BURN THIS VILLAGE TO THE GROUND

Indigenous Normativity, the Land, and Criminal Justice
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Introduction

The Canadian Criminal Justice System (CCJS) can be critiqued with the reception of the *Criminal Code of Canada*. The *Code* was adopted with parliamentary and legal trickery causing an immense amount of after thought and significant challenges in making the *Code* fit in the context in which it would operate.¹ There is a pervasive need to recognize the third founding nation of Canada and reform our legal system based on emerging values that propel forward a mixture of Indigenous and Canadian law which enables us to ask different questions and get different results. Truth and Reconciliation Commission’s Call to Action 45 (vi) calls for the constitutional recognition and integration of “Indigenous laws and legal traditions in negotiation and implementation processes involving treaties, land claims, and other constructive agreements.”² The *Criminal Code* is one such “constructive agreement” as it is a tool elaborating our view of morally reprehensible behaviour on a constitutional level. Indigenous legal principles can be legislated easily into sentencing principles but I am challenging police, prosecutors, lawyers and judges working in CCJS to seek avenues where Indigenous values can be at play before and through out the criminal process.

¹ Gerry Ferguson, Law 302: Criminal Law II, Coursepack (Faculty of Law, University of Victoria, Spring 2016) at 123 (“Crim Law II”).
² Truth and Reconciliation Commission of Canada, *Truth and Reconciliation Commission of Canada: Calls to Action*, 2012. Online at trc.ca: <http://www.trc.ca/websites/trcinstitution/File/2015/Findings/Calls_to_Action_English2.pdf> (“TRC”) Call to Action #45: We call upon the Government of Canada, on behalf of all Canadians, to jointly develop with Aboriginal peoples a Royal Proclamation of Reconciliation to be issued by the Crown. The proclamation would build on the Royal Proclamation of 1763 and the Treaty of Niagara of 1764, and reaffirm the nation-to-nation relationship between Aboriginal peoples and the Crown. The proclamation would include, but not be limited to, the following commitments:

(iv) Reconcile Aboriginal and Crown constitutional and legal orders to ensure that Aboriginal peoples are full partners in Confederation, including the recognition and integration of Indigenous laws and legal traditions in negotiation and implementation processes involving Treaties, land claims, and other constructive agreements.
The Story of Porcupine offers three Indigenous values which form a base for the discussions in this paper; respect, dignity and community. From these values come Indigenous legal principles the meaning of which are exposed in the story as well as other Indigenous legal academic work. This academic work avoids legal scholarship that “justifies the superiority of the west relative to Aboriginal people, whether in the imperial past (that is, Aboriginal people as savages) or in the present (that is, unable to come up with their own solutions, hopelessly corrupt).”

The utility of this exercise is simply to exhibit one way of grappling with Indigenous law seriously as law. In doing so I hope to avoid presenting idealized, romanticized or simplified representations of Indigenous law. Instead, I hope to show how one can deliberate over Indigenous law with the same rigor required of Canadian law.

Viewing criminality through an Indigenous lens can help to address the colonialism of incarceration at the ground level. It must be said that Indigenous communities vary from one to the next in the practical expression of their values and principles but there are identifiable

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3 Story of Porcupine in James Teit, “The Shuswap” in Franz Boas, ed. The Jesup North Pacific Expedition: Memoir of the American Museum of Natural History Vol II, Part IV (Leiden: EJ Brill/ New York: GE Stechert, 1909) at 658. Story reproduced in whole in appendices. This story was recorded by James Teit, who was a respected ethnographer in Secwepemc Territory in 1908. This story belongs to the Secwepemc people and is an embodiment of Indigenous legal principles and processes. The legal principles I have pulled from this story are my interpretation and as a publically available story I encourage readers to interpret the legal principles on their own terms. Also of note is that this is a translation from Secwepemctsin, therefore it may lack the nuance that the original might have had.


5 Hadley Friedland and Val Napoleon, “Gathering the Threads: Developing a Methodology for Researching and Rebuilding Indigenous Legal Traditions” (2015) 1:1 Lakehead Law Journal pp 18-44 at 19 (“Friedland and Napoleon”). This article presents a comprehensive summary of the methodology employed in the Indigenous Law Research Unit at the University of Victoria, Faculty of Law.

6 Robert Nichols, “The Colonialism of Incarceration” (2014) 17:2 Radical Philosophy Review at pp 435-455 (“Nichols”). Nichols “argues that although the incarceration of indigenous peoples is closely related to the experience of other racialized populations with regard to its causes, it is importantly distinct with respect to the normative foundation of its critique. Indigenous sovereignty calls for an alternative normativity that challenges the very existence of the carceral system, let alone its racialized organization and operation.”
“common threads”\textsuperscript{7} with which we can glean principles to guide the CCJS, not just at sentencing but also throughout the criminal process.\textsuperscript{8} In this paper I attempt to expose these common threads to initiate a meaningful discussion of why certain western justice ideologies and practices do not mesh with Indigenous ones. It is with these common threads that we re-orientate our focus, the focus “not to effect changes in the law but to remove the features of the law which had been subject to criticism.”\textsuperscript{9} If officers of the court take these values seriously in every day decision-making, social change may occur at the rate necessary to give effect to the legal changes called for in the Truth and Reconciliation Commissions call to action. Encapsulated in these pages, like many other Indigenous legal scholars before me, is an analysis that “seeks to enhance social and cultural perceptions that make potential liberating change more likely than not.”\textsuperscript{10} Applying these principles to criminal behaviour inevitably leads to an emphasis of different principles at sentencing and legislative affirmation will follow. As the Law Reform Commission of Canada (LRCC) states, social and legal reform “cannot be achieved just by enacting legislative changes; nor can it be implemented by experts and officials alone, it requires

\textsuperscript{7} Milward supra note 4 at 79. There must always be a recognition of the diversity which lies from Indigenous Nation to Nation. Some formulate principles differently and the praxis in which they emerge can vary tremendously. Milward says “one must obviously be honest about the diversity that exists between various Aboriginal societies...[but] one can also notice that Aboriginal approaches to justice sometimes share certain common threads.” Further he says seeking out these common threads is necessary to enable meaningful discussion.

\textsuperscript{8} Emily Snyder, Val Napoleon & John Borrows, “Gender and Violence: Drawing on Indigenous Legal Resources,” (2015) 48:2 U.B.C.L.Rev pp 593-654 (“Snyder, Napoleon and Borrows”) at 599: “While there is value in using restorative justice principles in certain contexts, we are mindful of the important critiques of using restorative justice processes to respond to violence against women. While restorative justice may have value in certain times and places...Indigenous law and restorative justice should not be conflated." This demonstrates that indigenous law may have answers for crimes that cannot be diverted.

\textsuperscript{9} Crim Law II supra note 1 at 133.

\textsuperscript{10} Frank Pommersheim, Braid of Feathers, (London, England: University of California Press Ltd., 1995) at 31. (“Pommersheim”) Frank Pommersheim is a professor of law at the University of South Dakota School of Law. His book analyzes the US Tribal Court history advocating for tribal courts because they have the potential to blend the best of both worlds being poised uneasily between local tribal culture and the dominant legal system. He writes from a US perspective but I believe all that he says is relevant in the Canadian Context because although the stories of colonial dispossession are not identical, they are similar.
extensive community involvement.” 11 As Jim Tully notes, participation in reconciliation “is not a contingent preference that we can choose to ignore. It is our shared responsibility.” 12

**Indigenous Sovereignty; Constrained Space**

I do not wish to spend too much time on the jurisdictional question in regards to Aboriginal sovereignty over criminal justice. Briefly though, the *Indian Act* gives an Indian Justice of the Peace (chosen by a minister) jurisdiction over a limited number of summary offences; trespassing(s. 30), removing cultural objects from reserve (s. 91), and removing natural resources from reserves(s. 93). Section 107(b) confers jurisdiction in order to enforce band council bylaws using fines and/or imprisonment, but s. 82(2) limits this jurisdiction, requiring that the Minister approve such Bylaws. This is very far from any sort of criminal jurisdiction where Indigenous law solely governs. If a nation wanted to assert a right to a culturally grounded approach to criminal behaviour they would have to run the *Van der Peet* analysis and show how the specific approach was “an element of a practice, custom or tradition integral to the distinctive culture of the Aboriginal group claiming the right.” 13 But the troubling bit is that “a court cannot look at those aspects of the Aboriginal society that are true of every human society.” 14 Further, the practice that is claimed must be phrased in specific, as opposed to general terms and be cognizable to the Canadian common law system. To do otherwise would cast the judicial inquiry at a ‘level of excessive generality,’ therefore claiming a right to a separate justice system would

