying structural injustice are helpful here.[26] Young argues that individuals' capacities to direct the course of their lives are conditioned (but not determined) by the social structures in which they are embedded. "Basic social structures," she explains, "consist in determinate social positions that people occupy which condition their opportunities and life chances. These life chances are constituted by the ways the positions are related to one another to create systematic constraints or opportunities that reinforce one another like wires in a cage."[27] These structural social groups are "relationally constituted" in the sense that they are the product of mutually-reinforcing forms of social interaction, whereby one person's position in the social landscape is defined by his or her "differentiated relation" to others.[28] Structural *inequality* arises when the members of one social group benefit from these arrangements, gaining greater control over their lives, while others lose: "[it] consists in the relative constraints some people encounter in their freedom and material well-being as the cumulative effect of the possibilities of their social positions, as compared with others who in their social positions have more options or easier access to benefits."[29] Diagnosing structural inequality in this sense does not simply involve discovering specific instances of differential treatment or socio-economic disadvantage; rather, it requires that we identify patterns of inequality that affect the members of particular groups along a number of different social axes. Moreover, we need to "tell a *plausible structural story* that accounts for the production of the patterns," that is, we need to provide a credible, evidence-based explanation of the configuration and recurrence of those patterns over time that clarifies the ways in which institutional regulations, norms, and policies, individual actions, and their outcomes work together to generate opportunities for the members of some groups, while constraining those of others.[30]

If we apply this model to the relationship between Aboriginal peoples and the criminal justice system, we quickly see how the problem of over-representation emerges as a symptom or locus of structural inequality. Empirical research into the *causes* of the problem—which Young rightly marks as the appropriate focus of ethical judgement[31]—reveals the plurality of institutional, historical, demographic, and socio-economic factors that make Aboriginal people's encounters with the justice system more frequent than those of non-Aboriginal Canadians and condition the quality of those encounters. Explanations for the problem of over-representation[32] have focused on the particular characteristics of those who come before the Courts—socio-economic status or "life chances," offending rates and types of offences committed, cultural differences—and on the "biases

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[26] Iris Marion Young, "Equality of Whom? Social Groups and Judgments of Injustice," *The Journal of Political Philosophy* 9, no. 1 (2001).
[27] Ibid., 12.
[28] Ibid.
[29] Ibid., 15.
[30] Ibid.
[31] Ibid., 8.
[32] For an excellent review of research into the causes of Aboriginal over-representation in the Canadian criminal justice system, see Dickson-Gilmore and La Prairie, *Will the Circle Be Unbroken?*, chap. 2. See also chapter 2 of RCAP, *Bridging the Cultural Divide*.

and processes of the law"[33] that place additional burdens on Aboriginal people—differential processing, a clash of legal cultures, policies and practices that discriminate against those of a lower socio-economic status. Yet, as Dickson-Gilmore and La Prairie point out, none of these explanations is sufficient on its own to account for the problem; on the contrary, it is only through careful consideration of the confluence of these different theories and the explanatory factors they identify that we begin to see a clearer picture of the phenomenon and its origins. Dickson-Gilmore and La Prairie provide a good example of this form of reasoning, referring, in this case, to the limitations of theories focused on a legal culture clash:

> [I]nsofar as Aboriginal offending patters may be linked with the socio-economic marginality which is very much a product of historic policies promoting assimilation and strategic underdevelopment of Aboriginal communities, the larger discrimination and racism that informed these policies, and which continues to influence Aboriginal lives may help to explain high rates of conflict and disorder, and in turn, over-representation. Seen in this light, it is not so much that culture clash arguments are somehow wrong, but rather that their reification of one factor to the detriment or apparent dismissal of others renders their explanation of over-representation too simplistic and limited to accurately represent a full understanding of a very complex reality.[34]

The authors of the RCAP report referred to above make a similar point, suggesting that the problem of over-representation can only be understood if situated within the historical, political, and institutional context of the colonial relationship.[35] Thus, Young's two criteria appear to be met: evidence suggests that the *patterns of inequality* reflected in Aboriginal people's encounters with the justice system are best understood in *structural* terms, as the product of multiple factors—institutional, historical, social—that, together and over time, have worked to effectively constrain the choices available to Aboriginal people and negatively shape their experiences with the justice system. If we follow Young even further, this also implies that "to the extent that injustices are socially caused [in the sense described earlier]... *democratic political communities are responsible collectively for remedying such inequalities*."[36]

The remainder of this paper focuses on two approaches to remedying the problem of over-representation, each of which has made restorative justice a central part of that remedial strategy. While the common appeal to restorative justice suggests a strategic and perhaps even principled convergence of approaches to the problem, this shared discourse masks important differences in the conceptualization and treatment of the dysfunctional relationship between Aboriginal peoples and the criminal justice system on each side. While in each case acknowledgement is made of the problem's embeddedness within a broader structure of marginalization, only those advocating restorative justice from outside the chambers of government appear to take this structural character seriously. Government reformers have tended, instead, to focus on cultural dissonance as the main source of the problem, presenting restorative justice as a form of accommodation meant to overcome cultural obstacles to the effective and efficient application of the law. Grassroots advocates of restorative justice in Aboriginal communities, on the other hand, show greater concern with the need to promote Aboriginal autonomy in the sphere of criminal justice as part of a broader political strategy to counteract the structural injustice of which over-representation is just a symptom. In the first case, restorative justice offers a solution to what is essentially a problem of

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[33] Dickson-Gilmore and La Prairie, *Will the Circle Be Unbroken?*, 29.
[34] Ibid., 48.
[35] RCAP, *Bridging the Cultural Divide*.
[36] Young, "Equality of Whom?": 16, emphasis added.

implementation; the structure and principled foundation of the system remain fundamentally just.[37] In the second, restorative justice is treated as a remedy—albeit a partial one—for a deeper set of problems rooted in the colonial relationship and its legacy.

