CHAPTER

Indigenous Legal Traditions: Roots to Renaissance

Val Napoleon and Hadley Friedland[*]

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As Indigenous peoples, we are beautiful, and we are messed up.[1]

This is one moment,
But know that another,
Shall pierce you with a sudden painful joy.[2]

I. Introduction

The fundamental ability of any society to deal with the universal issue of human violence and vulnerability is central to its maintenance of peace, order, stability, civility, and overall political governance. All societies experience the universality of the human condition, complete with the corresponding messiness, pain and joy that are generated when human beings live together. Each society has unique collective responses to these universal issues that are expressed through its legal traditions. This is no different for Indigenous societies. What is different for Indigenous societies is that colonialism has gutted, obscured, and undermined this essential aspect of social order and good governance. Today, many Indigenous people are on an important journey, with uneven progress and ongoing challenges, to recover these legal traditions as part of their decolonization and self-determination efforts.

In this chapter we hope to place this journey in context. To do so we set out four phases or eras of the major past, present and future debates about Indigenous laws. First, as we can never capture the past of any tradition definitively, instead of speculation or guesswork, we set out a logical starting point from which to think about the roots of all Indigenous legal traditions. Second, we discuss both the repression of Indigenous legal traditions that occurred within early colonization and the resilience of these traditions through this dark era. Third, we explore the contemporary recovery and revitalization of Indigenous laws within the limited spaces afforded to them in the larger frame of state justice systems. Finally, we describe the latest promising steps toward a renaissance or resurgence of Indigenous law, where it is treated seriously as *law*, not as isolated relics or artifacts of a fading past, nor merely as cultural customs or practices.

It can be challenging to talk broadly about Indigenous legal traditions without grossly over-simplifying them or resorting to sweeping pan-Indigenous generalities. Indigenous societies, and thus Indigenous legal traditions, are incredibly diverse. Across Canada alone, there are eleven major linguistic groups and within these, there are sixty distinct Indigenous peoples with numerous regional dialects.[3] It is simply impossible to adequately capture such diversity in the space of this chapter. For simplicity's sake we will examine one example of a legal concept or category that we are familiar with and one that was common in Algonquin groups across North America, including, particularly, Cree and Anishinabek societies – the *wetiko* (also known as *windigo*). The *wetiko* is sometimes roughly translated into "cannibal", but, upon closer analysis, is better

[1] John Borrows, *Our Way* Conference Presentation, University of Saskatchewan (March 23, 2012).
[2] T.S. Eliot, *Murder in the Cathedral* (1935).
[3] There are 500 distinct Indigenous societies in North America. See Canada, Royal Commission on Aboriginal Peoples, *Looking Forward, Looking Back* 1 (1996), 12, 15-17 ff.

understood as a legal concept that describes people who are harmful or destructive to others in socially prohibited ways within these societies.[4] When properly understood, the *wetiko* legal category shares commonalities with, or is even roughly comparable to what we currently characterize as criminal law.

We will follow the *wetiko* example through this chapter as an illustration of the broader issues all Indigenous legal traditions have had to grapple with, in one form or another, through the different eras described herein. Similarly, as we are most familiar with Canadian history and the Canadian criminal justice system, we will primarily follow Indigenous experiences in relation to Canada throughout this chapter. We encourage the reader to consider analogous categories in other Indigenous legal traditions, as well as the corresponding similarities in the historical and present interactions between other Indigenous legal traditions and state justice systems throughout the world.

II. Roots

1. A Logical Starting Point

We want to firmly root any discussion about Indigenous legal traditions in a logical starting point about the past. This starting point is broad enough to cover the diversity of Indigenous societies and does not require the reader to be Indigenous or to even have any knowledge about Indigenous peoples.

Prior to European contact or "effective control",[5] Indigenous peoples lived in the place that is now called Canada, in groups, for many thousands of years. We know that Indigenous peoples did not organize themselves in 'state' models of governance. We know that when groups of human beings live together, they have ways to manage themselves and all their affairs.[6] This task of human coordination is "the most common of common denominators in law."[7] Therefore, as a matter of logic alone, our starting point has to be that for a very long time, all Indigenous groups had self-complete, non-state systems of social ordering that were successful enough for them to continue as societies for tens of thousands of years.

It is actually discomforting, and it should be, to have to explicitly identify this as a logical starting point. However, it is important to do so because the myth of Indigenous people as lawless has too often been used as a trope by European theorist and jurists.[8] These writer's tropes have become so powerful and persuasive that they may still be unconsciously assumed as *a priori* knowledge or felt as plain common sense at this point in time. Their perpetuation imposes a continuing social reality with meanings that makes it appear normal, obvious, and therefore unquestionable. Dispensing with these very familiar, but illogical tropes does not lead us to subscribe to a utopian vision of Indigenous legal traditions of the past. However, we have no logical reason to think

[4] For a more in-depth discussion of this legal concept or category, see Hadley Friedland, *LLM Thesis: The Wetiko (Windigo) Legal Principles* (2009) [unpublished], 35-40 ff.
[5] *R. v. Powley* [2003] SCR 2007, 40 ff.
[6] Lon Fuller describes law as "a direction of purposive human effort" consisting in "the enterprise of subjecting human conduct to the governance of rules": Lon Fuller, *The Morality of Law* (1964), 130 ff.
[7] Jeremy Webber, 'The Grammar of Customary Law', (2009) 54 *McGill LJ* 583 ff.
[8] Ibid, 591 ff.

Indigenous laws did not work well enough for thousands of years.[9] We can logically assume that Indigenous legal traditions of the past, while not paragons of perfection (and no legal order is ever perfect), were reasonable legal orders managed by intelligent and reasoning people.[10] This is our logical starting point.

2. Minimal Content

Some of the laws in these legal orders had to address the unavoidable reality of human violence and destructiveness, and the aching reality of human vulnerability, because these factors are both present in all societies. Rules and prohibitions around violence, bodily harm and killing are part of the minimal content and some of the most characteristic provisions of any functional legal or moral order.[11] If pre-contact Indigenous societies did not have such provisions, then, as H.L.A. Hart argues, they would have had social and legal orders akin to the social arrangements of a "suicide club",[12] and would have all perished long before European contact. Indeed, North America would have truly been *terra nullius*. Since Indigenous societies functioned and persisted for thousands of years, their legal orders logically must have included this minimal content of law. In other words, we can safely assume that all Indigenous legal orders must have had some way to address the issues of human violence and vulnerability that we now characterize as 'criminal law' matters.