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12 Professor James Tully, *Sustainability Lecture: Reconciliation Here on Earth: Shared Responsibilities*, Lecture (Dalhousie University, Halifax NS; Published on September 8, 2014). Online at youtube.com: <https://www.youtube.com/watch?v=QGzGvxvH2o> (“Tully”).
14 *Ibid* at para 56.
be unacceptable.\textsuperscript{15} To hammer the nail in the coffin, practices that developed solely in response to contact with Europeans are excluded.\textsuperscript{16} Such stringent tests applied to Aboriginal sovereignty do not recognize the flux that laws undergo as they travel through time. Further, these tests seem to empty the content behind s. 35(1) of the Constitution Act \textit{1982}. It is very true that “law matters to all societies and Indigenous societies are no different in this regard.”\textsuperscript{17} This denial to have self-determination over aspects that are true of every human society is unacceptable in this era of reconciliation. Quite simply, as the Royal Commission on Aboriginal Peoples declared: “Native Canadians have a right to a justice system that they respect and which has respect for them, and which dispenses justice in a manner consistent with and sensitive to their history, culture and language.”\textsuperscript{18}

Milward finishes by saying that any efforts to reclaim substantive jurisdiction over criminal justice will necessarily face challenges, whether through constitutional litigation or negotiations marked by obvious disparities in bargaining power.\textsuperscript{19} Of course there is the option of the legislature overwriting the common law test for Indigenous rights and title but the fact remains jurisdiction for Indigenous people over criminal law is rather minimal in Canada. I continue to imagine a world where Indigenous peoples have broad jurisdiction over criminal

\textsuperscript{15} Milward \textit{supra} note 4 at 32.
\textsuperscript{16} \textit{R. v. Powley}, [2003] 2 S.C.R. 207, 2003 SCC 43. \textit{R. v. Sparrow}, [1990] 1 S.C.R. 1075 p. 1093 “[T]he phrase “existing aboriginal rights” must be interpreted flexibly so as to permit their evolution over time.” While this allows some Indigenous rights to change as they move through time, the SCC made it clear that these rights can still be limited by s. 35(1) of \textit{The Constitution Act \textit{1982}}.
\textsuperscript{17} Friedland and Napoleon \textit{supra} note 5 at 17.
\textsuperscript{19} Milward \textit{supra} note 4 at 48.
justice in their own communities; jurisdiction that is legally and judicially recognized under s. 35(1) of the Constitution Act 1982.

One can advocate for the resurgence of Indigenous legal systems apart from the CCJS but in constitutional restructuring the reception of Indigenous values must occur within urban settings for two reasons; the first is to recognize the third founding nation and to bring it within the fold of Canadian Constitutionalism. The urban statistics call for this normative shift given that only 20% of Aboriginal people live on reserve. The second reason is that in order to address the collective dependence of First Nations upon the state as a result of colonialism, the state must seek to empower Indigenous nations to use their own law, in their own way, when dealing with members who partake in criminal behaviour. It is only with different normative foundations that we are able to address the fact that consistently for the past decade Aboriginal people have made up 17-19% of all adult admissions to Canadian federal penitentiaries despite only making up 3.8% of the Canadian population. As Robert Nichols notes, the incarceration of Aboriginal peoples is distinct with respect to the normative foundation of its critique. This alternate normativity calls into question the very existence of the carceral system.

Those in the justice system that participate in the incarceration of Indigenous people need to recognize the effect this has on destabilizing Indigenous nation-building. Upholding

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20 Fred R. Fenwich, “Canada’s Urban Aboriginal Populations” (2005) 29:6 LawNow pp 76-77 (“Fenwich”). 51% of Aboriginal people live in urban areas and another 29% in rural non-reserve locations and only 20% on reserves.
22 Milward supra note 4 at 3 Statistical analyses in 2007-08 show aboriginal admission to provincial jail are also appalling; 21% NFL and BC; 35% AB; 69% MB, 76% Yukon; 81% Sask, and; 86% NWT.
23 Nichols supra note 6.
Indigenous preferred means of exercising justice requires enabling the community to choose what to do with the offender. Those working in the justice system and government ought to think about the ways they can facilitate that nation building so that Canada can truly be a multijuridical country. 24 A major part of our future as Canadians involves learning how to actively grapple with colonial realities to change the jurisdictional make up of Canada and the mentality behind it. As Lisa Monchalin says, “[t]he original colonial concern to establish and maintain control over Aboriginal people in this country is clearly evident in the policies and practices of those who maintain positions of power in Canada’s criminal justice system.” Rather than adopting crime prevention strategies that are insightful and possibly effective for all offenders, governments tend to adopt strategies that “fit with the dominant culture and the power structure upon which it rests.” 25 The dominant culture in Canada and the USA is founded on “the mythology of the non-Indian west [and] is grounded in conquest and possession, and it no longer works.” 26 Pommersheim calls for “painful introspection” particularly in the non-Indian community but I would argue Indigenous people who have bought into the “conquer and possess” mentality must also engage in painful introspection. Pommersheim indicates that the key to generating long-term coming together is the development of a story or an ethic. “An ethic of place.. [that] respects equally the people of a region and the land, animals, vegetation, water, and air.” 27 Without this ethic the viability of the west, perhaps north America as a whole, is seriously compromised.

24 John Borrows, Canada’s Indigenous Constitution, (Toronto, Buffalo, London: University of Toronto Press Inc., 2010). (“CIC”) Multijuridicalism is something that is discussed at length throughout this book.
26 Pommersheim supra note 10 at 31.
27 Ibid.
Indigenous Law?

When most people hear the words “Indigenous Law,” what often comes to mind are sentencing circles and restorative justice and while these can be major components of Indigenous law, this is not all that is referred to. The words encapsulate something much more than processes and principles only available at sentencing. Other words that come to mind that start to form a more robust understanding of Indigenous Law are “Indigenous Legal Traditions” and “Indigenous Legal Principles,” the like of which point out that there are legal principles that guide Indigenous legal processes responding to criminal behaviour. Further we can examine different sources of Indigenous law. John Borrows points out five; Sacred Law, Natural Law, Deliberative Law, Positivistic Law and Customary Law. Seeing the different sources of Indigenous law and taking them seriously as law, we begin to understand its complexity and see that it can be researched, analyzed, and debated over just as Canadian law is. Hadley Friedland and Val Napoleon aptly state that “Indigenous laws deserve the same respect and demand the same rigorous analysis if they are going to be understood in their full sophistication and complexity.”

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28 Milward supra note 4 at pg 10 “one reason aboriginal justice is often likened to restorative justices is that many aboriginal societies in the past have held councils to negotiate resolutions to conflicts”. Friedland and Napoleon supra note 5 at 34 “Aboriginal justice” is uncritically conflated with “restorative justice” and described idealistically in terms of the values of healing, reconciliation, harmony, and forgiveness. “One clear finding of this project is that, while there is often a strong emphasis on some of these concepts, they are not idealized, simple, or standalone responses to harms and conflicts. Every Indigenous legal tradition represented had nuanced and robust understandings of what implementation of these principles entails. Each legal order has a much broader repertoire of principled legal responses and resolutions to harm and conflict to draw as factual situations warrant.”

29 CIC supra note 24 at 23- 51. Scared laws are those that “stem from the creator, creation stories or revered as ancient teachings that have withstood the test of time”. Natural law comes from observations of the physical world, an understanding when contemplating this source of law requires that we “understand how the earth maintains functions that benefit us and all other beings.” Deliberative law “is an especially broad source... and is formed through processes of persuasion, deliberation, council, and discussion.” Positivistic law is found in those declarations, proclamations, rules, regulations, codes, teachings and “axioms hat are regarded as binding or regulating peoples behaviour.” Finally, Customary Law can be defined as those practices developed through repetitive patterns of social interaction that are accepted as binding on those who participate in them.

30 Friedland and Napoleon supra note 5 at 22.
something is sacred. Noting that this is one component of Indigenous law we are forced to look deeper to other sources that can be interpreted to find legal principles that guide our behaviour and responses to reprehensible behaviour.

