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Law, Theory and Aboriginal Peoples

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To some Aboriginal people domestic Canadian law is alien and oppressive. In this paper one source of this perception is explored, the argument digging below the surface of the law to layers of theory and world-view which conflict with the sensibilities of Aboriginal peoples.

I argue that a liberal vision underlies and animates the law, and that while grounded in this vision, the law cannot protect the interests of Aboriginal peoples. In analyzing how the law approaches the protection of Aboriginal interests, an alternative liberal argument focused on group autonomy is also considered. Examining the debate between liberal theorists about how best to protect Aboriginal interests reveals the threat liberalism in general presents to Aboriginal peoples. In adhering to deeper shared visions about the self, the community and the state, and in engaging in the shared mission of transposing these visions onto the lives and worlds of Aboriginal peoples, liberal theorists reveal liberal theory as one source of the perception of oppression.

The perception that the law is oppressive ultimately issues, however, from the law's grounding in a particular intellectual tradition. In exploring an approach highly critical of liberal legal theory, in tracing connections and commonalities between the philosophical groundings of both liberal and critical legal theory, this line of inquiry highlights the cultural divide between Western theorists and the worlds of Aboriginal peoples. Working towards a world in which Aboriginal interests can be appropriately protected does not mean translating these interests into group rights so they can be fit into the matrix of rights in Canada, just as it does not mean understanding these rights as reflective of group autonomy, and does not mean recognizing that the "fluid and dynamic" interests of Aboriginal peoples can be better served through progressive democratic measures. Rather it is essentially a matter of respecting the ability of Aboriginal peoples to continue to define who they are, a potential for self-definition which includes their capacity to project both their own theories and their particular forms of knowledge.

I INTRODUCTION: PERCEPTIONS OF THE LAW

Over the last few decades hundreds of Aboriginal people have moved into the legal field, as lawyers, judges and legal scholars. Many question their roles within the system, yet feel compelled to continue on. Aboriginal jurists commonly perceive the law as alien and oppressive[1]—not "our" law, but "colonial law," that of the "oppressor."

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1. Mary Ellen Turpel, "Home/Land" (1991) 10 Can. J. Fam. L. 17 [hereinafter "Home/Land"] and "Aboriginal Peoples and the Canadian *Charter*: Interpretative Monopolies, Cultural Differences" (1989-90) 6 Can. Hum. Rts. Y.B. 3 [hereinafter "Interpretative Monopolies"]; Patricia Monture-Angus, *Journeying Forward: Dreaming First Nations' Independence* (Halifax: Fernwood, 1999) [hereinafter *Journeying Forward*]; John Borrows, "Domesticating Doctrines: Aboriginal Peoples after the Royal Commission" (2001) 46 McGill L.J. 615 and "Sovereignty's Alchemy: An Analysis

Non-Aboriginals may find this perception confusing, for they likely think of the law as one of the few institutions in Canada which by and large works for the benefit of Aboriginal peoples, protecting Aboriginal rights from interference both from the government and Canadian society. Those with some historical knowledge may agree there is little to commend in the history of the law in Canada, but would most likely argue this is only history, that today the law shines as a beacon of hope for all Canada's Aboriginal peoples.[2] Undoubtedly many who have such a view of the law recognize contemporary challenges facing those who would champion Aboriginal causes within the law. Nevertheless, the general non-Aboriginal perception seems to be that the law has acknowledged Aboriginal rights, and that the fundamental challenge centres on working out the appropriate crystallization of these rights in the Canadian legal/political landscape.

Clearly someone's perceptions are mistaken. Either the law is an institution protecting the interests of Aboriginal peoples (however imperfectly at the moment), or the law maintains conditions of oppression. This paper explores one source of the common Aboriginal perception, investigating and developing an argument to the effect that the law not only commonly fails to adequately protect the interests of Aboriginal peoples (that it does not merely operate "accidentally" to hinder the aspirations of Aboriginal peoples), but that given its theoretical underpinnings it cannot but fail to protect these interests.