3. The *Wetiko* Example

Again, there is a great diversity of Indigenous groups. While all Indigenous societies logically must have has some way of addressing what we characterize as criminal law matters, each society would have had different ways of organizing and articulating this category of law within their legal order. As mentioned above, because it is impossible to adequately capture this diversity in the space of this chapter, we will examine one example of such a characterization, which we will follow through the different eras of thinking about Indigenous laws: the *wetiko*, a concept that described people who are harmful or destructive to others in socially prohibited ways in Cree and Anishinabek societies.[13]

Like analogous criminal law concepts, the *wetiko* legal concept or category grappled with the "ordinariness of human monstrousness."[14] It triggered particular obligations, legitimate collective reasoning processes and legal principles for determining an appropriate response to human violence and harm in particular circumstances. These principles were balanced and implemented differently based on specific facts in each

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[9] Val Napoleon, *PhD Dissertation*: *Ayook: Gitksan Legal Order, Law, and Legal Theory* (2009) [unpublished].

[10] Our use of 'legal orders' may be understood as "the norms, rules and institutions formed by a society or group of people to ensure social stability. They usually describe what is right and how to act, and what is wrong and how not to act; and the remedies and consequences of such actions." International Council on Human Rights, *When Legal Worlds Overlap; Human Rights, State and Non-State Law* (2009), 19 ff.

[11] H.L.A. Hart, *The Concept of Law* 2nd ed. (1994), 194 ff.

[12] Ibid.

[13] For a more in-depth discussion of this legal concept or category, see Friedland (n.4), 35-40 ff.

[14] This is Ruth Landes' description of the wetiko in her reply in Lou Marano *et al*, 'Windigo Psychosis: The Anatomy of an Emic-Etic Confusion [and Comments and Reply]' (1982) 23, 4 *Current Anthropology*, 401 ff.

circumstance, but the over-riding goals were preventing harm, protecting the vulnerable and ensuring group safety.[15] While we are not suggesting these goals were accomplished with any less heartache or any more efficacy than in any other analogous 'criminal' area of law, there is enough evidence, even from the written records of early Europeans, to support the logical inference they worked well enough in their historic political and social context.

Just like people today theorize and philosophize about the causes of crime, and struggle to understand criminal behaviour, Cree and Anishinabek people had theories about the causes of *wetiko* behaviour.[16] These theories were often, but not always, spiritual in nature.[17] This made sense in the context of decentralized societies where there was no brutal history of oppression necessitating the wrenching of church from state, and where law was not associated with centralized, formal and hierarchal processes, but with people, as legal agents, make necessary decisions and conducting themselves in principled and predictable ways.[18] In this non-hierarchal context, respected spiritual leaders and healers often contributed meaningfully to the collaborative reasoning through and resolution of difficult issues.

A crucial aspect of this historic social context is that the specific principles, practices and aspirations related to the *wetiko* legal category did not stand alone, just as those in the criminal law category do not stand alone in other legal traditions today. Rather, they were interconnected aspects of a "comprehensive whole", a broader, functioning Indigenous legal tradition:

> (1) that was large enough to avoid conflicts of interests and which ensured accountability, (2) that had collective processes to change law as necessary with changing times and changing norms, (3) that was able to deal with internal oppressions, (4) that was legitimate and the outcomes collectively owned, and (5) that had collective legal reasoning processes. [19]

The *wetiko* legal category and analogous categories in other Indigenous legal traditions were, like criminal law today, necessarily a core aspect of the larger legal orders they were part of because they addressed the unavoidable and critical issue of human vulnerability and violence. For a very long time, these laws served as legitimate responses and processes, and were relatively effective means to protect the vulnerable, prevent harm and ensure group safety. This contributed in an essential way to an overall functioning social order within Indigenous societies, just as it does in every society.

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[15] Friedland (n.4), 96 ff.
[16] For some examples, see Ibid, 70-81 ff.
[17] See, for example, Ibid, 31 ff. For a good discussion of the context of these spiritual theories, see Robert Brightman, 'The Windigo in the Material World" (1988) 35, 4 *Ethnohistory* 363- 367 ff.
[18] Lon L. Fuller, 'Human Interaction and the Law,' (1969) 14 *American Journal of Jurisprudence* 2 ff.
[19] Napoleon (n.9) 47-48 ff, arguing it is reasonable, and crucial, to contextualize individual Indigenous legal concepts this way.

III. Repression and Resilience

1. Repression on a Massive Scale

There have been devastating political and *legal* consequences for Indigenous societies and individuals based on illogical assumptions about an absence of law.[20] There are long dark eras in every commonwealth country where Indigenous legal traditions were suppressed and delegitimized in many different ways from many different angles. It is well documented that, as initial European contact and interaction gave way to European intrusion and control, Indigenous peoples found themselves faced with a loss of territory and essential resources, catastrophic disease, forced dislocation, externally imposed disruption and compulsory replacement of governance structures and practices, oppressive educational policies and entrenched poverty. While there is much diversity among Indigenous peoples, and there were various manifestations of and responses to these colonial factors, there was nonetheless a common experience in that Indigenous social, political and legal orders were undermined on a massive scale, at both a practical and symbolic level.

Legal traditions encompass far more than just rules for conduct. They include formal laws and informal laws, worldviews, aspirations, pedagogies, processes and practices.[21] The impact of the disintegration of so many aspects of Indigenous legal traditions, consequent to colonialism, would be difficult to overestimate. From our vantage point in history, ensconced in our familiar worlds where our state legal actors, laws and legal processes can be relied on, at least to do what they usually do, and accomplish what they usually aim to, such disintegration of the social ordering we take for granted is hard to conceive. We may question, criticize or dislike our state laws, but there are no powerful outsiders that are so blind to their existence and necessity that they use force to sweep them away as superstitious nonsense, or even criminalize them, as was done with Indigenous laws. One can only imagine the disorientation, chaos and fear that would result from the gradual but relentless loss of all our familiar normative signposts, from the most mundane to the most significant. For the purposes of this chapter, we focus on the impact of the state criminalizing the categories of law within Indigenous legal traditions that are analogous to criminal law and we continue with the example of the *wetiko* legal category.

A common issue facing almost all Indigenous laws of this nature is that legal responses to human violence and vulnerability are the most likely to require, not always, but certainly in the most acute or extreme circumstances, some recourse to force. Yet laws that require or authorize the use of force were exactly the ones first criminalized by colonial states, which monopolized the legitimate use of coercive force as part of the 'civilizing' project. In this way, states actively delegitimized and belittled Indigenous people's categorization and responses to violence, harm and group safety needs within their own societies. In Canada, within the nineteenth and early twentieth century, there are numerous documented court cases that lead to the execution or imprisonment of Indigenous legal decision-makers who had implemented a legitimate collective legal

[20] See, for example: James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (1995), 65 ff, and Michael Asch and Patrick Macklem, 'Aboriginal Rights and Canadian Sovereignty: An Essay on R v. Sparrow' (1991) 29 *Alta LR* 507 ff.