A memorable moment in law school can be reading Bruce Ziff’s “A Property Law Reader: Cases, Questions, and Commentary.” At page eighty-five, John Borrows applies a contemporary legal analytical tool to an Indigenous story; case briefing. Examining the story in this way allowed law students to critically engage with an Indigenous legal teaching tool (ie. Indigenous traditional stories) and expose Indigenous legal principles that can be applicable to contemporary legal problems. Publically available traditional Indigenous stories are resources that anyone can consult to answer legal questions about human problems. There are however, two critical assumptions we must undertake before doing so; one is “that the story was related by, or contained, reasoning people who were part of a reasonable legal order, and therefore that it must be possible to discern the rationality behind their actions.” The second is that when approaching traditional stories, they must be seen as equally rich and complex sources of normative material. Within most Indigenous societies, stories are used as tools for thinking and teaching, therefore a focused comprehensive examination of many stories can lead to understanding of an area of Indigenous law. Indigenous stories often contain animate animals; therefore the purpose of storytelling and listening in this way is to transform oneself into the life

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32 A case brief is a tool law folk use to examines the facts of a case, the central issue, the response and the reasons behind the response. In Friedland and Napoleons method legal reasoners are encouraged to bracket parts of the story they cannot make sense of. This is a way to continue reasoning through the story without getting stalled by understandings of Indigenous law that have not yet formed.
33 Friedland and Napoleon supra note 10 at 25.
34 Ibid.
of the story-teller “so each can see how the relationships of mutual dependency sustain their unique lifeways from the perspectives of each other.”  

Borrow’s insights triggered Friedland and Napoleon to develop a methodology to substantively engage with Indigenous legal traditions through their academic work and in active conversations with interested Indigenous communities. This methodology came to be used in a national research project called Accessing Justice and Reconciliation. The point of the project was to begin the process of “recovering normative possibilities for all of Canada.” And while the methodology has received criticism for applying common-law methods that could end up inadvertently distorting Indigenous law, “such approaches are necessary to avoid extremely cautionary approaches [which] paralyze us from engaging in any substantive work with Indigenous law.” Having community members actually engaging in the creation of the research methodology and determining how they could use it to actually fulfill their aspirations for the use of Indigenous laws meant that the final products had both legitimacy and utility at the ground level.

Transparent and rigorous methodologies for revitalizing Indigenous law which have this community feedback loop built in exhibit what Pommersheim calls “contextual legitimacy” which looks to the social, historical, and cultural setting of judicial adjudication and has two interrelated components. The first is “the obligation and [the second is] the desire to abide by the

35 Tully supra note 12.
36 Friedland and Napoleon supra note 5 at 22.
37 Ibid at 44. From east to west the nations whom participated in articulating Indigenous legal principles are: Coast Salish (Snuneymuxw First Nation and Tsleil-Waututh First Nation); Tsilhqot’in (Tsilhqot’in National Government); Northern Secwepemc (T’exelc Williams Lake Indian Band); Cree (Aseniwuche Winewak Nation); Anishinabek (Chippewas of Nawash Unceded First Nation #27); and Mi’kmaq (Mi’kmaq Legal Services Network - Eskasoni). These nations will decide the next steps in codification, and conveniently for lawyers and judges they can ask the nation for permission to read the final reports and garner an understanding of that nations world view.
38 Ibid at 31.
law within a legal and political system that merits fidelity and affirmation.” Where there is contextual legitimacy there will be appreciation and affirmation of the law. Pommersheim tells us that “the normative aspect of contextual legitimacy often depends on whether the system as a whole adequately contributes to a more orderly and just society in light of contemporary circumstances and evolving notions of justice.” Of course determining if these goals are being reached depends on validation from the community. This type of legitimacy at the grassroots level “is not a given; rather, it is the result of much necessary but unappreciated toil. It is not only the message but the messenger,” and it is work that is never completed. In short, the work of revitalizing Indigenous legal orders after the onslaught of colonialism, requires many hands and is not a task for the faint of heart.

The obligation lies on the legal community to engage critically with Indigenous law and to find areas where it may be applicable. The legal community is the interpretive community of practitioners who “determine what is permitted and what is normative in the context of arguing and developing the law in the process of adjudication.” They are able to because of the common ground that unites them: language of legal discourse, the practice of developing argument through legal research and the commitment to the rule of law. Without these foundations one asks “how does one argue (and then decide) cases using Indigenous law?” A better question might be “is conventional legal reasoning too narrow and restrictive in that it rules out important tribal knowledge and wisdom, such as in the realm of spiritual metaphysics

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39 Pommersheim supra note 10 at 68.
40 Ibid at 70.
41 Ibid at 75.
and community insight?"\(^{42}\) *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 is proof that this isn’t necessarily so.\(^{43}\)

Pommersheim states that Native societies do not accept the common Anglo-Canadian dichotomies of secular/sectarian and rational/spiritual.\(^{44}\) It is not a question of which is better, but rather what developments does the interpretive community agree are necessary for an enlightened approach to criminal behaviour. What is the accepted legal reasoning permitted in the court room? It is something that Indigenous and Non-Indigenous ally lawyers ought to participate in articulating. Pommersheim talks about these concepts in the generation of Tribal Court systems but these concepts are equally applicable to mainstream legal reform in the CCJS particularly because of the constrained jurisdictional space where Indigenous law can operate and the current urban Aboriginal population.

Now New Age Courts, if I can use that terminology, “do not have to blindly imitate the interpretive strategies and cannons displayed in federal and state settings, if [new age court’s] interpretive strategies and goals are to be different, it is necessary for all concerned to be conscious of why and how this should be so.”\(^{45}\) The “why” is clear; the CCJS is afflicted by its adversarial nature and limitations of evidence law to allow investigation into the truth. This competitive emphasis is held to be “counter-productive to repairing and strengthening

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\(^{42}\) Pommersheim *supra* note 10 at 77.

\(^{43}\) *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at paras 95-98 ("*Delgamuukw*") the trial judge admitted, adaawk and kungax as evidence out of necessity as exceptions to the hearsay rule because there was no other way to prove the history of the Gitksan and Wet’suwet’en nations. Unfortunately after admitting, the trial judge gave no weight to these oral histories. But the Supreme Court of Canada stated (in *Van Der Peet*) that tribal courts interpret the evidence of aboriginal peoples in light of the difficulties inherent in adjudicating aboriginal claims.\(^{44}\) Pommersheim *supra* note 10 at 77.

\(^{45}\) *Ibid* at 78.
relationships in the community.”

Further, in 1976 The LRCC stated that the principles of restraint ought to apply to “the scope of criminal law, to the meaning of criminal guilt, to the use of criminal trial and to the criminal sentence.”

Put another way, there is too much conduct captured in the Code that would be better to deal with in the community rather than prison.

Lawyers seeking to understand and apply Indigenous law might ask “What alternative legal language is there that can be applicable in a court room?” and “How might legal research in Indigenous law be conducted?” To pay heed to the unique expression of Indigenous values, a good place to start is discovering whose traditional territory one currently resides on and facilitating relationships with the Nations upon whose territories they live. The community holds the legal language and knowledge but to access it, relationships must be facilitated. Corntassel uses a Cherokee notion of “to’hi” which refers to peaceful healthy relationships requiring continual affirmation and cyclical renewal.

Further, seeking out opportunities for face-to-face communication and exchange fosters “increased personal, cultural and political respect and understanding.” Indigenous people can do much to create these opportunities too by creating atmospheres where Indigenous knowledge is presented with rigor, non-Indigenous people are welcomed and meetings occur in a nonthreatening, non-stereotyped way.

Grounding these

46 Milward supra note 4 at 19. “Canadian criminal procedure is often seen as culturally inappropriate and incompatible with aboriginal processes...[...] The imposition of adversarial procedures has had the effect of suppressing aboriginal legal orders along with processes that had nurtured community relationships. Aboriginal control over justice, in theory, aspires to reinvigorate traditional processes that had emphasized harmony and relationship reparation in place of imposed adversarial processes that do note have cultural legitimacy with aboriginal peoples.”

47 Don Stuart, Canadian Criminal Law, 7th ed (Toronto, Ontario: A Division of Thomson Reuters Canada Ltd., 2014) (“Stuart Treatise”) at 59.

48 Corntassel supra note 21 at pp 89-90.

49 Pommersheim supra note 10 at 32.

50 Ibid at 33. In teaching in the Sinte Gleska University, Pommersheim was struck by the transformative nature of exchanges between Indigenous and non-Indigenous people in an educational setting. The challenge for Lawyers, Government representatives and Indigenous people a like is how to create this setting outside of the confines of university.
relationships can be the values of respect, dignity and community. In the next section of this paper I will shift to exploring these values through Indigenous legal interpretation that might provide strategies for dealing with criminal behaviour that focus on relationship building rather than punishment.

**Taking Indigenous Law Seriously As Law**

My premise is Friedland and Napoleon’s methodology and legal research having worked with it in the Summer of 2015, as instructed by the Secwepemc. This is a modified version of the methodology that I have interpreted as useful for the purposes of this paper. As noted above getting an understanding of Indigenous law that is not romanticized and idealized requires one to seek out many resources and stories. Similar to doing case law research, we set out with a large body of resources and look for patterns and common threads. But we must have a research question which guides us when approaching a body of cases. Approaching a body of stories and Indigenous resources mirrors this activity on Indigenous terms. The question I focus on is “how do we promote morally praiseworthy behaviour when there is harm inflicted between and within communities?” The Story of Porcupine should be read before continuing and is available in Appendix A.