The domestic legal system as an institution is a social and historical construct, a structure built of words and meanings, designed to promote certain values in an ordering system.[3] The construct itself is grounded in a vision of how Canadian society should be structured and how the law as an integral component of society should work within this structure. This vision is the product of centuries of Western thought, as generations of Canadian (and Imperial) law-makers have worked out how they think modern societies should be constructed, and, in particular, how the modern Canadian state should be constituted. Canadian society is the product of centuries of visioning and re-visioning how this particular nation-state, (first a colony, then a parliamentary democracy, now a constitutional democracy) should be structured. While individuals within this historical intellectual tradition may each have had different views about how the law should work within the ever-evolving nation-state, broad principles and values came to form the fabric out of which is woven modern Canada and its

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of *Delgamuukw* v. *British Columbia*" (1999) 37 Osgoode Hall L.J. 537 [hereinafter "Sovereignty's Alchemy"]; Taiaiake Alfred, *Peace, Power, Righteousness: An Indigenous Manifesto* (Oxford: Oxford University Press, 1999) [hereinafter *Peace, Power, Righteousness*]; James (Sákéj) Youngblood Henderson, "Postcolonial Indigenous Legal Consciousness" (2002) 1 Indigenous Law Journal 1.

2. Some would even go beyond this, arguing that the law currently functions to unfairly benefit Aboriginal peoples, that it offers special unwarranted protection for questionable rights. See, for example, Tom Flanagan, *First Nations? Second Thoughts* (Montreal: McGill-Queen's University Press, 2000).

3. I am not here committing to the social construction thesis that the law as a whole is nothing more than a social construction. The elements I listed, on the other hand, are all clearly human constructs and dependent for their form and content on notions about how the law ought to function.

legal system. It is this broad vision, incorporating (however imperfectly) particular principles about the nature of the good and the right, principles themselves grounded in theories of the self, the community and the state, that comprises the theoretical underpinning of the law.

Here I endeavour to look below the law, to that substrata of vision which brings life to the law and is framed in terms of theory. It is underlying theory which attempts to channel Aboriginal aspirations into new forms and paths, and which some Aboriginal people maintain remains as the core of colonialism in Canada. This substrata of vision is provided by liberalism, with liberal legal theory giving structure and coherence to the law in Canada.[4] One argument I advance here is that, as a liberal institution, the law cannot protect the essential interests of Aboriginal people.

My critique aims to probe below liberal structures, to explore deeper theories about the self, the community and the state upon which liberal theory rests. In doing so, the thesis expands to advance the argument that it is not so much that liberalism lacks the capacity and legitimacy to adequately address the needs and wants of Aboriginal communities, but that as one thread emerging from a particular cultural and intellectual history, legal liberalism merely illustrates the danger posed when a legal theory grounded in one intellectual history and tradition attempts to cast its web of principles, values and fundamental arguments onto the lives of peoples grounded in separate and unique cultural and intellectual histories. It is this fundamental intellectual colonialism that underlies the perception that while the law now ostensibly protects "Aboriginal rights," it remains alien and oppressive.

II LAW AND THEORY

Approaching the Law From Various Critical Perspectives

The law is always "ought" momentarily crystallized, as it expresses one set of *values* captured in a system meant to promote these values in a society desirous of living in and through them. As an institution whose purpose is to bring a certain kind of order to relationships between people, between people and resources, and between people and the state, snapshots can be taken such that the order can be studied and internally criticized. Nevertheless, the law itself is not a

4. To say theory gives structure and coherence to the law, that it underlies the law, is not to say ideology (understood as a system of biased beliefs operating through an institution) underlies the law. Any humanly constructed instrument with a purposeful design is constructed in accord with some sort of architectural plan. This plan has to have some vision of how this instrument is to function, and so one must say the law is designed to further certain values and aims. I am loosely using the term "theory" to point to that plan. The theory underlying the law is not itself a system of biased beliefs. However, one might argue—even persuasively—that below this theory-determined institution lies another sub-level, that the aims and values around which the architectural plan is conceived are not those the law actually advances (when operating as intended), which would be to move towards the notion that at its root the law is an ideological instrument. While this sort of suggestion lies just below the surface in this paper, it is not what the paper is meant to argue for.

lifeless monolith whose inner nature is to be discovered and described, but a normative theoretical construct constantly being created and reinforced from within, constantly asserting that *these* values ought to be promoted in *this* way.[5]

Most modern theorists write prescriptive texts, for they begin with the presumption that the law is a social construct, malleable and instrumental in nature. These theorists embrace visions of an ideal world, however incomplete or incoherent their particular visions may be. They measure the law according to its fit with their theories about the good and the right. While they may not have at hand visions of systems up to the task of replacing that which they criticize (and many criticize on the basis that the law fails to satisfactorily promote the values society has tried to advance in generating this particular legal system), they identify a clash between the system they study and the values and principles they believe it ought to promote.