[21] Napoleon (n.9).

decision to execute someone in the *wetiko* legal category, in cases where they had determined there were no other means left to prevent harm or keep the rest of the group safe.[22]

The fact there were other principled and preferred responses to someone in the *wetiko* legal category, such as healing, supervision, and temporary or permanent separation, which were required to be employed first, and which usually worked effectively to completely resolve most cases,[23] was rarely considered by state legal decision-makers. Although in many of these cases, Cree or Anishinabek people extensively described their collective decision-making processes and principled reasoning leading to this tragic decision, these explanations were dismissed. Indigenous peoples were often described as 'child-like' and incapable of reason. Their legal decisions to employ force were reduced to, at best, an "honestly held belief", but even this was weighted down by demeaning notions that Indigenous individuals or groups were only acting under the pernicious influence of "pagan" or "superstitious belief" or "a form of insanity to which the whole tribe is subjected", which had to be eradicated for their own good.[24] The unfortunate legal actors tasked with implementing the incapacitation of a dangerous *wetiko*, who were respected and trusted leaders within Indigenous groups, were not only executed or imprisoned, but also held up as examples of irrational barbarism, which no longer had any place within the state legal order.[25] Similar examples to the Canadian *wetiko* cases abound.

Let us reflect on what the analogous situation would be in current Canadian criminal law. While what is called 'capital punishment' no longer exists in Canadian law, judges and juries make decisions that some people need to be incapacitated or removed from society. In turn, a justice bureaucracy of police, sheriffs and prison guards implement these decisions by imprisoning people who are deemed to be guilty of heinous offences and dangerous to society. Imagine then, if one day, another society's legal actors took the Canadian judge, the police officer, or the prison guard into custody, tried and found them guilty of an offence, say, of kidnapping or forcible confinement, and then imprisoned or otherwise punished them for their actions. What then if it were announced to the community at large, through word of mouth, official notices, and through social media, that these respected people – the judges, police officers, and prison guards – were backwards, superstitious, and had to be stopped from doing what they had always done? As a Canadian people, for our protection, we would now have to rely entirely on the outside legal actors who had criminalized, ridiculed and debilitated our laws and justice system. Who would dare remain a police officer? What would we do when faced with a person suspected of committing grave harm or becoming dangerous to others?

Our current legal actors would be placed in an untenable position. So would we, as ordinary Canadian citizens. Those who trusted and turned to these legal actors when in need would suddenly no longer know what or who to rely on for protection from harm.

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[22] See, for example, *R v. Machekequonabe* [1897] OJ No. 98, 2 CCC 138.
[23] See Friedland (n.4) 96-105 ff. See also Brightman (1988) 35, 4 *Ethnohistory* 358 ff.
[24] Sidney L. Harring, 'The Enforcement of the Extreme Penalty': Canadian Law and the Ojibwa-Cree Spirit World' in Sidney L. Harring (ed.), *White Man's Law: Native People in Nineteenth-Century Canadian Jurisprudence* (1998) 232 and 223 ff.
[25] See the fictionalized demonstration of this in graphic novel form, based on a compilation of real cases, in Val Napoleon, Jim Henshaw, Ken Steacy, Janine Johnston, and Simon Roy, *Mikomosis and the Wetiko* (2013).

We would know that our reliable, respected legal actors were punished according to the outsiders' rules for following the rules we knew. So whose rules should we trust? Neither would feel particularly solid or reliable. Not for nothing did Hart ask, "If there were not these rules then what point could there be for beings such as ourselves in having rules of *any* other kind?"[26] Even if other aspects of our legal traditions were not disintegrating around us, the gutting of these core elements related to human violence and vulnerability would shatter the foundation of the entire legal order. This is what *happened*, everywhere, with Indigenous societies.

2. Resilience and Perseverance

Yet just as Indigenous societies have persevered, against all odds, so too the eradication of Indigenous legal traditions was never completely realized. Comprehensively denied, disregarded and damaged through the concerted efforts and willful blindness of colonialism, they still did not wholly disappear. The legal concepts, processes and principles are as resilient as the people who reason through them and continue, in different ways, to meaningfully practice those they still can. As James Tully explains,

> No matter how relentlessly domineering governors try to implant and internalize… role-related abilities without the active interplay of the patients, as if they are blank tablets, in behavioural modification experiments, repetitious advertising and total institutions of colonial and post-colonial discipline (such as internment camps and residential schools), they invariably fail to 'construct' the other all the way down. They cannot eliminate completely the interactive and open-ended freedom *of* and *in* the relationship or the room to appear to conform to the public script while thinking and acting otherwise, without reducing the relationship to one of complete immobilization.[27]

All Indigenous peoples have struggled with demoralization and constructed internalized shame, but no Indigenous people have ever been 'constructed' all the way down.

When Potlatches and Sundances were made illegal by the Canadian state, Indigenous peoples continued to practice these important political and legal processes 'underground'. When entire communities realized they had lost meaningful practices over time, they sought out other Indigenous communities to learn from and revive them. Medicine people and elders continued to help people who came to them from within their own communities, and from others, even as they hid these practices. If some legal concepts, such as the *wetiko*, were ridiculed, reduced to cultural remnants, fetishized oddities, individual pathology or manifestations of group hysteria by outsiders, they also continued to be widely recognized and used as the complex intellectual concepts they were when it made sense to within Indigenous groups.[28] If certain principled responses to people within the *wetiko* legal category were criminalized, some legal decision-makers continued to implement others, such as healing, supervision, or separation, when doing so was possible and useful. Where there are the spaces of freedom, however limited, to reason through and practice with their own legal traditions, Indigenous people have continued to do so.

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[26] Hart (n.11) 192 ff.
[27] James Tully, *Public Philosophy in a New Key, Volume II: Imperialism and Civic Freedom* (2008) 278 ff.
[28] Friedland (n.4) 31-32 ff.