Holistic Sentencing, Equality, and the "Unique Circumstances" of Aboriginal Offenders

When Bill C-41 was first introduced in the House of Commons by Minister of Justice Allan Rock on September 20, 1994, it was presented as a long-awaited and much-needed effort to codify the purposes and principles of sentencing in Canadian law, which would ensure that criminal sanctions, "one of the most serious intrusions by the state into the lives of individuals,"[38] would be delivered uniformly and effectively, in conformity with principles of equality and fairness. Although the term "restorative justice" does not appear anywhere in the act that became law in 1995, the sentencing reform bill is generally seen as the first clear integration of restorative justice principles into the Canadian legal framework. In its subsequent interpretations of the act,[39] the Supreme Court made this connection explicit, while clarifying the relationship between restorative justice and efforts to resolve the problem of Aboriginal over-representation in the criminal justice system.

Three aspects of Bill C-41 are relevant for the present discussion. First, the bill expands the purposes of sentencing beyond the traditional goals of denunciation, deterrence, separation, and rehabilitation to include the following two "restorative" aims:

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> *(e)* to provide reparations for harm done to victims or to the community; and
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> *(f)* to promote a sense of responsibility in offenders, and acknowledgement of the harm done to victims and to the community.

The belief that an appropriate response to criminal wrongdoing should include measures to repair the harm caused by the crime and that offenders should be brought to understand, acknowledge, and take responsibility for the harm they have done to individuals and to the community (however the latter is understood) is central to most accounts of restorative justice. Second, the law encourages sentencing judges to treat incarceration as a sentence of last resort and to explore other sentencing options such as diversion (which redirects offenders into a parallel, often community-based, institutional stream for treatment, counselling, or other responses aimed at addressing the problems underlying the offence), probation, and the newly introduced conditional sentence. The latter allows an offender sentenced to a term of imprisonment of less than two years to serve his or her sentence in the community, provided that the court is satisfied that he or she will not pose a danger to society. Third, provision 718.2(e) of the law requires the court to consider "all available sanctions other than imprisonment that are reasonable in the circumstances… for all offenders, *with particular attention to the circumstances of aboriginal offenders*."[40] This last clause speaks most directly to the experiences of Aboriginal people in the criminal justice system; its meaning and purpose were clarified four years after the introduction of the law when the Supreme Court delivered its decision in the case of *R. v. Gladue*.

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[37] Hence, "reform" is the operative word here.
[38] Canada, *House of Commons Debates* (20 September 1994), p. 1155 (Hon. Allan Rock, MP).
[39] *R. v. Gladue*, [1999] 1 S.C.R. 688; *R. v. Wells*, [2000] 1 S.C.R. 207.
[40] Emphasis mine.

Gladue provided the first opportunity for an examination of s. 718.2(e), which the Supreme Court readily delivered, offering a careful interpretation of the provision, an assessment of its purpose, and a framework of analysis to guide judges in its future application. Central to the Court's decision is the finding that the "unique circumstances" provision had a remedial function, meaning that it was intended as a remedy or corrective for the failings of previous legislation:

> In our view, s. 718.2(*e*) is more than simply a re-affirmation of existing sentencing principles. The remedial component of the provision consists not only in the fact that it codifies a principle of sentencing, but, far more importantly, in its direction to sentencing judges to undertake the process of sentencing aboriginal offenders differently, in order to endeavour to achieve a truly fit and proper sentence in the particular case. (Para. 33)[41]

The implication, later reinforced with a discussion of the social context in which this section of the sentencing reform bill was enacted (Para. 49-65), is that the kinds of sentences normally handed down to Aboriginal offenders are not always "fit and proper," as evidenced by the disproportionate number of Aboriginal offenders in penal institutions, and that this state of affairs is partly attributable to the ways in which sentencing decisions are ordinarily reached. Furthermore, given the extent and clarity of the data on over-incarceration for all Canadians, but especially for Aboriginal Canadians who are disproportionately represented throughout the criminal justice system, it makes sense to assume that the legislation was intended to correct what had become a disturbing social trend:

> These findings cry out for recognition of the magnitude and gravity of the problem, and for responses to alleviate it. The figures are stark and reflect what may fairly be termed a crisis in the Canadian criminal justice system. The drastic overrepresentation of aboriginal peoples within both the Canadian prison population and the criminal justice system reveals a sad and pressing social problem. It is reasonable to assume that Parliament, in singling out aboriginal offenders for distinct treatment in s. 718.2(*e*), intended to attempt to redress this social problem to some degree. (Para. 64)

The introduction of restorative aims into the criminal law's sentencing rubric had a key role to play in this process of redress.

In *Gladue*, the Court defines restorative justice as "an approach to remedying crime in which it is understood that all things are interrelated and that crime disrupts the harmony which existed prior to its occurrence, or at least which it is felt should exist" (Para. 71). An appropriate response to criminal conduct, on this view, will be one that addresses "the needs of the victims, and the community, as well as the offender. The focus is on the human beings closely affected by the crime" (Para. 71). This definition is in keeping with most accounts of restorative justice, which concentrate on the interpersonal dimension of criminal wrongdoing and stress crime's impact on individuals and communities. That impact is conceived not only in terms of the harm done to particular relationships, but as a disruption or disturbance of a larger social equilibrium—real or imagined or idealized—that rests, uncertainly, on the everyday, particular interactions of individuals and their relationships with the world around them. Restorative justice, on this view, is about (re)establishing this social balance or harmony in ways that address the needs of everyone involved through practices such as restitution and reintegration that encourage "offenders to take responsibility for their actions" (Para. 72).