There are two sorts of prescriptive analysis with which a scholar might engage. On the one hand, scholars might undertake to criticize the law from the standpoint of the very theory about the good and the right it purports to embody. These scholars agree the law ought to promote the values and principles it has been designed around, but find fault with how this project of building a world of crystallized value has been carried out. This I call "internal prescriptive criticism." On the other hand, scholars may find fault with the very theory about the good and the right underlying the law as it currently exists. There are any number of independent theories about the good and the right at play in the Western world, any one of which could serve as underpinning for the law as a social institution. Scholars arguing that the law ought to be designed around values and principles contained within one of these other theories would be engaged in what we could term "external prescriptive criticism."

There are also theories about the good and the right to be pulled out of intellectual traditions that rest on philosophical grounds completely independent of the intellectual traditions of the West. Gazing at Canadian domestic law from these vantage-points may be to look across a chasm. This chasm is the result not only of the fact that theorists exploring from a non-Western perspective are not clearly members of the community from which issue both dominant legal theory and "standard" critical alternatives, but also from the lack of culturally-shared histories and philosophies. Thus, criticisms launched from these non-Western foundations may differ not only on intellectual grounds, but on culturally determined perspectival grounds.

In exploring the perception of some Aboriginal people that domestic Canadian law is alien and oppressive, we begin with a description of the law, a description which articulates that vision of society which animates the law,

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5. Those who purport to engage in "doctrinal analysis" are typically engaged in what could be characterized as a *form* of prescriptive theorizing, as they engage in analysis of doctrine for the purpose of pointing out areas of internal incoherence or inconsistency, and as such study and criticize from a perspective promoting *values* of consistency and coherence. See Vincent Wellman, "Authority of Law" in Dennis Patterson, ed., *A Companion to Philosophy of Law and Legal Theory* (Oxford: Blackwell, 1996) 573 [hereinafter "Authority of Law"].

giving it life and guidance. In unpacking how the law approaches the question of the protection of Aboriginal interests, we also consider an internally critical perspective, the perspective of a liberal theorist, examining an argument to the effect that the liberal project must be rethought, as more must be done to further the aim of protecting Aboriginal culture by respecting the autonomy of Aboriginal communities. In examining this sort of internal criticism, however, we will begin to see how debate between liberal theorists about how best to protect Aboriginal interests masks the threat liberal theory presents to Aboriginal peoples. In adhering to deeper shared visions about the self, the community and the state, and in engaging in the shared mission of transposing these visions onto the lives and worlds of Aboriginal peoples, liberal theorists reveal liberal theory as the problem, not as a source of any acceptable solution.

To flesh out this problem, an approach critical of liberal legal theory is examined. Teasing out the connections and commonalities between the fundamental groundings of both liberal and critical legal theory underscores the cultural divide between (a) philosophies underlying both domestic law and suggestions for reform and (b) Aboriginal lives and worlds. It is not a problem of working out how Aboriginal interests can be translated into group rights and fit into the matrix of rights in Canada, just as it is not a problem of understanding these rights as reflective of group autonomy, and not a matter of recognizing that the "fluid and dynamic" interests of Aboriginal peoples can be better served through progressive democratic measures. Rather, it is essentially a question about the ability of Aboriginal peoples to continue to define who they are, a potential for self-definition which includes their capacity to project their own theories and particular forms of knowledge.

Underlying the Law: Liberalism and Liberal Theory

When we turn our gaze to the law in Canada we witness an institution built on a bedrock of liberal values and principles, with legal theorizing, both descriptive and internally prescriptive, centred around liberalism. This is understandable, given that Canada is a liberal democracy. But liberal values and principles are so pervasive and all-encompassing they often escape attention:[6] descriptive theorists fail to acknowledge that the law they aim to describe promotes liberal ideals and principles, and prescriptive theorists, by and large, begin with a liberal stance, calling the law into question on the basis of its fit with their particular articulation of liberalism.