Even through this era of forced social disintegration, dislocation, and assimilation, a lack of state recognition, or even state and outsider reprobation, did not and could not completely repress Indigenous legal traditions. As John Borrows has argued, part of the strength and resiliency of Indigenous laws derives from them having been practiced and passed down through "[e]lders, families, clans, and bodies within Indigenous societies."[29] Indigenous laws continued to be recorded and promulgated in various forms, including in stories, songs, practices and customs.[30] The fact many Indigenous people continue to use the meaning making resources within their own legal traditions is sometimes most evident in unspoken or implicit ways, in the 'common-sense' or preferred responses to crimes within Indigenous communities.[31] The passing down, practice and promulgation of Indigenous laws may have been significantly damaged and disrupted through the years of near totalizing repression, yet, however differently, quietly and unevenly, it still occurred.

IV. Recovery and Revitalization

1. The Failure of State Criminal Justice Systems

There is no bright line between the phases of repression and resilience and of recovery and revitalization of Indigenous legal traditions. Dispossession, dislocation, and social disintegration continue. At a certain point, though, in almost every country with an Indigenous population, there is some recognition that the state criminal justice system has failed and is failing Indigenous peoples. All over the world, the grim statistics are similar. Indigenous peoples face substantially higher rates of incarceration than their non-Indigenous counterpoints[32] and they also face disproportionately higher rates of violent crime, victimization and death.[33] In Canada, between 1967 and 1993, when the Royal Commission of Aboriginal People's [RCAP] Report was written, over 30 government commissioned justice studies had been undertaken to investigate the causes and possible solutions to this massive failure.[34] Since RCAP, several more studies have been commissioned, and, by all accounts, despite hundreds and hundreds of recommendations,

[29] John Borrows, *Canada's Indigenous Constitution* (2010) 179 ff.
[30] Ibid, 139 ff.
[31] Val Napoleon, Angela Cameron, Colette Arcand and Dahti Scott, 'Where's the Law in Restorative Justice?' in Yale Belanger (ed.), *Aboriginal Self Government in Canada: Current Trends and Issues,* 3rd ed. (2008).
[32] "The justice system has failed… Aboriginal people on a massive scale" was the opening statement of the Manitoba Justice Inquiry. See A.C. Hamilton and C.M. Sinclair, Commissioners, The Justice System and Aboriginal People: Report of the Aboriginal Justice Inquiry of Manitoba, online at http://www.ajic.mb.ca/volumel/chapter5.html#8 . See also James C. MacPherson, "Report from the Round Table Rapporteur" [Report from the Roundtable] in *Aboriginal People and the Justice System: National Round Table on Aboriginal Justice Issues* (1993) 4 ff.
[33] For some of these statistics, see, for example, Canada, Canadian Centre for Justice Statistics, Profile Series: 18, *Aboriginal Peoples in Canada* (2001), online at http://www.statcan.ca/english/research/85F0033MIE/85F0033MIE2001001.pdf , 6-7 ff.
[34] Carole Blackburn, "Aboriginal Justice Inquiries, Task Forces and Commissions: An Update" [RCAP: Aboriginal Justice Inquiries Update] in Macpherson (n. 32) 15 ff. Eight of these were reviewed for the Roundtable on Justice (16-38 ff).

the statistics keep getting worse.[35] The sheer volume of literature on this phenomenon is noteworthy.

At the same time that we have statistics saying, for example, in Saskatchewan, a young Indigenous male has a better chance to go to jail than university,[36] an increasing number of Indigenous people, overcoming tremendous obstacles, and again attesting to the resilience within Indigenous societies, are seeking out and achieving higher formal education. There were many extraordinary people working within their own communities, determined to provide better opportunities and build better, healthier lives for everyone within those communities. There are also professionals within the justice system who see the human faces and senseless suffering behind the statistics and genuinely seek more humane, effective and just solutions. The confluence of the widely acknowledged failure of state criminal justice systems, an increasing cohort of strong, dedicated and formally educated Indigenous individuals, and sincere and compassionate justice system professionals has been the opening of spaces within the state justice system to allow for some recovery and revitalization of Indigenous laws.

2. Aboriginal Justice Initiatives

The spaces that open within a state's justice system for recovery or revitalization of Indigenous legal traditions are never very large. Yet they do exist. In partial response to the widely acknowledged failure of the criminal justice system related to Indigenous people, select aspects of certain Indigenous legal traditions have been adopted as pan-Indigenous 'traditional' or 'culturally appropriate' responses to crime, and subsumed within specific parts of the states' criminal justice processes, almost always in the sentencing phase. Importantly, these select aspects are rarely, if ever, described, recognized, argued or used as *law* in these spaces. Instead the language of 'values' or 'practices' is used, and the overall processes are considered 'alternative' or 'community' justice initiatives. In Canada, the argument for the inclusion of these select aspects is not a jurisdictional one. Rather it is explicitly ameliorative, based first on the statistics on over-representation of Indigenous offenders, and second, on the premise that this over-representation is the result of cultural differences between Indigenous people and the rest of Canada.[37]

Some of the most well known of justice initiatives that adopt select aspects of Indigenous legal traditions are Family Group Conferencing and Sentencing Circles. Family Group Conferencing emerged out of New Zealand, based on Maori and restorative justice principles and has been widely adopted and implemented in New Zealand, Australia and Canada. These typically involve family and extended family, as well as appropriate professionals, gathering to resolve issues, most often in child welfare or young offender matters. Sentencing Circles developed in Canada, and were actually first initiated by a non-Indigenous Yukon circuit court judge, Judge Barry Stuart, in the early 1990s, who was frustrated with the criminal justice system inadequacies in relation

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[35] Canada, Treasury Board of Canada Secretariat, *Canada's Performance: Annual Report to Parliament* (2004).

[36] Judge Patricia Lynn & Representatives of Federation of Saskatchewan Indian Nations, *Report of the Saskatchewan Indian Justice Review Committee* (1992) as cited in Isobel Findley and Warren Weir, 'Aboriginal Justice in Saskatchewan: 2002-2021- The Benefits of Change' in *First Nations and Métis Peoples and Justice Reform, Vol.* 1(2004) 74 ff.