A summary of the facts in the case are as follows; two communities could not live together at one place, what one did well the other did badly. Swan wanted to remedy the defects

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51 Friedland and Napoleon *supra* note 5. To get a better understanding of the methodology I would encourage a reading the entire article.

52 This exercise is limited by the constraints of the paper limits. In a more rigorous research of Indigenous law on this topic many stories would be analysed and recurring themes exposed to determine what common legal responses emerge.

53 Friedland and Napoleon *supra* note 5 at 20. “In order to be practical in our inquiries of Indigenous law we must ask more specific research questions of Indigenous laws.” This specificity allows a critical reaching into Indigenous law’s depth, scope, and complexity.
of both parties to enable them to live without continual interference. He decided an invitation to a feast would need to be sent to Elk and his people, to enable them to cure themselves of the ignorance Swan felt was the root of their problems. Coyote volunteered to go. Just as with cases in Canadian law there may be many issues, responses to those issues and reasons for why that response was the right course of action. The two issues that have emerged can be stated at a communal level and an individual one;

Community Issue: How to remedy defects between two nations who are interfering in and trying to imitate each other’s ways?

Individual Issue: What is the response when one fails to complete an important communal task?

The community response is to choose a representative, invite, feast, engage in mutual recognition, sharing of mutual knowledge and together coming up with laws that would govern the relationship between communities into the future. The individual response is to inquire/confront one who has failed to perform the communal task, ask the community who is suitable for the task, demonstrate the right course of action and reward that course of action. Note that within these responses, legal processes for dealing with human to human conflict emerge.

The reasons behind the decision are where ratios emerge. Ratios in Canadian law are those legal principles which will be applicable to other legal issues as they arise. Within the methodology we lay out “said” and “unsaid” reasons. For the community issue, the ignorance of

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54 Secwepemc Nation, “Stseptewle – Stories of the Secwepemc” online at landoftheshuswap.com <http://www.landoftheshuswap.com/legend.html> “Seklep (Coyote) was also an important figure in Secwepemc stories. He was a helper to the people as well as a trickster. [...] Coyote often used himself as an example of how to behave properly. He helped the people realize the consequences of improper behavior.”
both parties that made the means of procuring a living as difficult as possible, is a said reason. Because both communities were to live in one place it was necessary to confront the situation, remedy the defects and live without continual interference. Reaching further into the philosophical realm the principle can be stated thus; mutual recognition and collaboration on laws that govern relationships into the future is necessary for peaceful co-existence. We understand from the story that it is necessary to respect each nation coming to the collaboration table. This is the part of the story where each nation “knelt down” before each other. We treat each other with dignity if we understand that both parties engage in complex intellectual reasoning. There is also a recognition here that there is a lack of knowledge held by the opposite party and it is necessary to understand that knowledge before the nations can live peacefully. In this way there is a discussion of how each can maintain their ways of doing things while also ensuring they don’t come into conflict with one another. Each nation sharing the space must facilitate a healthy relationship of mutual respect and recognition.

For the individual, a said reason is that those who volunteer to undertake tasks will be given the opportunity to do so, but the community will decide if the task had been fulfilled and if not whom would be more suitable for the task. Punishment here can be taking the task away from Coyote, but the correction of his behaviour is not forced upon him. Instead the correct course of action is demonstrated and the “offender” is encouraged to draw the inference from the demonstrated behaviour. This treats the individual with respect because the community supposes that the individual can fulfill an important role for the community. The individual is dignified because he can make a choice to fulfil the right course of action; if he does so he will be rewarded (i.e, the large present of Dentalia). However, when that individual does not take his obligation seriously the task will be taken away. It is interesting to note that coyote is not
separated from the community, rather he is shown the correct course of action and presumably given another chance. The general philosophical principal is that each member of the community has an important role in creating and maintaining a healthy community. When that individual does not contribute to the communal wellbeing they are corrected but not with punitive punishment, rather they are guided and dignified in this regard. The other general philosophical principle that emerges is that one ought not to punish but rather to direct through our own actions the right course. This respects the autonomy of the individual allowing them to choose their course of action. With this understanding we start to view morally reprehensible behaviour differently and the community becomes implicated in the solution to the harm. Resources that have discussed these values from an Indigenous perspective will now be taken up.

**Respect**

Monchalin discusses the respect that is inherent in Indigenous people’s world views, not just between humans but also between non-human life forms, including the earth. She writes:

> Aboriginal people’s views of justice are informed by a vision of right relations between all aspects of creation. Accordingly, justice is much more than something to be achieved within the narrow confines of the Canadian criminal justice system; it is a way of relating with all others that is based on a commitment to peace and to treating all our relations with respect.  

Monchalin quotes Ojibway author Richard Wagamese who explains the concept between the phrase “all my relations”. I know this phrase as a Cree one used at the conclusion of a prayer. When one says this they do not refer just to human life forms they have relationships with, but rather “you also mean everything that relies on air, water, sunlight and the power of the Earth and the Universe itself for sustenance and perpetuation. It’s recognition of the fact that we are all

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55 Monchalin supra note 25 at 376.
one body moving through time and space together.” Tully says this respect accorded to the earth has been lacking and therefore approaches to live sustainably have be undermined.\textsuperscript{56} This has implications for reconciliation between Indigenous and non-Indigenous people because part of showing respect is understanding where one is coming from. Indigenous people and their relationship to the land are inseparable. Why would the land have anything to do with criminal justice you might be thinking? Gerald Clifford, an Oglala and Chairman of the Black Hills Steering Committee in the US stated this concept perfectly from a Lakota perspective, he said;

\begin{quote}
Our relationships to one another as Lakota are defined by our relationship to the earth. Until we get back on track in our relationship to the earth, we cannot straighten out any of our relationships with ourselves, [or] to other people.\textsuperscript{57}
\end{quote}

The Correctional Services of Canada identifies the loss of cultural identity as one underlying cause of Aboriginal criminality.\textsuperscript{58} In the youth criminal justice arena there is a belief that the land does not work on youth anymore. They don’t “know the story about what happened to these places.”\textsuperscript{59} Quite simply they do not understand the creation stories which promote a sense of pride and facilitate community involvement and therefore building.

Colonial norms “have impeded Indigenous peoples’ ability to develop and express their distinctive understandings... there is reason to make space,”\textsuperscript{60} but there is also reason to listen.

One may not accept Indigenous metaphysical theories, but “genuine deliberation can occur

\begin{footnotes}
\textsuperscript{56} Tully \textit{supra} note 12 “If we try to reconcile Indigenous and non-Indigenous people with each other without reconciling our way of life with the living earth, we will fail because the unsustainable and crisis-ridden relationship between Indigenous and non-Indigenous people that we are trying to re-conciliate has its deepest roots in the unsustainable and crisis-ridden relationship between human beings and the living earth. To put it more strongly, as long as our unsustainable relationship to the living earth is not challenged, it will constantly undermine and subvert even the most well-meaning, free-standing efforts to reconcile the unsustainable relationship between Indigenous and non-Indigenous peoples through modern treaties and consultations, as we have seen over the last 30 years.”

\textsuperscript{57} Pommersheim \textit{supra} note 10 at 33.

\textsuperscript{58} Milward \textit{supra} note 4 at 30.

\textsuperscript{59} Pommersheim \textit{supra} note 10 at 34. This clearly has implications for Indigenous rights in family justice matters.