Concepts of rights, freedom and autonomy are so all-pervasive it can be said that the political morality of liberalism supplies the language of everyday legal discourse. Furthermore, the pervasiveness of liberalism excuses (at least partly) the presumptions of most prescriptive theorists, for they want to be active in the dominant discussion. Engaged as they are with their fellow liberal-thinkers,

6. John Gray, *Endgames: Questions in Late Modern Thought* (Cambridge: Polity Press, 1997) at 51[hereinafter *Endgames*].

living in a society structured by liberal thought, they may give little notice to the fact they are enveloped in a particular culture, one adrift in a sea of alternative cultures.[7] This is clearly illustrated in the current debate between liberals and communitarians, as some have noted that this debate may be defused and tamed through efforts at bringing communitarian insights into liberal theorizing, efforts we see, for example, in the more recent work of John Rawls and Will Kymlicka.[8] Communitarians, far from being "deep critics" of liberalism, are committed to essentially the same values and principles upon which rest liberal theory, which makes the process of resolving the "conflict" between the two camps a matter of working out how the self is situated in and related to a community and culture. It should be acknowledged, however, that being immersed in a sea of liberal thought does not by itself account for the way in which theorists work within the liberal paradigm, for the pervasiveness of liberal thought in modern Western societies is enhanced by the fact that theorists seem either convinced of the truth of liberal theory or resigned to its power.[9] Either way they may find it unproductive to criticize the law from any standpoint other than liberal theory.

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7. The term "culture" is inordinately elastic, capable of capturing a wide variety of notions and describing a wide variety of activities and objects in the world. In this work I propose a middle path, tying this term down to collectivities formed through shared structures acting to connect people into self-described and self-defined groups both physically and by providing meaning and purpose to the collectives pulled together. This captures both "ethnic" cultures, formed through shared language, traditions and beliefs (the shared structures), and "political" cultures, formed through shared visions of the good life, embodied in social, economic and political institutions. I will speak, then, of the liberal culture (one which could be generalized across nations, or restricted within Canada's borders) and the cultures of Aboriginal peoples (themselves capable of identification on political grounds, but also "ethnically").

8. Ronald Beiner makes this point in "What's the Matter With Liberalism?" in A. Hutchinson and L. Green, eds., *Law and Community: The End of Individualism?* (Toronto: Carswell, 1989) [hereinafter *Law and Community*] at 38-41 [hereinafter "What's The Matter With Liberalism?"]. He notes that the recent Rawls (in, for example, "Kantian Constructivism in Moral Theory: The Dewey Lectures" (1980) 77 J. of Phil. 519 [hereinafter "Kantian Constructivism"]) and Amy Gutmann (in "Communitarian Critics of Liberalism" (1985) 14 Phil. and Public Affairs 308) have both simply capitulated one of the main points of communitarianism, that "liberal ideals are historically generated, the product of a particular, specifically modern culture and of a shared liberal tradition." Furthermore, on the charge of "atomism," that liberalism is grounded in an overly simplistic and erroneous notion of the individual self, liberals can (a) reply that many classical liberals (*e.g.* John Stuart Mill) never held such a view and (b) explicitly incorporate into liberal theory a notion of the self as constituted by community values and beliefs, while preserving the notion that the self nevertheless must be free to question these values and even to reject them if that is deemed reasonable. In that regard Will Kymlicka's *Liberalism, Community and Culture* (Oxford: Clarendon, 1989) [hereinafter *Liberalism, Community and Culture*] is illustrative.

9. Will Kymlicka is both taken with liberal theory and asks that those interested in developing defenses for cultural rights resign themselves to doing so within liberal theory, as to do otherwise would be wasteful, given liberalism's entanglement with the law:

> For better or worse, it is predominantly non-[A]boriginal judges and politicians who have the ultimate power to protect and enforce [A]boriginal rights, and so it is important to find a justification of them that such people can recognize and understand ... Aboriginal rights ... will only be secure when they are viewed, not as competing with liberalism, but as an essential component of liberal political practice.

Liberalism, Community and Culture, *ibid*. at 154. It is difficult to say whether Kymlicka fails to fully appreciate the exercise of power this thinly veils, or whether he appreciates the threatening nature of this position, but is resigned to its inevitability.