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[41] All paragraph citations refer to *R. v. Gladue*, [1999] 1 S.C.R. 688.

The inclusion of these restorative aims alongside the more traditional sentencing goals set out in s. 718 of the Criminal Code opened the door to sentencing decisions and practices that would be more responsive to the circumstances, perspectives, and needs of those affected by them, while acknowledging the complex social, economic, and historical dynamics of criminality to which proponents of restorative justice often draw attention. The guidelines were designed to tackle the problem of over-incarceration generally by reducing the emphasis on imprisonment, widening the scope of sentencing responses available to the sentencing judge, and encouraging a more tailored approach to sentencing attuned to the specific circumstances of the offence and the offender. In a general sense, then, the restorative approach to sentencing was seen as desirable because it meant, literally, keeping more people out of prison. For Aboriginal offenders, however, the move to adopt restorative principles and practices in sentencing had an additional cultural angle: since Aboriginal cultures tend to privilege a restorative approach to justice, so the argument went, decisions that enable restorative sentences and sentencing practices will be more likely to be experienced as meaningful by, and will therefore be more effective for, Aboriginal offenders than ones that follow the conventional path. As we will see, a major weakness of this approach—which might help explain its subsequent failure to reduce the disproportionate level of incarceration of indigenous peoples in Canada[42]—is that it frames the problem of Aboriginal over-representation in terms of efficiency rather than as a matter of legitimacy. The fact that Aboriginal people come into contact more frequently with the criminal justice system and are imprisoned at a dramatically higher rate than other Canadians is attributed, in this case, to poor implementation of a system that remains, all things considered, fundamentally just. The Court's focus on cultural accommodation as an internal reform measure intended to address deficiencies in the application of the law may open up spaces for greater Aboriginal participation in and engagement with the justice process, but it sidesteps the larger structural questions raised by the problem of over-representation that risk weakening the democratic foundations of the system as a whole.

The restorative provisions of the sentencing reform act that the Court identified in *Gladue* address the problems of over-incarceration and Aboriginal over-representation at two levels. As a general prescription for reducing the system's over-reliance on imprisonment (for all Canadians), the introduction of restorative aims into the sentencing guidelines encourages judges to consider a range of sentencing options that may be appropriate in the particular case and to view incarceration as a sentence of last resort. Judges are reminded of the plurality of sentencing aims that should guide their decisions and of the need to balance retributive and deterrent objectives with rehabilitative and reparative goals. Moreover, the introduction of less (overtly) punitive responses, such as the conditional sentence, to the array of sentencing options available provides judges with clear alternatives to incarceration that are to be considered first, in light of the sentencing goals that are viewed as paramount in a given case.[43] Judges are encouraged to approach the sentencing process in a holistic fashion, as a careful weighing of multiple and sometimes conflicting objectives oriented by the specific circumstances of the offender, rather than as the application of a set standard or test designed to yield clear and consistent sentencing outcomes regardless of the circumstances of the case (Para. 81). Thus, the restorative turn in sentencing here functions as a kind of compress to stem the flow of offenders into penal

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[42] Kent Roach, "One Step Forward, Two Steps Back: *Gladue* at Ten and in the Courts of Appeal," *Criminal Law Quarterly* 54 (2009).

[43] Although, as Kent Roach and Jonathan Rudin point out, there is some question as to whether the introduction of the conditional sentence might lead to net-widening rather than a reduction in prison sentences. Kent Roach and Jonathan Rudin, "*Gladue*: The Judicial and Political Reception of a Promising Decision," *Canadian Journal of Criminology* 42, no. 3 (2000).

institutions, while working to recalibrate the system as a whole by promoting sentencing alternatives that are more attuned to the context in which crime occurs and to its human impact.

While these general guidelines apply to *all* offenders, they take on a somewhat different meaning when applied to the sentencing of Aboriginal offenders. Here, the adoption of restorative aims and practices in sentencing is less about reducing the use of incarceration per se—although this remains an important goal—than it is about rendering sentencing outcomes more meaningful to the Aboriginal people who are so frequently affected by them. Both rationales, however, rely on a logic of efficiency that upholds the fundamental integrity of the existing system, even while seeking ways to generate better outcomes, that is, to prevent crime, reduce recidivism, and enhance public security.

The connection between restorative justice and the sentencing of Aboriginal offenders hinges on the interpretation of s. 718.2(e), which is the main focus of the *Gladue* decision. As cited above, this provision instructs sentencing judges to "pay particular attention to the circumstances of aboriginal offenders, with the implication that those circumstances are significantly different from those of non-aboriginal offenders" (Para. 66). The Court focuses on two sets of "unique circumstances" that judges should consider in determining an appropriate sentence:

> (A) The unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts; and
>
> (B) The types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular aboriginal heritage or connection. (Para. 66)

The first category includes social, economic, and historical factors that have severely disadvantaged Aboriginal people compared to other Canadians. The Court cites the experience of systemic and direct discrimination, dislocation, and poor socio-economic conditions as primary examples (Para. 68). The second points to the cultural dimension of the justice system's differential impact on Aboriginal offenders. Drawing upon the findings of the Aboriginal Justice Inquiry of Manitoba and RCAP, the Court affirms that Aboriginal people's negative experiences with the justice system are at least partially attributable to differences in cultural values, traditions, and perspectives on justice. This tension is particularly apparent when it comes to sentencing. While the dominant approach privileges the traditional sentencing goals of denunciation, deterrence, and separation, Aboriginal peoples tend to place greater emphasis on the restorative aims of healing, reparation, and reintegration (Para. 70).[44] In practice, the first perspective often involves isolating offenders from society for reasons of public safety, punishment, or treatment, whereas the second is more likely to see the offender serve his or her sentence in the community, with direct involvement by community-members in the sentencing or healing process (Para. 74).