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

to Indigenous individuals he often saw before him.[38] They essentially involve any number of people connected to the offender and possibly the victim, gathering in a circle to discuss the offence and the offender's circumstances, and then recommending what they consider to be an appropriate sentence to the presiding judge, who decides whether to follow the circle's recommendation. They have since been adopted and used in several US states and in Australia. Over time, their use in Canada seems to have abated, although the reasons for this are complicated and unclear.[39]

In Canada there are also some well-known and longstanding adapted Aboriginal court processes, such as the Cree circuit court in northern Saskatchewan, the First Nations Court in British Columbia, the Gladue Court in Toronto and the Tsuu T'ina Peacemaking Court in southern Alberta.[40] These innovative court processes operate within the mainstream justice system, conform to Canadian criminal procedure and apply the Criminal Code. The level of adaptation from the mainstream justice process varies greatly. The Cree court is a regular court, except that it operates entirely in Cree, with a Cree speaking judge and lawyers. The First Nations Court and Gladue Court implement an adapted 'culturally appropriate' process at the sentencing phase to understand the root causes of the criminal behaviour and develop a 'healing' plan that aims to address these. The Tsuu T'ina Court begins with a court process, held on the Tsuu T'ina reserve, but, with a guilty plea, the judge agrees to suspend sentencing and turns cases over to a Peace-making process. Peacemakers selected from the community then facilitate a structured circle process. Conditions are imposed through this process, and the offender returns to court only once these are completed, at which time the judge sentences accordingly.[41]

The space these justice initiatives and court processes open up for the recovery and revitalization of Indigenous laws is real. This is so, even though the language of 'law' is not used, the actual amount of community control is usually minimal due to a lack of resources, indirect government control and extensive reporting requirements, and processes are either state procedures or rooted in ideas of pan-Indigenous restorative justice, rather than in specific Indigenous legal traditions.[42] Whenever Indigenous people have some input and control of the conversation over responses to crime in their communities, groups and individuals can reason with and through the intellectual legal resources from their own legal traditions. This occurs at an implicit or informal level, through people referring to, reasoning through and acting on their legal obligations, whether or not they explicitly identify them as such.[43] It also occurs at a discursive level, within the debates that are generated when Indigenous people's opinions and narratives about a particular case are brought into a public conversation about the appropriate legal response to that case.[44] Even if the language of 'values' or 'customs' is used, rather than the language of law, the conversations and solutions generated within these spaces are the

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[38] *R. v Moses*, [1992] 2 CNLR 116, 71 CCC (3d) 347 ff.
[39] Jonathan Rudin, 'Aboriginal Justice and Restorative Justice' in Elizabeth Elliot and Robert Gordon (eds.), *New Directions in Restorative Justice: Issues, Practice, Evaluation* (2005).
[40] For a concise summary of these and other court processes, see: Karen Whonnok, "Aboriginal Courts in Canada, Fact Sheet" (2009), online: http://www.scowinstitute.ca/library/documents/Aboriginal_Courts_Fact_Sheet.pdf.
[41] Ibid.
[42] Rudin (n.39).
[43] Napoleon et al (n.31).
[44] Justice B. Richland, *Arguing with Tradition: The Language of Law in Hopi Tribal Court* (2008) 141 ff.

very "hard work" that continually recreates and sustains the legality and legitimacy of any law, and which is particularly relevant when legal orders are horizontal, without formalized enforcement mechanisms, like most Indigenous legal orders are. [45]

3. How Justice becomes just Healing

Call it what you will, but to the extent the work of law is happening in these spaces, the space for recovery and revitalization is real. However, its limits have lead to certain distortions about Indigenous legal traditions. Because only select aspects of certain Indigenous legal traditions are acceptable within the Canadian state, specifically, those aspects that do not require the use of coercive force or enforced separation from society, a peculiar set of assumptions develop regarding Indigenous laws related to what we broadly understand to be criminal behavior. This narrative completely and problematically conflates 'Aboriginal justice' with 'restorative justice' or rallies around the singular description of justice as 'healing'.[46] All other aspects of Indigenous legal traditions are ignored, or described in whispers as 'uncivilized' oddities or embarrassing cultural remnants. The *wetiko* legal concept has been relegated to these whispers for some time.

It is not that healing and restorative processes aren't important, or even preferable, to other responses to crime within many Indigenous legal traditions. It is just that, when we start from the logical starting point that these legal traditions once had to have dealt with the whole spectrum of harms and violence human beings inflict upon one another, it is obvious these could not have been the only available responses. Without question, healing was the predominant and preferred response to people fitting within the *wetiko* legal category.[47] However, in any society, there will always be a small minority of human beings, whether we call them *wetikos* or whether we call them criminals, who are beyond healing, either at a certain time, or at all. For example, no one would argue that Jeffrey Dahmer or Charles Manson would have been an appropriate candidate for healing. They are rare, but not alone. Let them be and we are, once again, faced with Hart's suicide club.

The predominant narrative of 'justice as healing' is not false, but it is dangerously incomplete. It flattens the complexity of Indigenous legal traditions and raises real questions about their utility to effectively respond to the "pressing reality" of the "unprecedented levels of violence experienced within Aboriginal families and communities in the current generation".[48] It has disproportionate and chilling effects on the lives, bodily integrity and safety of Indigenous women and children.[49] Healing alone is not enough to prevent harm, protect the vulnerable or ensure group safety in many situations, and at any rate, is a long-term process, not a panacea. It is not logical or

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[45] Jutta Brunnée and Stephen J. Toope, *Legitimacy and Legality in International Law: An Interactional Account* (2011) 355 ff.

[46] For example, see the Supreme Court's description of this in *Gladue* (n. 37), and *R. v. Wells*, [2000] 1 SCR 207, 27 ff.

[47] Brightman (1988) 35, 4 *Ethnohistory* 358 ff. See also Friedland (n.4) 97 ff.

[48] Mary Ellen Turpel Lafond, 'Some Thoughts on Inclusion and Innovation in the Saskatchewan Justice System' (2005) 68 *Sask L Rev* 295 ff.

[49] See, for example, Emma LaRocque, 'Re-examining Culturally Appropriate Models in Criminal Justice Applications' in Michael Asch (ed.), *Aboriginal and Treaty Rights in Canada: Essays on Law, Equity and Respect for Difference* (1997) 75 ff.

accurate to say that healing is the only legal response to crime in Indigenous legal traditions. It is more accurate to say that healing is the only legal response permitted to Indigenous groups within most states, which monopolize the use of coercive force.[50]

The analogous situation in current Canadian society would be if powerful outsiders permitted us to operate parts of our criminal justice system but regardless of the individual facts, our legal decision-makers could only apply the sentencing principle of rehabilitation. It would be indicative of the limits of the permissible space for our law in the dominant society, not of the limits of our law itself, if we found we could not safely or successfully manage every case on those terms. There are clear cases where, based on the facts, sentencing principles other than rehabilitation need to be prioritized in order to maintain individual and community safety. There are equally clear cases, within Indigenous communities, that require responses other than or in addition to healing. Returning these cases to the mainstream criminal justice system, in order to access the state monopolized resources those responses require, should not be (but often is) seen as a failure of Aboriginal justice initiatives.