While liberal values and principles underlie the law, so one can speak of liberal theory informing the law and its development, liberal theory proper is a separate matter. Liberal theorists each articulate particular visions of the grounding of liberal values and principles, and no one articulation captures the theoretical construct that is the law as liberalism incarnate. Thus, we need to attempt a broad overview of liberal theory to (a) capture a sense of threads that run through recent articulations of liberal theory, (b) indicate where there are separate streams of liberal thought germane to the study of Aboriginal perceptions of the law and (c) say a few words about tensions and problems that arise in contemporary articulations of liberal theory.

Liberal theory rests on a number of fundamental premises about human nature. Will Kymlicka begins by noting that liberals advance the claim that we all have an essential interest in living a good life.[10] This is not to say that our collective aim should be to strive to identify "the good," some entity possessed of value, the promotion of which would be the guiding principle for social and political engineers.[11] The good life must be pursued *individually*, as we each strive to better ourselves according to our own sense of what is valuable. Furthermore, while we each search for a good way of living, this does not license others to impose their beliefs upon us, however much they may sincerely believe they know what the good life entails. Our search for the good life is personal (and to some degree subjective), and this demands that we be free from outside coercion or interference. As Kymlicka notes, our lives are "lived from the inside,"[12] with meaning in life derived from freely embracing the form of life we have each personally discovered and which we each separately believe to be the best we can live. This means the imposition of forms of life by external sources is not only a mistaken approach to discovering and inculcating the good life, but that it would also undermine whatever essential meaning the form of life imposed may have promised. Society must be structured, then, to facilitate our individual endeavours to discover and live by good ways of living.

At least two arguments support this liberal approach to the place of value in individual and social contexts, and to the structuring of society. First, there may be concern with our ability to satisfactorily identify a single "societal good." Second, there may be concern about what is called for under the notion of respect for the individual. While the two may together offer reasons for privileging the individual, the second must be the more fundamental.

Would the single societal good be the maximization of happiness, the promotion of virtue, the creation of conditions wherein those with special abilities might flourish, the instantiation of majority-determined principles of

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10. *Ibid.* at 10.
11. Michael Sandel contrasts teleological and deontological visions of political morality, with utilitarianism as an example of a theory which posits a *telos* guiding decisions and behaviour (the maximization of general happiness), and Kantian liberalism as an example of a theory which prioritizes the right over the good, grounding both notions of the right and right action independent of any conception of the good. See Michael Sandel, *Liberalism and the Limits of Justice* (Cambridge: Cambridge University Press, 1983) at 2-7 [hereinafter *Liberalism and the Limits of Justice*].
12. *Liberalism, Community and Culture, supra* note 8 at 12.

equality and fairness, or some combination of these sorts of potential social ends? Concern may be with the difficulty in coming up with adequate criteria for identifying what the one "true end" of society might be, or with the possibility that there may not be one identifiable good, but many, possibly radically conflicting, conceptions of the good.[13] Undoubtedly, uncertainty about the identification of a societal good fuels the attractiveness of liberal theory.

Yet by itself this uncertainty is insufficient to ground the liberal thesis that the good life must be pursued by and through the individual. On the one hand, our inability to identify "the good" might entail that our project be to continue searching for this elusive society-structuring end, all the while using our currently best-supported vision to structure society.[14] Furthermore, if there are radically incommensurable conceptions of the good, one might argue, perhaps on pragmatist grounds, for adoption of that of dominant society.[15] Alternatively one could argue for the protection of the inheritances of liberalism—conceptions of liberty and equality—as these function to allow for a civil society in which the value of pluralism can be accommodated.[16] Here the liberal theorist must argue that, whether or not knowledge of (or reasonably well-grounded beliefs about) a "societal good" were available, the process of constructing society on its basis would be *disrespectful* of the individual, that moral being possessed of value in the world. This, then, would be the stronger liberal argument in support of locating value in the individual, and the individual's faculty of judgment. Society must not be built around principles centred on grand notions of the good (for example, around the principle that happiness must be maximized), for to do so would be *in principle* disrespectful of the individual.[17]

Two related arguments lend further support. First, it must be recognized and appreciated that lives are "lived from the inside,"[18] as individuals both experience the world and—through their creative force, their self-legislating capacity—create the world of value in which they live. The imposition of social forms on

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13. In *Endgames, supra* note 6 at 52, John Gray argues that:

> Rawls [in *A Theory of Justice* (Oxford: Oxford University Press, 1972), but more particularly in *Political Liberalism* (New York: Columbia University Press, 1993)] grasps an insight of profound importance when he argues that ... our society harbors conceptions of the good that are not merely incompatible but also rationally incommensurable: there is no overarching standard in terms of which their conflicting claims can be arbitrated.