With respect to Aboriginal offenders, then, the argument for incorporating restorative justice principles into the criminal justice system's sentencing rubric relies on two main assumptions: first, that restorative justice ideals are central to Aboriginal conceptions of justice (a point I will return to later) and, second, that to be effective in carrying out its objectives, namely, to successfully denounce and deter crime and/or rehabilitate the offender, a sentence must be made *meaningful* both to the individual to whom it is handed down and to the broader communities that constitute its audience. For a sentence to be meaningful, it must be articulated in a language that is both comprehensible and *significant* to its recipient(s), appealing to discourses, values, and

[44] Note that the Court takes great pains to avoid making claims about *all* Aboriginal peoples.

practices that have meaning for the people to whom the sentence is directed. Giving due consideration to the "unique circumstances" of Aboriginal offenders, as s. 718.2(e) requires, thus entails not only paying greater attention to the background factors—systemic and idiosyncratic—that brought the offender before the courts, but also adopting sentencing sanctions and procedures that respond "to the needs, experiences, and *perspectives* of aboriginal people or aboriginal communities" (Para. 73, emphasis mine). And since "most traditional aboriginal conceptions of sentencing place a primary emphasis upon the ideals of restorative justice" and share a belief in "the importance of community-based sanctions," the Court argues, these should have pride of place in sentencing Aboriginal offenders (Para. 70, 74).

An important and encouraging aspect of Parliament's acknowledgement of the distinctive circumstances and perspectives of Aboriginal peoples in the sentencing law is that it follows the increasingly prevalent wisdom among liberal theorists and policy-makers that a neutral approach to sentencing, which assumes an initial starting-point of equality, will not yield fair and equitable outcomes. As the Court asserts in *Gladue*, "the fundamental purpose of s.718.2(e) is to treat aboriginal offenders fairly by taking into account their difference" (Para. 87). The integration of restorative justice practices and principles into the sentencing guidelines therefore needs to be understood as part of a larger effort to contextualize criminal conduct and better tailor sentences to the specific needs of the offender and affected communities in pursuit of a more substantive equality. This endeavour falls short, however, to the extent that it downplays or disregards the more insidious structural forces at play in the law's differential treatment of Aboriginal offenders and pays inadequate attention to the historical and political context in which this problem developed.

More pointedly, the law's concern with delivering sentences that resonate with the justice practices and beliefs of those to whom they are directed—that are "culturally appropriate"—does not fundamentally challenge or alter the conventional justice system, nor does it reflect a substantial departure from the mode of thinking that has long served to uphold that same system. While the introduction of community-based sanctions, alternative sentencing practices, and restorative sentencing aims broadens the scope of responses available to the sentencing judge and enhances the participation of Aboriginal communities in the justice process, these measures fail to adequately acknowledge and respond to the deeper structural problems of which over-representation is merely a symptom. Instead, and even more troublingly, this move serves to legitimate a system whose involvement in the historical oppression and continuing marginalization of Aboriginal peoples remains fundamentally unaddressed. Aboriginal peoples' estrangement from the justice process is seen as signalling the presence of *cultural barriers* to the effective application of the criminal law that are to be *overcome* (a problem of implementation or efficiency), as opposed to deeper structural inequalities that need to be dealt with (a matter of legitimacy). The integration of restorative values and practices into the justice process provides a way of circumventing what are perceived as cultural obstacles to the effective and efficient application of the criminal law without disturbing the larger conceptual and institutional landscape of social control. Daniel Kwochka makes a similar point in contrasting what he refers to as the restorative and punishment paradigms: "Culture is considered for its impact on the sentence necessary to achieve the goal of punishment, not because culture is based on restoration rather than punishment."[45] This logic of efficiency is an important undercurrent of the Court's concern that judges "craft sentences in a manner which is meaningful to aboriginal peoples" (Para. 77) and risks bolstering a presumption

[45] Daniel Kwochka, "Aboriginal Injustice: Making Room for a Restorative Paradigm," *Saskatchewan Law Review* 60 (1996): 169.

underlying many culture clash arguments, namely, that "the problem lies with the limitations of Aboriginal culture to adapt to non-Aboriginal legal culture—an assumption of inferiority."[46] Moreover, in this scenario, the power to *accommodate* Aboriginal cultural difference remains in the hands of judges who determine what form that accommodation will take;[47] thus, the existing authority structure remains virtually untouched.

Giving Aboriginal communities a stronger voice in sentencing and incorporating restorative values and aims into the sentencing process thus emerges in the government's sentencing reform initiative as a relatively minor form of political accommodation that enhances the *semblance* of legitimacy, aimed at improving the justice system's effectiveness, without fundamentally challenging its structural integrity. The turn to restorative justice offers a relatively straightforward and politically palatable response to an issue that is in reality considerably more complex and potentially destabilizing.