4. Idealized Values as State Critiques

Indigenous laws are often even further reduced to over-simplified, idealized foils to critique state criminal justice systems within academic literature. This creates two major problems. First and foremost, it creates an artificial dichotomy between Indigenous and state responses to harm and violence, one that is "fraught with stereotypes, generalizations, oversimplifications and reductionism".[51] This inhibits any productive discussion examining cultural differences *and* similarities between legal principles that grapple with the same universal human issues. It also obscures the range of normative choices available within and across diverse legal traditions. Second, highly idealized, even romanticized Indigenous 'values', with no grounding in current practices or real issues, are contrasted with state legal principles that are practiced imperfectly in the chaos and messiness of everyday life, unavoidably carrying the historical and political baggage of the day, and applied to real-life cases. This purely oppositional space has the unintentional impact of reducing conversations about Indigenous laws to veiled critiques of current state laws. It does not allow us the intellectual room to imagine Indigenous laws beyond a symbolic resistance to colonialism.[52] Once reduced down to cultural differences or ideals, narratives of incommensurability and fragility can inhibit critical and rigorous scholarship engaging with Indigenous laws, further obscuring their presence

[50] The leading case affirming this is *Thomas v. Norris* [1992] 2 CNLR 139 (BCSC), where the British Columbia court found that any aspects of Spirit Dancing that would be contrary to the common or civil law, such as someone being forced to take part in a initiation ceremony against his or her will (as the plaintiff was in this case), was not protected as an Aboriginal right under s.35 of the constitution (89-90 ff). Hence, the defendants were liable for assault and battery in the case, despite arguing they were acting in accordance with their responsibilities, after the plaintiff's common-law wife requested their help, because of "marital and other problems (32 ff). The judge maintained the "supremacy of English law to the exclusion of all other" (104 ff).

[51] LaRocque (n.49) 78 ff.

[52] Napoleon et al (n.31).

and inadvertently perpetuating the colonial myth of an absence of Indigenous legal thought.[53]

V. The Renaissance

1. Engaging with Indigenous Laws seriously as Laws

The recovery and revitalization of Indigenous legal traditions is well underway, but the limited spaces for this within colonial states has lead to distortions and dangers at practical, political and intellectual levels. At this point in time though, we are on the cusp of a new era: The renaissance or resurgence of Indigenous law, claimed, recognized and engaged with seriously as *law*.

On a general level, there has been increasing and sustained momentum toward a greater recognition and practical and public use of Indigenous legal traditions in Canada. This has been occurring within and across academic, legal, professional, and Indigenous communities. For example, the Canadian Bar Association recently passed a resolution to recognize and advance Indigenous legal traditions in Canada.[54] This resolution was followed closely by a national Aboriginal Law section conference entitled, "Working with and within Indigenous Legal Traditions", which focused on the various ways lawyers are currently engaging with Indigenous laws in various areas of legal practice, including criminal justice initiatives.[55] The Chief Justice of the B.C. Court of Appeal, Lance Finch, C.J., stated clearly that Canadian courts have recognized pre-existing Indigenous legal orders, and recommended that every Canadian law school should have a course, not only on Aboriginal law (Canadian state law about Aboriginal issues), but also on Indigenous legal traditions themselves.[56]

This is a crucial recommendation. When we imagine more public, explicit and integrated use of Indigenous legal traditions in Canada or other countries generally, there are many political, legal, practical, and institutional issues to address.[57] But there are also real intellectual hurdles to overcome, as we have seen above. Today, one of the big questions is how Indigenous laws and state laws will interact in the future, which includes questions about legitimacy, conflict of laws, harmonization efforts, and, in the criminal justice field, how legitimate responses to human violence and vulnerability that require coercive force should or will be acted on today. These and more issues need to be seriously discussed and addressed. However, when they are discussed entirely in the

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[53] Gordon Christie, 'Indigenous Legal Theory: Some Initial Considerations' in Benjamin J. Richardson, Shin Imai & Kent McNeil (eds.), *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (2009) 213 ff.

[54] Canadian Bar Association Resolution 13-03-M, carried by the Council of the Canadian Bar Association at the Mid-Winter Meeting held in Mont-Tremblant, QC, February 16-17, 2013 online: Canadian Bar Association <http://www.cba.org/CBA/resolutions/pdf/13-03-M-ct.pdf>.

[55] Canadian Bar Association, National Aboriginal Law Conference – Working with and within Indigenous Legal Traditions, Victoria, BC, April 11-12, 2013. For a description and papers, see online: CBA Professional Development <http://www.cbapd.org/details_en.aspx?id=na_abl13>.

[56] Continuing Legal Education Society of British Columbia conference, "Indigenous Legal Orders and the Common-Law", November 12-13, 2012. For a description and papers related to this conference, see online: Continuing Legal Education Society <http://www.cle.bc.ca/onlinestore/productdetails.aspx?cid=648>.

[57] Borrows (n.29), Chapters 4, 5, 7 and 8, explores many of these comprehensively.

abstract, relying on over-simplified pan-indigenous stereotypes (negative or positive), or people's illogical assumptions about Indigenous legal traditions, rather than on grounded research about specific legal principles within specific legal traditions, they tend to operate as conversation stoppers, and are distorting in and of themselves. How well we are able to address the real political, legal, practical and institutional issues will depend on whether we actually address the intellectual ones, or whether we skip this step and assume we already know certain answers about the substantive content of Indigenous legal traditions. The renaissance of Indigenous legal traditions is not about a specific concrete outcome, but rather about rebuilding the intellectual resources and political space to have more symmetrical, reciprocal and respectful conversations within and between Indigenous and state legal traditions.

Recently, several North American law schools have started to develop and offer substantive courses on Indigenous legal traditions. These schools include the University of British Columbia, the University of Alberta, the University of Ottawa, Osgoode Hall, and the University of Minnesota.[58] Perhaps the most innovative and ambitious academic initiative is the work toward developing a joint Common-law and Indigenous law degree program at the University of Victoria (*Juris Indigenarum Doctor* and *Juris Doctor,* otherwise known as the JID). This degree program would be the first of its kind in the world.[59]

This academic work is important for the renaissance of Indigenous laws, particularly because there are real challenges, at this point in history, to accessing, understanding and applying Indigenous legal principles, beyond finding the political and jurisdictional space to do so.[60] Indeed, even in American tribal courts, which do hold clear, if contested jurisdiction and have for a relatively long and stable period, the actual use and application of Indigenous legal principles, as opposed to state or adapted state jurisprudence, is surprisingly sparse.[61] The deeply engrained but illogical starting points about Indigenous laws and the long periods of repression in colonial states, as well as the distortions born of limited spaces to openly recover and practice Indigenous laws, have all led to deep absences within legal scholarship and serious challenges to Indigenous peoples' own capacity to articulate, interpret, and apply Indigenous laws to contemporary issues. However, that is changing.