14. Margaret Moore notes that we make decisions in private matters with doubt concerning the truth of our beliefs (for example, she notes we make decisions about marriage in light of doubts about the ability of relationships to survive in the long term), and wonders why doubt about whether our beliefs concerning the good life are "true" should prevent us from making public or political decisions on their basis. See M. Moore, *Foundations of Liberalism* (Oxford: Clarendon Press, 1993) at 150-151 [hereinafter *Foundations of Liberalism*].
15. See, for example, Richard Rorty, *Consequences of Pragmatism* (Minneapolis: University of Minnesota Press, 1982) and *Contingency, Irony, and Solidarity* (Cambridge: Cambridge University Press, 1989).
16. See John Gray, "What is Dead and What is Living in Liberalism?" in *Post-Liberalism: Studies in Political Thought* (New York: Routledge, 1993) [hereinafter *Post-Liberalism*].
17. Clearly there would be practical concerns: a utilitarian society could demand, for example, sacrifice of the interests of some to further the happiness of others. The challenge to those who prioritize the good over the right runs deeper than this.
18. *Liberalism, Community and Culture, supra* note 8 at 12-13.

individuals channelling their lives into particular paths, inhibits their ability to be individual moral beings, to be free in their pursuit of what they believe to be the good life and to freely choose how to live on the basis of the values they currently hold dear.[19] This upholds the principle of liberty. Second, to potentially treat people as means to some end (as achieving success in pursuit of a societal good may require that some individuals be used to further this pursuit) is to ignore the separateness and distinctiveness of individuals. This upholds the principle of equality, as each person must be treated as an end. Together these principles demand that society must be structured around equal protection of the liberty of each individual.

Liberal theorists need not focus on the nature of "the good," and instead concentrate on the need to foster individual freedom to pursue individual visions of the good life. Individual freedom is demanded given both our shared interest in living good lives and our need to be unencumbered by unnecessary outside forces constraining our efforts. With this approach, liberal theorists eschew nihilist or fatalist conclusions some might imagine follow skeptical claims about "the good."[20] Liberal theorists can acknowledge a degree of skepticism about our knowledge-claims concerning the ultimate nature of a societal good and even acknowledge that on an individual level we may never be certain that the life we are currently living is the best available, yet avoid a pessimistic outlook by maintaining that there *is* such a thing as the individual good life and proposing that one of our fundamental aims must be to continually search for the good *for ourselves*.[21] This, then, would serve as the guiding architectural principle for liberal societies—which should be designed so as to assist each of us in our individual quests to live good lives.

Here we must distinguish two paths liberal theorists might take, arguing that one is not in harmony with the deeper philosophical vision to which the liberal adheres. We just noted the liberal theorist holds we each search for the good life, and that liberal society should be constructed to further this individualized project. We need to ask why, though, the search is necessary and what it is about the search that is valuable.

The search may be thought to be necessary because we acknowledge the fallibility or general inadequacy of our individual faculties, forcing us to face the fact we may be wrong about what we currently believe the good life to entail.[22] Given that we accept the possibility of error in current beliefs and given that we believe there is such a thing as the right way to live, we must continually

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19. On the subject as the ground for all maxims of action see I. Kant, *Groundwork of the Metaphysics of Morals*, trans. H. J. Paton (New York: Harper & Row, 1964) [hereinafter *Metaphysics of Morals*]; on the attempt to ground a theory of justice in a Kantian model "without the metaphysics" see Rawls, *A Theory of Justice*, *supra* note 13; for a critique of such an attempt see *Liberalism and the Limits of Justice*, *supra* note 11.
20. This is one reason contemporary liberal theorists have taken this tack, as earlier critics attacked what they took to be a skeptical premise within liberal theory. See, for example, Alison Jaggar, *Feminist Politics and Human Nature* (Totowa: Rowman & Allenheld, 1983).
21. M. Moore argues that far from being able to maintain its claim to "justificatory neutrality," modern liberal theory readmits an ideal of the good: *Foundations of Liberalism, supra* note 14.
22. *Liberalism, Community and Culture, supra* note 8 at 10-12.

endeavour to search for better ways of living. This search requires that we be constantly willing to subject our current beliefs to scrutiny, questioning the validity of our claims to knowledge about both the good and the good life we wish to pursue. It also requires that we be willing and able to revise our current beliefs if we find them ill-founded or seriously suspect they may be mistaken.