Aboriginal Justice, Legal Pluralism, and the Pursuit of Self-Government

The development of alternative, community-based justice practices in Aboriginal communities tells quite a different story about restorative justice and its role in addressing indigenous peoples' troubled relationship with the criminal justice system. Indeed, well before lawmakers turned their attention to the problem in a serious way, Aboriginal Canadians were already hard at work developing innovative, community-driven justice programs to deal with the overwhelming and seemingly intractable social problems plaguing their communities. One of the most successful and commonly cited of these programs is the Community Holistic Circle Healing (CHCH) Program developed in the mid-1980s by members of the Anishinaabe (Ojibway) community of Hollow Water, Manitoba. Berma Bushie, director of the CHCH program, describes the troubling circumstances that led to its creation in a 1997 Public Works and Government Services Canada report:

> The beginnings were in the community in the early eighties. Back then, what we were faced with was alcohol abuse at its highest point. You could find a party in the community any time of the day and any day of the week.
>
> There was violence between men. There were gangs back then. There was also violence against women, both physically, sexually, mentally and psychologically. But the physical violence and sexual assaults were the most visible. Where were the children? They were forgotten. It became really difficult for grandmothers because they were left with the children. When you look at the history of our community, women did not start drinking until the sixties. That's when our community started to go downhill. Prior to that the women were holding everything together.
>
> So the seventies were really crazy. In the early eighties a few of us decided to sober up. Our community was in crisis, and the question was where to start? It was such a big problem in all areas and just a very few people were talking about what was happening and trying to address the problems. In the early eighties we did a lot of talking, did a lot of crying, and slowly, over time, more and more people came together.[48]

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[46] RCAP, *Bridging the Cultural Divide*, 41.
[47] The example I have in mind here is sentencing circles.
[48] Public Works and Government Services Canada, "The Four Circles of Hollow Water," in *Aboriginal Peoples Collection* (Ministry of the Solicitor General of Canada, 1997), 140.

The CHCH program seems to have grown out of two realizations: first, that the situation in Hollow Water had become untenable, that immediate, radical intervention was needed to redirect the community from the path to self-destruction upon which it was set[49] and, second, that the formal criminal justice system was not helping; if anything, it was making matters worse. The dominant system presented too few options for dealing with criminal behaviour, especially when most offenders could be expected to return to the community in which they had committed their crime during or upon completion of their sentence; risked re-victimizing the victims of crimes such as sexual assault—frequently children—who were pushed to relive the experience in surroundings that were unfamiliar and sometimes hostile in order to secure a conviction; and did not seem to generate meaningful accountability for offenders.[50] Bushie and her colleagues soon came "to understand that in order for change, real change, to happen we had to start with ourselves. We had to start healing our own abuse, our own dysfunction; and, that's a journey for all of us in that community."[51]

This search for alternative approaches to dealing with criminality grounded in the experience, culture, and relational networks of local communities is far from unique to Hollow Water and has occurred across the country in Aboriginal communities facing similarly devastating circumstances of poverty, substance abuse, and violence tied to the experience of Indian Residential Schools and other oppressive colonial and contemporary government policies. As Bushie's comments illustrate, these initiatives have been driven, first and foremost, by the need for immediate, productive solutions to the widespread and acute social problems afflicting Aboriginal communities across Canada, and to Aboriginal people's experiences with the criminal justice system, but they also reflect a desire for deeper and more expansive social and political change. Indeed, these two objectives are closely intertwined: advocates of Aboriginal justice programs[52] seek at once to reduce the harm generated by a system that has neglected the needs and perspectives of one of its principal "clients" and to contribute to ongoing efforts to decolonize public institutions that continue to perpetuate the marginalization of indigenous peoples in Canadian society.[53] The promotion of Aboriginal justice programs—and restorative justice for Aboriginal communities—thus needs to be situated in relation to the continuing struggle for Aboriginal self-determination.

One of the central claims I am making in this paper is that a comparison of the government's position on the inclusion of restorative justice principles and practices in the criminal law's sentencing guidelines with "grassroots" accounts of the development of restorative justice in Aboriginal communities reveals contrasting understandings of the significance of the problem such measures are intended to address. While both perspectives show an immediate concern with the relationship between Aboriginal peoples and the criminal justice system generally, and the problem of over-representation in particular, that issue takes on a different meaning in each case. For

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[49] Bushie describes the situation as one of "visible chaos." Marie Wadden, *Where the Pavement Ends: Canada's Aboriginal Recovery Movement and the Urgent Need for Reconciliation* (Vancouver: Douglas & McIntyre, 2008), 87.

[50] Public Works and Government Services Canada, "The Four Circles of Hollow Water."

[51] Ibid., 132.

[52] Hereafter, I will use the term "Aboriginal justice programs" to refer in a general way to the various community-driven, localized, and culturally relevant justice programs that have been promoted by Aboriginal people and their allies in an effort to carve out spaces in which indigenous peoples can take control over how justice is delivered in their communities (both rural and urban).

[53] I use the term "decolonization" here to refer to the dismantling of institutional structures, norms, and social attitudes implicated in the domination of indigenous peoples.

government reformers, the problem is essentially one of efficiency: how to make a system that is fundamentally sound work better for Aboriginal people. The alternative perspective I am attributing loosely to Aboriginal and allied proponents of restorative justice in Aboriginal communities frames the issue in terms of legitimacy, which presents a challenge not only to the present operation of the justice system, but to its very structural integrity.