2. Intellectual Shifts

Today there is a growing trend of legal scholarship that advocates for and has begun the robust and respectful engagement needed to work critically and usefully with Indigenous

[58] Professors offering these focused courses include one of the authors (Val Napoleon), at UVic, Gordon Christie and Darlene Johnston at University of British Columbia, Larry Chartrand and Sarah Morales at University of Ottawa, Andree Boisselle at Osgoode Hall, and John Borrows at University of Minnesota.
[59] The first proposal for the JID program was drafted by John Borrows in September 2005, following his study of Indigenous legal traditions entitled, "Justice Within", sponsored by the Law Commission of Canada. See Law Commission of Canada, *Justice Within, Indigenous Legal Traditions*, DVD: (2006). See also: John Borrows, 'Creating an Indigenous Legal Community' (2005) 50:1 *McGill LJ* 153 ff.
[60] For a longer discussion of some of these challenges, see Hadley Friedland, 'Reflective Frameworks: Methods for Accessing, Understanding and Applying Indigenous Laws' (2013) 11 (2) *Indigenous LJ* 8-17 ff.
[61] Mathew Fletcher, 'Rethinking Customary Law in Tribal Court Jurisprudence' (2006) Indigenous Law and Policy Centre Occasional Paper Series.

legal traditions. This type of scholarship begins by asking different questions *of* Indigenous legal traditions than are typically or were historically asked. Rather than focusing on broad generalities, or on using Indigenous laws as rhetorical tools to critique state legal systems, leading Indigenous scholars are starting to focus on the specifics of Indigenous laws themselves. This focus leads to the following intellectual shifts from typical research questions about "Aboriginal justice,"[62]

From	To
What is Aboriginal justice?	What are the legal concepts and categories within this Indigenous legal tradition?
What are the cultural values?	What are the legal principles?
What are the "culturally appropriate" or "traditional" dispute resolution forms?	What are the legitimate procedures for collective decision-making?
OVERALL SHIFT:	
What are the rules? What are the answers?	What are the legal principles and legal processes for reasoning through issues?

To illustrate the results of these shifts, we will focus in more detail on recent scholarly treatment of the *wetiko* legal concept. One of the first, and clearest example of an Indigenous legal scholar employing these shifts in his analysis is John Borrows' treatment of a *wetiko* or *windigo* case recorded in 1838 by the Superintendent of Indian Affairs, William Jarvis, which involved an Anishinabek group who had to urgently respond to, and ultimately execute, someone who had become increasingly dangerous to himself and to others.[63] Rather than staying at the level of cultural 'practices' or 'values' in the account, Borrows identified several transferable legal principles. For example, he identified procedural principles, such as waiting, observing and collecting information before acting, and counseling with others around the person when it is clear something is wrong. He identified legal response principles, such as helping the person who is growing harmful and, "if the that person does not respond to help and becomes an imminent threat to individuals or the community, remove them so they do not harm others." In addition, he highlighted restorative principles that met the needs of the people closest to and most reliant on the person who had to be removed.[64] He argued that it is these underlying principles, not the specific practice or outcome, that would still be familiar to Anishinabek people today, and it is worth considering how they might apply in the contemporary context.[65] In treating the Anishinabek group's historical actions seriously as *legal* practices, Borrows was able to look seriously beyond just bare rules or historical practices, to the underlying legal principles, as well as the legitimate processes of legal reasoning, deliberation, interpretation and application.[66]

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[62] Friedland (2013) 11 (2) *Indigenous LJ* 29 ff.
[63] John Borrows & Leonard Rotman, *Aboriginal Legal Issues: Cases, Materials, and Commentary*, 2nd ed. (2003) 908-919 ff.
[64] Ibid.
[65] Ibid.
[66] Napoleon et al (n.31).

This refreshing intellectual shift frees up the discussion about Indigenous laws from distracting debates that perseverate on particular historic practices, to the detriment of serious contemporary analysis. This is particularly relevant when discussing the *wetiko* legal concept. Nobody is arguing Cree or Anishinabek communities should be able to (or would even want to) execute someone becoming a *wetiko* today. In fact, the adaptability of how the particular legal principle of incapacitation or removal was applied in practice is demonstrated even historically. For example, when other resources for incapacitation or removal were accessible to Indigenous groups, such as police outposts or even missionaries, Indigenous groups often preferred to access these rather than having to execute a w*etiko* who was at risk of causing imminent harm to others.[67] This demonstrates that the underlying principle can be recognized and applied in different ways, and using the available resources, which today include access to and partnerships with state law enforcement and mental health professionals.[68] Focusing on the underlying principles, rather than just practices, helps others understand the ongoing relevance and potential usefulness of the principles related to legal categories like the *wetiko* for responding to contemporary issues of violence and harm.

3. Research Examples: Indigenous Legal Principles

There is currently exciting collaborative research and work engaging with Indigenous legal traditions being done within and across professional, academic, and Indigenous communities. The newly created Indigenous Law Research Clinic (University of Victoria, Faculty of Law), the Indigenous Bar Association (IBA) and the Truth and Reconciliation Commission (TRC) have partnered, with funding from the Ontario Law Foundation, to undertake a national research project engaging with Indigenous legal traditions called the Accessing Justice and Reconciliation Project (AJR Project). The AJR project partnered with seven Indigenous communities and engaged with six distinct Indigenous legal traditions across Canada to identify responses and resolutions to harms and conflicts within Indigenous societies. From west to east, these were: Coast Salish (Snuneymuxw First Nation and Tsleil-Waututh Nation); Tsilhqot'in (Tsilhoqot'en National Government); Northern Secwepemc (Tsilhoqot'en National Government); Cree (Aseniwuche Winewak Nation); Anishinabek (Chippewas of Nawash Unceded First Nation #27); and Mi'kmaq (Mi'kmaq Legal Services Network, Eskasoni).

The fundamental premise behind the AJR project was that legal researchers would engage with Indigenous laws seriously as *laws*.[69] The results reveal a wide variety of principled legal responses and resolutions to harm and conflict available within each legal tradition. Both authors are involved in this project, and we want to give but one of many examples of the rich complexity that emerged out of pursuing this shift in approach to researching Indigenous laws regarding harms and conflicts. One clear finding of this project is that, while there is often a strong emphasis on concepts such as healing,

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[67] See Friedland (n.4) 119-121 ff.