\end{footnotes}
across metaphysical differences” and if one is truly listening, one may find that we have access to valuable insights that we would have otherwise missed.61

Dignity

Dignity and respect are often cited together, but dignity has more to do with autonomy and self-determination.62 Dignity dictates that the individual actor or community has the knowledge and power to make a choice about the ways they will conduct and govern themselves. These are thought of as the hardest lessons to learn, Vine Deloria Jr. a leading Sioux intellectual in the US discusses the concept of dignity, she states;

Some of the voices contained herein may appear to be complaining about the loss of land, the loss of a way of life, or the continuing propensity of the white man to change the debate to favour himself. But deep down these are cries about dignity, complaints about the lack of respect. “It is not necessary,” as Sitting Bull said, “that eagles should be crows.”63

The Story of Porcupine embodies these notions as well. It states that “the birds [were] acting in some ways like mammals, and the mammals like birds.” Attempting to imitate one’s ways contributed to the problem of living together. The embodiment of this in Canadian Law is the Indian Act, which forces a different kind of governance structure onto Indigenous nations giving rise to legitimacy issues between traditional governance structures and processes and state imposed governance structures.64 The story suggests that there are ways to share a space and still uphold unique ways of doing things, but there must be a certain amount of synergy. Webber

61 Ibid at 617.
62 P.A. Monture- Okanee and M.E. Turpel, “Aboriginal Peoples and Canadian Criminal Law: Rethinking Justice”, (1992) 26 U.B.C. Law Rev pp 239- 279. (“Monture and Turpel”) at 255 “Blind application of criminal justice norms and institutions to aboriginal peoples may be inconsistent with Canada's international legal obligations to respect the rights of aboriginal peoples to self-determination. It is [the authors] firm belief that the Canadian criminal law cannot be unilaterally imposed upon aboriginal peoples prior to a formal and complete definition of their pre-existing and inherent aboriginal rights.”
63 Pommersheim supra note 10 at 5.
64 Indian Act, R.S.C. 1985 c. I-5, s. 74 Elections of Chiefs and Band Councils.
suggests that it is not the case that there will be full agreement on social norms. But “members realize that, within broad limits, they have to put up with normative positions, normative interpretations, that they do not fully agree with if they are to live in society with people who have their own minds.” Further, once those norms are substantively supported, “the more effective and stable the norms are likely to be, because members will both know and accept them more readily.” 65 I seek to elucidate these norms as I do feel that they are ones that can approach full agreement, without trying to emulate each others methods and recognizing a common interest. As Monchalin puts it;

As the history of colonial relations has taught us, relationships that lack a shared commitment to pursue peace by treating one another with respect and dignity are doomed to failure. It is in this light that Aboriginal peoples and their supporters have called for a radical (re)visioning of justice and reconciliation in Canada. 66

Community

Pommersheim discusses the notion of community from a nation to non-Indigenous nation perspective, he says “despite a history of conflict, [our] future is inextricably linked. There cannot be well-being for some if not for all.” 67 The problem that plagues us is the excess of individualism, which is much celebrated and cherished in Canadian and American society but the problem is that the essential corrective; belonging, has not been celebrated and cherished with the same enthusiasm. As noted above this sense of belonging is the key to the coming together in the development of a story or an ethic. This ethic depends on the emergence of a common understanding and respect, with the land at the center. Pommersheim states:

The land needs to be retained, restored and redefined. Its economic role – long dormant – must be resuscitated. Its spiritual role – long atrophied – must be revivified. Its healing

65 Webber supra note 60 at 624.
66 Monchalin supra note 25 at 376.
67 Pommersheim supra note 10 at 30.
role – long obscured – must be revitalized. The land must hold the people, and give direction to their aspirations and yearnings.

In this sense not only does the land guide us but it places limits on our activities. Our activities must contribute to the viability of the land if we are to prevent ourselves from “marrying the land with modern detritus.” The respect and dignity afforded to the land by Indigenous people is critical in light of the current ecological crisis and is the common ground which can unite Aboriginal and Non-Aboriginal people. The viability of the land is integral to our common aspirations for improving the quality of opportunity and life in one’s family and community. In a way, each side must, “accede to a condition before any of the mutual agenda can be addressed.” By learning from each other we may “discover a story that teaches us to abhor our old romance with conquest and possession.”

A final view on the Indigenous value of community is a Cherokee notion of Gadugi – namely that “whatever issues arise in community living, they must be dealt with in a unitary way.” Further Gadugi means that “no one is left alone to climb out of a life endeavor.” If we apply this notion directly to Canadian views of criminality we discover that it is only when we are all implicated in the solution to crime as a community that we might reach lower levels of crime, although this should not be our only measure of success.

**Root of the Conflict: Punishment vs Relationship Reparation**

Our current system is premised on punishment rather than an affirmation of the good behaviour people have participated in. *R v. Mellstrom*, 1975 CarswellAlta 16 provides a useful

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68 Pommersheim *supra* note 10 at pg 34.
70 *Ibid* at 31.
72 *Ibid*. 
review of the modern authorities on the principles of sentencing. There we are told that deterrence, reformation and retribution are the three principles of criminal justice “requiring earnest consideration in the determination of punishment.” Somewhere in the earnest consideration we have forgotten to include an understanding that the best approach to rehabilitating offenders is to promote good behaviour rather than using fear to coerce compliance. The governing principle in the CCJS is deterrence, which calls in the “emotion of fear…so that the offender may be afraid to offend again and also that others…will be restrained by the same controlling emotion.”

When we consider the role of Elders as adjudicators in criminal justice systems, akin to judges as stark contrast emerges and a different emotion which promotes good behaviour emerges as well. Elders are the most respected members of Aboriginal communities because they have accumulated life experience and hold the wisdom of the community in their hearts and minds. Here we see the values of respect, dignity and community at play and we can start to understand their interrelation. Mary Ellen Turpel-Lafond and Patricia Monture-Angus tell us:

Elders are feared as well as respected. The fear does not grow out of the concern that the Elder will punish or hurt you. The fear exists because the Elder knows you, your family and your community. She or he can see your faults clearly and, therefore, to meet with the Elder is to accept that any wrongdoing on your part is, in a sense, known to all. You must confront your own faults along with your virtues. This system emphasizes a willingness to accept your own lack of wisdom and to learn from the Elder. It encourages responsibility for your behaviour and reflection on how to live harmoniously in a community.

Compliance and respect for the rule of law, written or unwritten comes from contextual legitimacy and the desire to belong to a community which reflects one’s values. In these contexts

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74 Ibid para 30.
75 Monture and Turpel supra note 62 at 246.
76 Monture and Turpel supra note 62 at 246.
we do not see compliance out of fear, but compliance because there is an understanding that the Elder’s role is not adjudicating but rather guiding and teaching. In this light correcting reprehensible behaviour starts by showing the offender respect and dignity, allowing them the autonomy to choose how to correct their behaviour and become integrated into the community. There are instances when coercion or punishment was used, but the way in which the punishment is delivered reaffirms the offender’s connection to the community. Milward gives us an example of a Coast Salish woman who had been charged with shoplifting. The criminal sanction was the removal of a rattle from her possession for a year which was used in longhouse ceremonies. When the Provincial Court Judge was made aware of the seriousness of the decision within the Coast Salish culture an absolute discharge was granted. The community addressed the matter at a dinner and it was made clear that her action brought shame not only to herself but also to her family.

Here we see the community taking part in the criminal sanction. There is also a sense of accountability instilled in the offender such that the deterrence principal is served both individually and generally. But note the focus is on the offender and their rehabilitation, not necessarily community safety. Further we see the ability of Provincial Court Judges to make decisions informed by respect and dignity while facilitating community building. It is this everyday decision making that helps to address the fact that “neither Aboriginal offenders nor their communities are served by [incarceration].”

First Nations Courts are another avenue in the urban setting where we see these principles at play and if judges and lawyers embody the Indigenous values of respect, dignity and

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77 Milward supra note 4 at 85.
78 Ibid at 86.
community they too can assist in nation building in this forum. It is a skill that judges and lawyers can develop if they facilitate relationships of respect and dignity with the communities the “offender” comes from. In coming to these communities in this way, lawyers and judges will find that they also belong to the community. In learning from and listening to the Aboriginal people there, they are able to tap into a different legal language and legal knowledge. In First Nations Court, Judge, Crown, Elders and Defence Lawyers sit at a round table and determine a healing plan for the offender. Everyone in the room is able to speak to sentence, but most importantly the offender has a say in what this healing plan entails. The Elders communicate Indigenous law teachings and although sometimes the offender is non-responsive, the Elders know that eventually their teachings will become meaningful when the offender identifies with the teachings and decides to partake in being a healthy member of the community. Note the respect and dignity shown to the offender. The offender can see that he is a valuable member of the community and has a chance to acknowledge the authority of the Elder and learn from them. Most importantly this is an instance where the CCJS is embodying the values of respect, dignity and community as this creates a forum in which traditional knowledge can be transferred. The tragedy is that this happens within the confines of the Criminal Code and Indigenous law only becomes applicable after a guilty plea is entered and the offender passes the “danger to society” test. However this is a start, with the numbers of First Nations courts rising, the legal communities new challenge is figuring out the ways in which Indigenous law can be used in fact-determining processes. The focus on deterrence and restitution limits “the capacity of

80 Kirsty Broadhead, Field Notes: FN Court Observance in Duncan BC, (22 February 2016). [unpublished].
81 Milward supra note 4 at 27. “If a judge decides that an Aboriginal offender is a danger to the public that offender will not be eligible for community-based sentences.”
Aboriginal communities to design their justice systems in such a way as to reflect cultural
difference.” Fact-determining processes would necessarily have a more inquisitorial function
rather than an adversarial emphasis.\textsuperscript{83}

**Historic Philosophical Antecedents**

An examination of the history of the *Criminal Code* exposes that Canada is still operating
on archaic Victorian notions of criminal justice which ought to cause Parliament to recodify the
entire *Code*. If we are moving toward recodification we must be reminded of the philosophical
reasons stated for codification. A new coherent code would do much to regulate justice processes
on the ground preventing matters from entering the system when it is unnecessary for them to do
so.