This legitimacy argument, as I see it, can be articulated in three ways. The first, an argument I attributed earlier to Friedland,[54] sees legitimacy as contingent upon the fulfilment of the ends for which a particular law or policy came into being. This is particularly important where the policy in question requires citizens to sacrifice some fundamental good, such as liberty. To the extent that such a policy does not adequately achieve the ends that justified its intrusion into the lives of citizens or its compromise of their individual liberty, it loses its legitimacy in the eyes of those affected by it. If the policy leaves the members of one social group worse off than those of another, then there is further reason to question the validity of the compromise behind the policy (unless an unequal distribution of benefits was understood and consented to from the beginning) and, hence, the legitimacy of the policy itself. The second argument emphasizes the need for democratic participation of citizens—whether direct or via duly elected representatives—in the design of policies and institutions that will affect them.[55] The capacity of individuals to live according to norms, rules, and traditions of their own choosing is enhanced when they have a voice in the creation and development of the institutions and policies that govern their lives. Finally, policies and institutions acquire a particular kind of legitimacy when they reflect the beliefs and traditions of those affected by them, when citizens are able to identify with or find meaning in the laws and practices of their society. This means not only feeling a connection between the laws of the land and one's own well-being, but experiencing these norms and institutions as concrete factors in the betterment of one's life.[56]

Viewed from this perspective, the criminal justice system as it currently stands is not only malfunctioning; its very legitimacy as a source of political and legal authority over the lives of Aboriginal people is in doubt. As we saw earlier, the empirical data on over-representation indicate that Aboriginal people are disproportionately affected by that system and have, by all accounts, failed to reap any benefits from that differential impact. Furthermore, as RCAP took great pains to document, the justice system boasts an old lineage in policies of assimilation, domination, and exclusion targeted towards Aboriginal peoples without their proper consent.[57] Situated in that historical context, the justice system emerges as yet another outside imposition, which fails to take into consideration the perspectives, beliefs, and traditions of Aboriginal peoples, and neglects their fundamental right to self-determination.

The focus on Aboriginal cultural differences in the discussion of the introduction of restorative justice principles into the sentencing law in *Gladue*, although somewhat misguided, was not unwarranted, as it touches upon the third legitimacy argument. While cultural dissonance offers only a partial explanation of Aboriginal people's adverse experiences with the justice system,[58] it nonetheless addresses an issue at the heart of many arguments in favour of restorative justice in Aboriginal communities, namely, that Aboriginal peoples have their own approaches to

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[54] Friedland, "Different Stories."
[55] For a version of this argument, see John Borrows, "Indigenous Legal Traditions in Canada," *Journal of Law & Policy* 19 (2005): 172.
[56] Duncan Ivison, *Postcolonial Liberalism* (Cambridge: Cambridge University Press, 2002), 6-7.
[57] RCAP, *Bridging the Cultural Divide*.
[58] Dickson-Gilmore and La Prairie, *Will the Circle Be Unbroken?*

dispute resolution that are not adequately reflected in the criminal law. Aboriginal legal traditions are numerous and diverse, but observers of and participants in those traditions have identified several recurring themes and core beliefs shared across cultures.[59] The first has to do with the relational dimension of criminal wrongdoing. Many Aboriginal cultures emphasize the interconnectedness of all things—of people to each other and to their community, and of human beings to the whole of the natural world. People, communities, and the rest of the natural world live in a delicate balance that needs to be respected and maintained. Wrongdoing upsets that balance, and interventions by the community (justice processes) are aimed at restoring that lost equilibrium. This involves identifying the source of the social rift that has occurred and finding ways of healing the harms that have been caused. That healing process is key, as it is in bringing together those involved in the incident and the wider community that ties of fellowship can be repaired and imbalances within the community revealed by the harmful act, addressed. Chief Justice (Emeritus) Robert Yazzie of the Navajo Nation expresses this idea as follows:

> What is an offender? It is someone who shows little regard for right relationships. That person has little respect for others. Navajos say of such a person, "He acts as if he has no relatives." So, what do you do when someone acts as if they have no relatives? You bring in the relatives![60]

In contrast to the dominant liberal model of justice, which places a high importance on impartiality and the search for truth (e.g., proving guilt beyond a reasonable doubt), Aboriginal conceptions of justice often emphasize the existence of multiple "truths," diverse perspectives on the incident, all of which hold value, and see the expression of emotions in that process as desirable. The direct participation of those affected by the incident in the justice process is essential for identifying those truths, determining what needs to be done by the wrongdoer to make amends—that is, to assume responsibility for their actions and help restore balance in the community and in their relationship with the victim—and reinforcing, through examination, interpretation, and discussion, the meaning and significance of shared norms and values.

This brief look at some of the shared themes that emerge in discussions of Aboriginal justice traditions suggests that the Court's depiction of restorative justice as expressing core elements of Aboriginal conceptions of justice is not itself without credence. No doubt these shared beliefs and practices have a lot to do with the endorsement of restorative justice that has come from many Aboriginal communities, both rural and urban, seeking alternative approaches to dealing with criminality. At the same time, though, it is important to note the framing of this cultural argument. In the case of the government's sentencing reform initiative, restorative justice is incorporated into sentencing practice as a way of dealing with over-incarceration generally, but also as a form of *accommodation*, a means of overcoming the cultural barrier posed to effective implementation of the law in the case of Aboriginal Canadians by absorbing their distinctive cultural practices into the

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[59] I cannot hope to do justice to these accounts in this short space, but I wish nonetheless to draw attention to a few key ideas. I draw on the following sources in this short overview: Borrows, "Indigenous Legal Traditions in Canada"; Wanda D. McCaslin, ed., *Justice as Healing: Indigenous Ways* (St. Paul: Living Justice Press, 2005), esp. parts 1 and 2; Monture-Angus, "Myths and Revolution"; Rupert Ross, *Returning to the Teachings : Exploring Aboriginal Justice* (Toronto: Penguin, 2006); Murray Sinclair, "Aboriginal Peoples, Justice and the Law," in *Continuing Poundmaker and Riel's Quest: Presentations Made at a Conference on Aboriginal Peoples and Justice*, ed. Richard Gosse, James Youngblood Henderson, and Roger Carter (Saskatoon: Purich Publishing, 1994).