[68] See Borrows stressing of this in Borrows (n.29) 82-84 ff.

[69] For more on the method and outcomes of this project, see Val Napoleon and Hadley Friedland, 'The Inside Job: Engaging With Indigenous Legal Traditions Through Stories' in Tony Lucero & Dale Turner (eds.) *Oxford Handbook on Indigenous Peoples' Politics* (forthcoming 2014) and Hadley Friedland and Val Napoleon, 'Gathering the Threads: Developing a Methodology for Researching and Rebuilding Indigenous Legal Traditions', (forthcoming 2014) *Canadian Journal of Law and Society*, Special Ed.

reconciliation and forgiveness in many Indigenous legal traditions, they are not idealized, simple, or stand-alone responses to harms and conflicts. Every Indigenous legal tradition represented had nuanced and robust understandings of what implementation of these principles entail, *and* had a much broader repertoire of principled legal responses and resolutions to draw on where specific factual situations warrant.

Carrying on with our example of the *wetiko* legal concept, in our engagement with the Cree legal tradition, respondents in our Cree partner community made it very clear they see healing of the offender as the predominant and preferred legal response to even extreme harms. For example, when one researcher asked about published stories in which people who became *wetikos* were killed, one elder, who practices traditional medicine, exclaimed: "probably someone who didn't know nothing and had no compassion would just go kill someone". She went on to state emphatically that instead, the proper response is to try to help and heal the person turning *wetiko*. She stressed that people turning *wetiko* should not be seen as faceless dangers, but rather, "these are our family members".[70]

However, it was also made clear to researchers that while healing was a preferred response for Cree peoples, it was not implemented in isolation or blind to ongoing risks of harm. When someone was waiting for or not willing to accept healing, the principle of avoidance or separation was often employed in order to keep others safe. Avoidance or temporary separations were also principled ways of de-escalating conflict and expressing disagreement. Other Cree principles guiding responses to harm and conflict more generally included acknowledging responsibility as a remedy, re-integration, learning from natural or spiritual consequences, and, historically, in published stories, incapacitation in cases of extreme and ongoing harm. Re-integration followed healing or taking responsibility. These responses were fact-specific and decisions were made based on an extensive deliberative process, which included elders, family members, experts (medicine people), and the person causing harm when possible. The same elder quoted above pointed out that re-integration might require ongoing observation and monitoring, even for life where warranted, as it was in the case of someone helped from turning *wetiko,* as she explained no one can be completely healed from this.[71]

This is just one small example of the kind of informative, nuanced and complex response principles we saw in research results from each Indigenous legal tradition that legal researchers approached seriously as law. The research results raise many practical and philosophical questions, and that is how it should be. The important point is that the level of detail and sophistication raises different questions, and creates different conversations, whether about responses to particular cases, or about the larger legal, political and institutional issues that must be sorted out, than previous ones based on illogical assumptions or on oversimplified or stereotypical pan-Indigenous values or practices related to responding to criminal behaviour.

It is this kind of serious and sustained engagement with Indigenous laws that is beginning to build a solid intellectual foundation to, as Navaho Court of Appeal Judge Raymond D. Austin puts it, bring Indigenous legal traditions into their "rightful place

[70] Draft Cree Legal Summary, AJR Project (2013) [unpublished, on file with authors] 26-27 ff.
[71] Ibid, 26-35 ff.

among the world's dispute resolution systems" in the future.[72] Although people may be using new forums and methods to do so, Indigenous legal traditions are once again being publically and explicitly recognized, explored and understood as the intellectual and normative resources they are. We can imagine many ways in which Indigenous peoples can draw out and draw on these resources to collectively manage their affairs and deal with the range of human and social issues that are part of being strong self-governing and interdependent peoples, including the reality that the core concerns of human violence and vulnerability will always be with us, in any society. There are also many ways that Canada and other countries can learn from, collaborate with, and incorporate principles and practices from Indigenous legal traditions.

VI. Conclusion

When we speak of criminal law matters related to Indigenous people, it is important not to underestimate the vast losses and damage from colonialism that Indigenous peoples have suffered. It is both naïve and dangerous to ignore the immense social suffering, the massive intergenerational trauma, the frightening level and intensity of violence and the ongoing conditions of vulnerability within many Indigenous communities today. Sadly, too often acknowledgement of these realities sinks into a tired and insulting 'primitivist' discourse about Indigenous people in non-Indigenous circles, or, within Indigenous circles, into narratives of demoralization and despair.

It is no wonder that many people, Indigenous and non-Indigenous alike, hope that Indigenous legal traditions have something positive to bring to these urgent and pressing issues. Yet these legal traditions do not survive in some pristine, untouched state, as if they were magically immune to the damages and devastation of colonialism. Searching to revive some imagined past utopia, or waiting for a future day of glorious transcendence will simply not do the job. At this point, we need robust and practical approaches to the pressing realities Indigenous people face on the ground, or else our work will be meaningless or, worse still, inadvertently perpetuate the maintenance of the status quo.

In this chapter, we have set out four phases or eras to describe the changing state of debate regarding Indigenous legal traditions, in order to realistically contextualize the current challenges and potential of Indigenous laws, as applied to the universal issue of human violence and vulnerability. First, we posited, not an imagined utopia or a free-for-all, but a logical starting point to talk about the roots of Indigenous legal traditions. Second, we acknowledged the long dark era of the almost totalizing repression of Indigenous laws, as well as their resilience through this period. Third we looked at the opportunities and distortions within the limited spaces for the recovery and revitalization of Indigenous laws in the larger frame of state justice systems. Finally, we discussed the recent movement toward a renaissance or resurgence of Indigenous legal traditions, where it is recognized and treated seriously as *law*.

[72] Robert A. Williams Jr., 'Foreword: The Tribal Law Revolution in Indian Country Today' in Raymond D. Austin, *Navajo Courts and Navajo Common Law: A Tradition of Tribal Self-Governance* (2009) xv ff, pointing out that this aspiration is one goal for establishing a solid foundation for the Navajo courts.

Setting out these four phases explicitly acknowledges the deeply rooted nature, as well as the strength, resiliency and promise of Indigenous legal traditions, without underestimating the devastating and demoralizing impacts of colonialism, the difficult present reality and the huge amount of work required to be able to access, understand and apply Indigenous laws constructively today. It is both a challenging and exciting time to be engaging with Indigenous legal traditions. There is much work to be done, and there is much hope.

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