The *Code* experiences difficulties in regulating justice processes on the ground and this
may indicate the community’s attempts at reconciling an incoherent statute at the ground level.
We may have a *Code* to guide us but judges and lawyers make the rule book make sense in
community settings. An example of this is the Conservative Governments supposed revision of
pre-trial credit with *Bill C-41*.\textsuperscript{84} Section 719 (3) permits sentencing judges to take into account
any time spent in custody by the person as a result of the offence but limits the credit available to
one day for each day spent in custody.\textsuperscript{85} Section 719 (3.1) says that “if the circumstances justify
it,” the maximum credit can be one and one-half days for each day spent in custody. In *R. v.*
*Summers*, 2014 SCC 26, [2014] 1 S.C.R. 575 this issue was considered and although it did not

\textsuperscript{83} Milward *supra* note 4 at 31.

\textsuperscript{84} *Criminal Code*, R.S.C., 1985 c. C-46, s. 719(3) and s. 719(3.1).

\textsuperscript{85} Ibid.
strike down the law because it was not challenged on constitutional grounds, it did offer surer legal footing when judges give sentencing breaks. Judges can and do find circumstances to justify the award of a 1.5 to 1 credit ratio, whether those be egregious pre-trial detention conditions or the fact that this time has no bearing on eventual parole or early release eligibility. The fact that a 2 to 1 credit, which was used before Bill C-41, is barred is evidence that Parliament can guide processes on the ground to some extent, provided they don’t violate the Charter.

It is safe to say in the creation of our Criminal Code there were conflicting views between codification and avidly protected judicial discretion. The roots of codification came from the Benthamite school of thought and stated that codification would offer a body of laws that was plainly articulated in place of the “oracular, mysterious incantation of doctrinal technicalities by lawyers and judges.” Upon entering a court room for the first time, this might still be an applicable characterization of Canadian law, but that is beside the point. Bentham believed that law must be knowable and accessible and in this light, his style of codification would require laws to be drafted by learned philosophies, removed from the political process,

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86 Tonda MacCharles, “Supreme Court Restores Credit for Pre-Trial Jail Time” (11 April 2014) Toronto Star Newspapers, Online: thestar.com <http://www.thestar.com/news/canada/2014/04/11/supreme_court_restores_credit_for_pretrial_jail_time.html> (“MacCharles”) “Pre-trial custody in a remand jail is hard time, in overcrowded conditions with no access to treatment or rehabilitative programs”.

87 Ibid.


proceeding systematically from basic principle to practice. The goal was an internally harmonious and philosophically grounded system. 90

Edward Livingston’s code drafting efforts came the closest to the Benthamite standard. Of note was that his draft Code for Louisiana treated people like reasonable beings. It was an expression of the legislator talking to the people and telling them what he intended to do, why, and marked out the limits of behaviour. Livingston said that people are not only capable of obedience they can also reflect. 91 As the LRCC stated “it is the community in which problems such as crime arise and real solutions can only be found there…force and coercion…[..] like any weapon must be handled with care or they will increase frustration and violence.” 92 What might be missing is a community feedback loop once the Code is established, one that allows those specifically affected by the law to spell out how the law impairs them from achieving their purposes and how the law might be restructured to prevent unnecessary limits while also working toward the established state goals.

Thomas Babington Macaulay is among English codifiers who developed a method of drafting where the leading idea or the general principle would be stated, meanings of certain words would be explained, exceptions would be illuminated with definitions as well and finally examples would be given. 93 This process is good because it upholds our general principles, but the path it lays to practice might be too prescriptive; there must be room for the community to make sense of the general principle on the ground. The issue, which Macaulay pointed out himself, is that spelling out all morally reprehensible behaviour creates a technical study of law

90 Ibid at 1099.
91 Ibid at 1102.
92 LRCC Report supra note 11 at 2.
93 Cross supra note 88 pp 524-525.
which becomes unmanageable. Macaulay said that the more progress he made writing the Code the more contempt he had for the technical study of law.\textsuperscript{94} This type of codification is inherently flawed, a flaw that becomes apparent when one man, or a small group of men work to expose all morally reprehensible behaviour in one statute to operate over many communities, nay drastically different countries. A code that is to operate over a given community ought to have the communities input in what the general principles are and how they can find expression in the praxis in which they operate. Macaulay’s Code was the imposition of Colonial British criminal law applied to Indigenous groups in the British Colony of India. Remarks from a distinguished Anglo-Indian Judge aptly summarizes:

To put forward a body of law which is not even founded upon any previously existing system, and to clothe the enactment in language which is as new to those who are to dispense the law as to those who are to live under it, appears to me a mode of proceeding irreconcilable with the maxims of practical wisdom and one calculated to produce a degree of confusion and difficulty which has never yet been found in administering the criminal justice of any civilised country.\textsuperscript{95}

While, Sir Rupert Cross, says the importance to be attached to such remarks is “of course disputable,” I, with the greatest respect, disagree. These remarks can be linked to comments that stalled codification in the times of Macaulay and Livingston. On this side of the codification debate were calls from individuals like James Carter, who said “law could not be produced new and whole by legislative fiat because law reflects the experience and life of a culture, which projects a social standard of what is right.”\textsuperscript{96} These pervasive ideas came from what is called the “Savigny School of Thought” in Germany. Just scratching the surface for the purposes of this paper, this school of thought holds that “all success in the science of law rests upon cooperation

\textsuperscript{94} Ibid at 523. Sentiments law students can identify with. \\
\textsuperscript{95} Ibid at 523. \\
\textsuperscript{96} Kadish supra note 89 at 1132.
of different intellectual activities.”97 At a time when the historical and national spirit commenced in Germany against French philosophy which was designed to “improvise legislation in the Prussian Code,”98 the Savigny school holds that:

In the mass of ideas, rules, and technical expressions which we derive from our predecessors, there must unfailingly be mingled with the truths achieved a great mass of error, which by the traditional power of an ancient possession can easily obtain authority over us. To avoid this danger we must desire that from time to time the entire mass of what has been handed down to us should be proved anew, questioned, and investigated as to its origin… it is necessary for us to make periodical revision of the labours of our predecessors in order to separate the ungenuine, and to appropriate the truth… all which places us in the position of approaching according to the measure of our strength nearer to the goal in the solution of the common problem.99

In Canada, the Criminal code would be adopted with “scarcely a ripple of opposition” because Sir John Thompson was able to bank on his own immense and well deserved prestige as a lawyer and on the general ignorance of the criminal law on part of the opposition. Stating that the existing law was being changed as little as possible and distracting the opposition with a strategically expendable provision to abolish juries, the Bill slipped through. The lateness of the Bills arrival in the Senate provided one last threat to the passage of the Canadian Criminal Code. Senate members felt insulted by the dumping of a massive Bill so late in the session, but the insult was insufficient to kill such an important measure and it passed on July 8, 1892. Once Justice H.E. Taschereau of the Supreme Court was able to examine the new Code he concluded that “the changes and innovations are numerous and of a sweeping character, both in the substantive and in the adjective law.”100

98 Ibid at 775.
99 Ibid at 778.
100 Crim Law II supra note 1 at 124.
Some sixty years after the Code was adopted the Royal Commission (1952-2954) and subsequently the LRCC (1972-1988) would be struck to pour over a series of amendments and push for recodification of the General Part. In 1987, a Sentencing Commission released a comprehensive report detailing deficiencies in Canada’s sentencing structure. The first point was the absence of a uniform approach to the theory, purpose or principles of sentencing.¹⁰¹

At present the Criminal Code does not have a preamble or a statement of principles. One such statement would guide the interpretation of the Criminal Code and could help to control the use of discretion by police officers, prosecutors and judges in applying the Criminal Code. Exposing the basic principles underlying the Criminal Code can help ensure that these publically accountable actors perform their role in accordance with a common and explicit set of values, especially after the adoption of The Charter.¹⁰² The contrary argument is that a preamble or statement of principles would complicate the already difficult task of interpreting the provisions of the Criminal Code. Those opposed to a preamble or general statement argue that what is needed is for the contents of the Code to be comprehensive and internally consistent, that way the meaning of the Criminal Code would be evident from its substantive provisions alone.¹⁰³

While the latter argument is persuasive, a comprehensive restructuring is still needed because the revolving door of parliament means that many different interpretations of the Criminal laws purpose have been injected into the Code. Unfortunately, the push for complete or substantial recodification of the Criminal Code died in 1998. At that time, Justice Minister Anne

¹⁰¹ Gerry Ferguson, Law 305: Law, Theory and Practices of Sentencing, Coursepack (Faculty of Law, University of Victoria, Spring 2016) at pp 7-8 (“Sentencing”).
¹⁰³ ibid at pg 8.
McLellan indicated that it was not her intention to undertake a comprehensive codification of the General Part of the *Criminal Code*. Rather, energy would be focused on a limited number of issues of public concern and importance within the General Part.\(^{104}\) To the legal community’s dismay, the *Criminal Code*, in particular the area of criminal procedure, is still affected by criticisms that it is “poorly organized, incomplete in important respects, and lacking in clarity, coherence and consistency in many areas.”\(^{105}\) These piecemeal changes do not approach the goal of having a coherent criminal justice system, which proves true the proposition that the *Criminal Code* would benefit from a preamble enunciating the purpose of criminal law and the formulation of principles to be applied to achieve that purpose.\(^{106}\)

A preamble would provide coherence to an often incoherent criminal law and criminal justice system.\(^{107}\) But how would we produce this preamble? What principles would be legislated? A new preamble would necessarily revive the call for recodification. Reconciliation efforts in Canada would seriously be undermined if Indigenous leaders were not invited to collaborate on a new preamble and recodification.