[60] Robert Yazzie, "Healing as Justice: The Navajo Response to Crime," in *Justice as Healing: Indigenous Ways*, ed. Wanda D. McCaslin (St. Paul: Living Justice Press, 2005), 123.

dominant criminal justice system. Through the rubric of restorative justice, those practices are reinterpreted, repackaged, and reapplied in such a way as to allow Aboriginal peoples greater participation in the justice process, and some reflection of their values and traditions in more localized sentencing procedures, but without actually surrendering legal authority to those communities. Thus, sentencing circles, the practice most commonly associated with this hybrid approach to restorative justice for Aboriginal people in Canada, gives those affected by a particular crime a greater voice in the sentencing process, but it is the judge who presides over the proceedings and ultimately hands down the chosen sentence.[61]

Patricia Monture-Angus offers the following evocative words to express her thoughts on accommodation:

> The more reading and the more listening I do the more I notice how much this conversation about Aboriginal justice is becoming solely about the mainstream system accommodating us. I do not want to be accommodated. It is a truly offensive suggestion. Offensive because in the long run I expect it will not make even a little bit of difference for the experiences my children will have. I want to be able to live my life with the faith that my children will live their lives in the way of our law. That is the way to live most nicely together.[62]

The message Monture-Angus is articulating is an undercurrent of much of the literature on restorative justice in Aboriginal communities. The goal is not for indigenous justice traditions to be add-ons to a system that has shown itself to be to a large extent antagonistic to Aboriginal interests and beliefs, but for Aboriginal peoples to carve out institutional and political spaces in which they can design and implement justice models of their own choosing. This likely would involve extensive collaboration with the dominant justice system, as has been the case with the grassroots-initiated CHCH program in Hollow Water, but that relationship is to be negotiated as part of a broader effort to overcome the structural injustices indigenous peoples continue to face.

Such arrangements are not without precedent in Canada's federal system. As John Borrows has taken great pains to demonstrate, legal pluralism is very much a reality in the Canadian context, although indigenous legal traditions are rarely acknowledged as components of a legal landscape dominated by the civil and common law traditions.[63] The dismissal of indigenous law is likely due in part to differing understandings of what law is. Monture-Angus describes her Mohawk understanding of law as "the way to live most nicely together," an idea that contrasts sharply with the more prevalent, Western association of law with a system of rules and a clear authority structure for judging and enforcing them.[64] The diverse indigenous legal traditions that Borrows and Monture-Angus describe permeate everyday life and are constantly being rearticulated and reinforced through the telling of stories, ceremonies, and other practices. The interpretation of indigenous legal traditions, moreover, is a participatory process that requires the involvement of individual community-members, unlike the dominant liberal model that sees authority for judgement and interpretation vested in professionals—judges and legislators, who are charged

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[61] Dickson-Gilmore and La Prairie, *Will the Circle Be Unbroken?*, 89.
[62] Monture-Angus, "Myths and Revolution," 259. James Tully identifies accommodation as one of several neo-colonial "strategies of incorporation" of indigenous peoples into the dominant society that have been adopted by the Canadian government. James Tully, "The Struggles of Indigenous Peoples for and of Freedom," in *Political Theory and the Rights of Indigenous Peoples*, ed. Duncan Ivison, Paul Patton, and Will Sanders (Cambridge: Cambridge University Press, 2002).
[63] Borrows, "Indigenous Legal Traditions in Canada."
[64] Monture-Angus, "Myths and Revolution," 255.

with remaining impartial and distant from the issue at hand and the people involved.[65] The full acknowledgement and inclusion of indigenous justice traditions in Canada's legal landscape, then, requires a good faith effort to reconcile these different legal traditions through institutional arrangements and practices that enable Aboriginal peoples to "address issues of normative order within their communities through values that have persuasive meaning for them."[66]

A common refrain in the promotion of Aboriginal restorative justice, reflected in Berma Bushie's comments cited earlier, is the need for indigenous peoples to take control of their own problems, to take ownership of the ills facing their communities and begin the healing process by reviving silenced traditions and generating new ones for themselves. Yet, perhaps surprisingly, many of those advocating greater Aboriginal control over the criminal justice process are not simply looking to withdraw from mainstream institutions; on the contrary, they aspire or hope to transform the criminal justice system as a whole for the benefit of *all* citizens. Thus, James Sa'ke'j Youngblood Henderson and Wanda McCaslin see some promise in the 1994 sentencing reforms, both as an acknowledgement of and attempt to address the justice system's failings with respect to Aboriginal people, and as a means of "renewing the Canadian criminal justice system" as a whole, grounded in the "Aboriginal concept of justice as healing."[67] This spirit of generosity flows through much of the writings on restorative justice in Aboriginal communities, pushing readers to conceive of restorative justice not just as a set of practices, but as a way of life, one that focuses on "balance and the interconnection of all things" and seeks to heal conflict at all levels.[68]

Aboriginal Justice and Restorative Justice: An Unsteady Alliance

This paper began with the observation that, increasingly, restorative justice has been held up as a remedy for the deep dysfunction afflicting Aboriginal peoples' relationship with the criminal justice system in Canada. Indeed, on the face of it, it seems that advocates on all sides are endorsing this approach to dealing with crime in Aboriginal communities, signalling perhaps some sort of unforced consensus or strategic convergence around the principles and practices of restorative justice. Yet, a closer investigation of some of the discursive and political contexts in which restorative justice has been advanced reveals that convergence to be little more than skin deep. Focusing on the government's 1994 sentencing reform bill and its subsequent interpretation in the Supreme Court's *Gladue* decision, on the one hand, and various "grassroots" accounts of restorative justice in Aboriginal communities, on the other, I argue that the endorsement of restorative justice in each case arose from very different interpretations of the problem at hand, with divergent implications. In the first case, the problem of over-representation was conceived principally in terms of efficiency. The focus here was on the cultural obstacles to effective implementation of the law; restorative justice offered a way of overcoming those obstacles by accommodating Aboriginal peoples' different justice traditions and giving them a greater voice in the justice process, while preserving the overall integrity of a system perceived to be basically just. In the second, support for restorative justice appears to have emerged as part of a bottom-up strategy to revive previously silenced cultural traditions and practices and tackle pressing social problems on the ground. The problem of over-representation is viewed from this angle as a problem of legitimacy, indicating the

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[65] Borrows, "Indigenous Legal Traditions in Canada," 195.
[66] Ibid., 211-212.
[67] James Sa'ke'j Youngblook Henderson and Wanda D. McCaslin, "Exploring Justice as Healing," in *Justice as Healing: Indigenous Ways*, ed. Wanda D. McCaslin (St. Paul: Living Justice Press, 2005), 3.
[68] Harley Eagle, "Hearing the Hard Stuff," in *Justice as Healing: Indigenous Ways*, ed. Wanda D. McCaslin (St. Paul: Living Justice Press, 2005), 54-55.

presence of deep structural inequalities that need to be addressed. The move to achieve greater Aboriginal autonomy in the sphere of criminal justice thus emerges as part of a broader strategy to deal with these structural problems and assert indigenous peoples' right to self-determination.

But why restorative justice? The question of the allegiance of advocates of Aboriginal justice with the restorative justice movement is an important one that I cannot hope to address properly in this short space. However, by way of conclusion, I wish to mention briefly some reasons why, given what has already been said, Aboriginal justice advocates might want to approach this alliance with a certain measure of caution.

No doubt, the restorative justice movement has much to offer Aboriginal communities working to develop and implement their own, community-based justice projects: connections, support (both human and financial), marketability, and the influence that comes with the backing of a powerful international social movement. Not only that, as we have seen, there are clear conceptual and practical affinities between many indigenous justice traditions and restorative justice that make the relationship seem natural. Indeed, many accounts of restorative justice claim roots in indigenous conceptions of justice.[69] Yet it is precisely this claimed lineage that may be a cause for concern. Ted Palys and Wenona Victor illustrate this point by describing Victor's experience in helping her Stó:lō community design its own justice program.[70] In a search for justice models that might be applied to their situation, Victor recounts how the community began by inviting an expert on Maori-inspired Family Group Conferencing to speak to them about the process. She then describes her astonishment upon realizing that the leader of the workshop was not Maori, but "white." Victor remains open-minded, however, recalling that sometimes non-indigenous people are recognized as "experts" on Aboriginal cultures, but soon comes to a surprising realization: "by the end of the three day training course I was convinced the Maori had lost their minds! There was absolutely nothing Indigenous about this model of justice whatsoever!"[71] Victor's experience raises an important concern about the application of preconceived ("prefab") restorative justice models in Aboriginal communities: that the process of transporting such models—models that claim to have been inspired by indigenous justice traditions—*back* into indigenous communities produces a kind of feedback loop, one that distorts the very traditions upon which they were ostensibly based. This seems to be the kind of worry that Chris Cunneen is getting at when he asks "whether restorative justice, as it is conceptualized in the West, runs the risk as a globalizing force of trampling over local custom, and crushing the very thing it claims to be."[72]

One cannot help but ask, furthermore, whether we are really talking about self-government when the justice practices meant to treat community dysfunction and solve the problems between Aboriginal peoples and the criminal justice system are brought in from the outside, and remain under the authority of government officials. To the extent that Aboriginal justice projects remain

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[69] Elmar G. M. Weitekamp, "The History of Restorative Justice," in *Restorative Juvenile Justice: Repairing the Harm of Youth Crime*, ed. Gordon Bazemore and Lode Walgrave (Monsey, NY: Willow Tree Press, 1999); Daniel W. Van Ness and Karen Heetderks Strong, *Restoring Justice*, 2nd ed. (Cincinnati, OH: Anderson Publishing Co., 2002).

[70] Ted Palys and Wenona Victor, ""Getting to a Better Place": Qwi:Qwelstóm, the Stólō, and Self-Determination," in *Indigenous Legal Traditions*, ed. Law Commission of Canada (Vancouver: UBC Press, 2007).

[71] Ibid., 17.

[72] Chris Cunneen, "Restorative Justice and the Politics of Decolonization," in *Restorative Justice: Theoretical Foundations*, ed. Elmar G. M. Weitekamp and Hans-Jürgen Kerner (Portland, Oregon: Willan Publishing, 2002), 34.

subject to tight budgetary, administrative, and procedural constraints, they run the risk of falling victim to a form of "bureaucratic colonialism" that keeps many such self-government initiatives from developing to their full potential.[73] At the same time, the idea of completely abandoning Aboriginal communities, many of which are suffering from a multitude of social ills, to deal with their own problems seems equally untenable.[74] Restorative justice may have provided an entry-point into the world of localized, community-based justice practices, but it will be up to indigenous peoples themselves, with the firm support of the government and the Canadian public, to figure out what those processes will come to look like.[75]

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[73] Jonathan Rudin, "Aboriginal Justice and Restorative Justice," in *New Directions in Restorative Justice: Issues, Practice, Evaluation*, ed. Elizabeth Elliott and Robert M. Gordon (Portland, OR: Willan Publishing, 2005)., 108

[74] Dickson-Gilmore and La Prairie, *Will the Circle Be Unbroken?*

[75] My thanks to Juan Marsiaj for helpful discussions as the argument was taking shape.

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