Recodification would have to start with an investigation into the community. The type of investigation I refer to is not investigated through the will of individual members of the people, but “rather the common mind of the people living and working…that produce the positive law, which according to the consciousness of each individual is not accidentally but necessarily one and the same law.”\(^{108}\) What is required is a recognition that positive law must give due regard to “the progressive life of nations,” that there is no stillness experienced in life of man and this is

\(^{104}\) Crim II *supra* note 1 at 141.
\(^{105}\) *Ibid* at 140.
\(^{106}\) *Canada supra* note 102 at 8.
\(^{107}\) *Ibid*.
\(^{108}\) Savigny *supra* note 97 at 786.
the same with the life of nations and the law that governs them.\textsuperscript{109} We experience change within this structure but there are also solidified conditions. The individual connection to these conditions is a manifestation of the spirit of the people “through which the law is produced.”\textsuperscript{110}

Michel Foucault’s description of this is that the “division between the permitted and the forbidden has preserved a certain constancy from one century to another.”\textsuperscript{111} In our short history of industrialization the solidified conditions require a “free market in labour and, in the nineteenth century, the role of forced labour in the mechanisms of punishment diminishes accordingly and ‘corrective’ detention takes its place.”\textsuperscript{112} The aim is no longer the body but the soul, in efforts to conform such a soul to the solidified conditions, the souls “labour power is possible only if it is caught up in a system of subjection...[...]. The body becomes a useful force only if it is both a productive body and a subjected body.”\textsuperscript{113} It is through these conditions that the “improvement of individuals becomes more unequal, dissimilar, and predominant, and in which a more distinct separation of occupations of knowledge, and of the ranks thereby created takes place.”\textsuperscript{114} Basically what emerges is disparity and disrespect for different kinds of knowledge that play no role in the connection to the solidified conditions. As Foucault says those who are part of the anatomy of the state perpetuate this disparity.\textsuperscript{115} It is here we find that the

\begin{itemize}
  \item \textsuperscript{109} Ibid at 787.
  \item \textsuperscript{110} Ibid at 788.
  \item \textsuperscript{111} Michel Foucault, Discipline & Punish: The Birth of the Prison, Second Vintage Books Edition (Toronto: Random House of Canada Limited., 1975) at 17. (“Foucault”)\textsuperscript{112} Ibid at 25.
  \item \textsuperscript{113} Ibid at 26.
  \item \textsuperscript{114} Savigny supra note 97 at 788.
  \item \textsuperscript{115} Foucault supra note 111 at 29 “It would be wrong to say that the soul is an illusion, or an ideological effect. On the contrary, it exists, it has a reality, it is produced permanently around, on, within the body by the functioning of a power that is exercised on those punished – and, in a more general way, on those one supervises, trains and corrects, over madmen, children at home and at school, the colonized, over those who are struck at a machine and supervised for the rest of their lives.” We are all apart of perpetuating a system which is unsustainable, we must question the solidified conditions.
\end{itemize}
“production of law… which rested upon the community of consciousness becomes more
difficult.”\textsuperscript{116}

nay it would finally almost entirely disappear, if for that purpose through the influence of
the same new condition, the proper organs were not again formed, namely, legislation,
and the science of law. There may, through it, be produced new legal institutions, or
those previously existing may be modified; nay, through it the latter may entirely
disappear, if they have become estranged from the sense and requirements of the age.\textsuperscript{117}

It is the destiny of the “law to absorb little by little elements that are alien to it,”\textsuperscript{118} and to work to
change these solidified conditions based on the sense and requirements of the age. The CCJS is
founded upon the “conquer and possess” ideal and must absorb Indigenous ideas about the land
that are alien to it as a starting point. Once we accept this common ground we can start to work
out our relationships with each other.

At a very basic level, community input to the contrary of the solidified conditions, is
what is required to help determine what objectives are to be met and how those objectives will be
met. The dichotomy plays out clearly in Canada’s codification history; the third nation, now
decimated to a minority, has no say in changing the solidified conditions to allow compliance
with the sense and requirements of the age. Further the lack of jurisdictional space means there
needs to be a conscious concerted effort to have Indigenous input into the constitutional
framework of Canada. The assistance from the Canadian state coming from a place of respect,
dignity and community is necessary to displace the relationship of dependency Alfred pointed in
the section; Indigenous Sovereignty; Constrained Space.

Returning for a moment to the German codification experience, it was determined that
the citizens of Germany would unite, “in order to make all that remains of the French spirit

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\textsuperscript{116} Savigny \textit{supra} note 97 at 788.
\textsuperscript{117} \textit{Ibid} at 787-788.
\textsuperscript{118} Foucault \textit{supra} note 111 at 22.
\end{flushleft}
disappear”. Not because the French spirit was inherently wrong, it just didn’t fit the context in which it was to operate. In a word; “the uniformity of civil legislation would save Germany from the anarchy with which Germany [was] threatened” after the expulsion of the French.

The German Law and the Canon Law are at once confused and incomplete. The Roman Law will never be entirely known. Besides, there is an antipathy between the Roman and the German mind. There ought, then, to be a new uniform code.

The antipathy found in the German mind can quite readily be found in the Indigenous mind in Canada, and perhaps even the non-Indigenous mind who understands the origin of the Canadian Criminal Code and the direction in marches us in. The criminal justice system lacks credibility in the eyes of many Aboriginal people because of the way it has contributed to the systematic dismantling of Aboriginal systems of justice. Instead of creating something anew Canadians impetuously accepted a Code that was not drafted in the context in which it would operate and now the great mass of error has easily obtained authority over us.

Another reason for pointing out the unmanageable technicality of the law presented by codification is to say that although codification marches us toward a type of certainty upholding rule of law, the product that emerges, I would argue, is not the certainty and knowability that Bentham spoke of, perhaps this is why he himself never drafted a code. Its seems apt to say that the clearing of the brain was in fact more of a rearranging of the attic. The further we propel ourselves into technicality we lose site of the social democratic philosophy that guided codifiers like Livingston, revered as one whom was closest to the Benthamite vision. What we’ve lost

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119 Savigny supra note 97 at 776.
120 Ibid at 776.
121 Monchalin supra note 25 at 356.
122 Kadish supra note 89 at 1137.
sight of is not preferring private charity over “the social duty which every nation owes to the individuals which compose it; which is not only a duty of protection but mutual support.”123

**A Final Note on Kantian Philosophy of Criminal Fault or Mens Rea**

We must seriously consider “the views we hold about why people commit crimes [because those views] deeply influence our ways of dealing with them.”124 If the enemy is crime, surely the emphasis should be on treating the offender so as to facilitate their inclusion in the community. I would suggest most aboriginal leaders see healing at the centre of correcting reprehensible behaviour, especially after the onslaught of colonialism. In this vain I would suggest that they would agree with the view that “we should allow the concept of mens rea to wither and die and that it should simply be a question of adopting the non-punitive view of treating someone who has committed prohibited conduct.”125 Mens Rea is an area of law which Stuart says the most ink has been spilt. It is an area of law that is highly contested because it is one “where the basic principles are the subject” of such contestation.126 At the heart of this debate is the age old philosophical quarrel over free will and determinism. The debate can be a subject of a whole other paper but my point is thus. The criminal law’s foundations lie in Kantian Philosophy; the concept that we are rational beings capable of rationally choosing right from wrong. But this view forgets, or places little emphasis on, the fact that the environment too plays an integral role. Bentham deliberately avoided articulation of this ancient riddle but it is interesting to note that “free will clearly played no part in his utilitarianism.”127 Given that

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123 Kadish *supra* note 89 at 1106.  
126 Stuart Treatise *supra* note 47 at 171.  
127 Julian *supra* note 124 at 377.
utilitarianism is what the CCJS’s focus on punishment is derived from, seen in fundamental purpose of sentencing (s. 718 of the Code), it seems strange that it does not give way to his description of human behaviour, namely that “nature has place mankind under the governance of two sovereign masters, pain and pleasure. It is for them alone to point out what we ought to do, as well as to determine what we shall do.” Treating the offender with respect, dignity and facilitating their integration into the community, means that we are using pleasure to reinforce what good behaviour is. Of course the approach would not be absent punishment, but punishment used for healing is different than the kind of punishment the CCJS administers.

Further “a scheme which presupposes a mind that always functions consciously and always reasons forward from premises to conclusions, is utterly remote from life.”128 In addressing colonialism in the court room, it is not enough to just take judicial notice, especially when there is no healing infrastructure in place to deal with the harm once it is recalled.129

Monchalin states:

The abnormal colonial experiences of Aboriginal people in Canada have also contributed to a number of risk factors in their lives that are associated with crime. Some of the more common risk factors include lower levels and less access to formal education, overcrowded living conditions, inner-city living, poverty, social exclusion, racism and discrimination, lack of cultural identity, addictions, family violence, and living in single-parent families. Although the presence of multiple risk factors in someone’s life does not necessarily mean they will offend or be victimized, the risks for both increase dramatically if one is exposed to such factors… The criminal justice system operates to sustain existing colonial power structures. Policies and practices that uphold Euro-Canadian world views and values—passed down from the colonial forefathers—remain embedded within the criminal justice system.130

128 Stuart Article supra note 125 at 188.
129 R. v. Gladue, [1999] 1 S.C.R. 688 [“Gladue”] at para 83 “In all instances it will be necessary for the judge to take judicial notice of the systemic or background factors and the approach to sentencing which is relevant to aboriginal offenders.”
130 Monchalin supra note 25 at 366.
What we need central to the idea of criminal responsibility is a determinists perspective. The causal philosophy of science can help to predict human behaviour. There is a certain indeterminacy as to what behaviours emerge as a result of chance and therefore we cannot know what behaviour will emerge but we do know that the environment plays a role. Julian says we use deterrence as a means to structure the totality of environmental forces. Lomobroso, father of the Positivist school for Criminology, says that if crime is necessary because heredity, environment and random chance then by consequence societies resistance to crime is necessary.\textsuperscript{131} It is like a defence against crime. Punishment is therefore justified because we are defending against crime (ie. deterrence). But deterrence is not the only piece that could fit the puzzle. Implicating society to detect and rehabilitate the offender is a better solution. Not only that, but implicating the offender in their sentence and which course of action they wish to take, flies in the face of Stuarts assumptions that “we would be deluding ourselves if we were to believe that the majority of offenders are “treated” or even “treatable”…. irrespective of the explicit or implicit judicial philosophy underlying them”\textsuperscript{132}

**Conclusion**

Pommersheim states that “it is important to note that a young, law-educated tribal member who is bilingual and bicultural is an emblematic figure, poised between two worlds, bringing the best messages of both.”\textsuperscript{133} Those so-called “urban aboriginal people” who may not be tribal members because of the assimilation policies that Aboriginal people were subjected to, may identify with this quote. The problem is that their homelands are urban centres. They might

\textsuperscript{131} Julian *supra* note 124 at 377. I do not in anyway agree with the notion of crime being necessary because of heredity, but this should not prevent us from examining what other benefits a deterministic perspective can offer.  
\textsuperscript{132} Stuart Article *supra* note 125 at 182. Julian *supra* note 125 at 377.  
\textsuperscript{133} Pommersheim *supra* note 10 at 69.
ask, “How will I bring Indigenous values into practicality if I have no homeland where my world views find expression?”

We are fooling ourselves if we do not realize the pervasive colonial currents that underlie not just the CCJS but the relationship between Aboriginal and Non-Aboriginal people. If we are to approach these at all we must question what the requirements are for “law abiding citizens”. The common good becomes defined by whatever “shape-shifting colonial elites” say it is.\(^{134}\) So it becomes critical to question the aim in which we shoot when we are rehabilitating “offenders.”

Central to the notion of being tied to the land is questioning the industrial paradigm we currently march in toward our destruction. Indigenous peoples’ resistance to participate in such paradigms causes us to think critically about why we participate in it and what we can do to reduce its effects on our mother, that is mother earth. This means thinking about economic development required for Aboriginal self-government differently. Decolonization and reconciliation are two amalgamated concepts. Painful introspection requires a questioning of a world that “wants you to constantly accumulate things”\(^{135}\) to the detriment of facilitating a sense of community and belonging. As Billy-Ray Belcourt states, “this world isn’t for us anymore; but we’ve known that for quite sometime.”\(^{136}\) Indigenous people know this and non-Indigenous allies who approximate agreement on the centrality and viability of the land understand that the materiality of this world cannot be accepted with complacency anymore.


\(^{136}\) Ibid.
A large number of people lived together at one place. Their chief was Swan.\textsuperscript{137} At another place, one long day's journey away and beyond a high range of mountains, lived another band of people, who were sometimes called the Deer People.\textsuperscript{138} They consisted of the Deer, Caribou, Moose, Goat, Sheep, and others, and their chief was the Elk.\textsuperscript{139} The two groups of people had been enemies for a long time. Each tried to interfere with the other, and to make their means of procuring a living as difficult as possible. Each people had a different kind of government and lived and worked differently. What one did well, the other did badly. The birds acted in some ways like mammals, and the mammals like birds. The Swan wished to remedy the defects of both parties, and to enable them to live without continual interference. He believed that their troubles all arose from ignorance.

One day in the winter-time, when the snow lay very deep on the mountains, Swan assembled his people, and, after explaining his plans to them, he asked if any one of them would carry his message of invitation to Elk. Whoever would undertake the journey was to receive a large present of dentalia.

Coyote volunteered to go, and prepared for the journey by putting on his finest clothes, embroidered moccasins, and all his dentalia and necklaces. At dusk he left the house, but, not wanting to face the deep snow, he ran around the underground house all night, admiring himself. Coyote was still running in the morning, when the people awoke. The Swan asked him why he had not gone; and Coyote answered, “I was just playing and running around for practice. I will start to-night.” When evening came, the people saw him leave, and watched him until he was out of sight. Coyote soon found the snow too deep, returned after dark, and lay down underneath the ladder where he fell asleep. When the people awoke in the morning, they found him fast asleep, and Swan asked him why he had not gone. Coyote answered, “Oh! I was playing, became tired, and lay down to sleep. I will start to-night.”

Then Swan asked the people which one of them was best able to undertake the journey, and they all agreed that Porcupine was the fittest person, for he was accustomed to walking in the high mountains where there was much deep snow. Porcupine was selected, and after sewing his moccasins all night, and dressing himself warmly, he left at daybreak. When Coyote saw him

\textsuperscript{137} The Swan was noted for his goodness and wisdom.
\textsuperscript{138} The smaller animals and birds all lived together. The other community consisted of all the large animals, but, according to some, was composed of game-animals only (therefore called Deer People). All the big game was hunted by the people including the Buffalo, Antelope, etc. According to some, Bears were not included.
\textsuperscript{139} The Elk was a great chief, but, according to some, sometimes he was inclined to be thick-headed or stupid.
leave, he laughed, and said, "When even I could not go, how can such a poor, slow, short-legged creature be able to travel through the deep snow?" That night Porcupine reached Elk's house in an exhausted condition, and all covered with ice and snow. After warming himself, he delivered his message to Elk, and asked for sinew and awl with which to sew his moccasins. After he had done so, he left for home, bearing Elk's reply. Elk promised to visit Swan on the following morning together with all his people.

When Elk and his people arrived, Swan feasted them and when the feast was over, he and all his people knelt down before Elk. Swan told him all he knew of the affairs of both people and told him in what way he thought they did wrong. Swan gave Elk all his knowledge and all his advice.

Then Elk and his people all knelt down before Swan, and Elk gave him all his ideas and knowledge. Each people gained full knowledge of the other, and together became able to plan doing what was right. After this they lived much easier and happier than before and the methods of one party did not come into conflict with those of the other.

The laws made at the council are those which govern animals and birds at the present day. Porcupine got his rich present of dentalia, and was much envied by Coyote.\(^\text{140}\)

\(^\text{140}\) A similar tradition is told by the Lilooet (see also for the last remark, Teit, Traditions of the Thompson River Indians, p. 83).