The search may also be thought to be necessary, however, as itself an expression of an individual will. What we search for may be in a sense irrelevant. Some might suggest there is no thing "out there" that is the good life, but rather that the entire story is just that of the will *inventing* values and living through them. Attention is centred on the *capacity* to choose, not what is chosen; ultimate value is accorded to nothing but the will and its exercise in *creating* the world of value which we then inhabit (some may continue to say we "choose" our values, though this term loses some of its common meaning under this position).[23]

Recall we noted above that contemporary liberal theorists maintain there is such a thing as the good life, that thing we all have an essential interest in living. Concentrating attention on the will threatens to undermine the sense of this notion. One of the challenges posed by grounding liberal theory in respect for the individual has been in finding a theory of the self that upholds placing such value in the individual while simultaneously having the autonomous self direct its energies towards goodness in the world.[24] Kant's vision of the self as an independent entity, capable of universal legislation—in essence a sovereign law-making body unto itself—is best-suited to the task of locating ultimate value in the individual self, but central to this vision is the location of the essence of personhood in a transcendent realm, the noumenal world.[25] Only a self removed from the phenomenal and empirical world would have the capacity to be self-legislating, for this capacity requires that the self be capable of initiating causal chains and of being truly responsible for its own actions. If the self were postulated to be wholly phenomenal, it is difficult to see how it could be truly autonomous, capable of legislating action, of acting as a sovereign entity unto itself. This transcendental self, however, is *ex hypothesi* distanced from the phenomenal world, its self-legislating capacity grounded in another realm of being. How does one argue, then, that this transcendentally-grounded entity should have as its concerns phenomenally-situated "goods" and "good lives"? The liberal theorist is forced to decide how to proceed. Does he worry about the need to ground the theory in a vision of the self capable of upholding the ultimate value put on the self, a need which drives one to postulate a self removed from

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23. Rawls occasionally uses language which suggests this picture, as when he says the identity of the self is independent of any ends or desires: see "Kantian Constructivism"*, supra* note 8 at 544, discussed in *Liberalism and the Limits of Justice, supra* note 11 at 62-63.
24. Margaret Moore describes this as working out how the essentially formal notion of the autonomous self can be wed to the need for substantive moral content in the decisions and judgments reached by the self (*Foundations of Liberalism, supra* note 14 at 50, 156-158). This problem was noted long ago in relation to Kant's ethics, and plays a central role in contemporary critiques of Kantian liberalism. See, for example, *Liberalism and the Limits of Justice, ibid.* and Bernard Williams, *Ethics and the Limits of Philosophy* (London: Fontana, 1985).
25. *Metaphysics of Morals, supra* note 19.

the world of experience and goods, a being for whom concern about the world is hard to generate? Or does he worry about the need to ensure that individuals are concerned to search for things with value *in the world*, such that the self acts autonomously (where acting autonomously is left a mystery[26]) but with direction?

Contemporary liberal theorists distance themselves from transcendental notions, avoiding an approach which grounds the self in a noumenal realm. Besides a basic aversion to transcendental philosophy, there are a number of reasons why liberal theorists avoid grounding their positions in nothing but the independent and sovereign will. First, this avoids threats of egoism and arbitrariness such grounding would invite. If value were to lie exclusively in the capacity to exercise the will, that which is chosen would be that which is chosen, nothing more. That which is chosen would have no inherent value, and we would be either misusing language or misleading ourselves to say we were "searching for" or "choosing" it. Furthermore, the liberal rejects the prioritization of will over reason. Liberal theory adheres to a vision of the reasoned quest for the good life, the choosing of ends and projects on the basis of a reasoned examination of one's self and the beliefs one currently holds. Focusing attention exclusively on the sovereign will threatens to undercut this vision of reason guiding the will and encourages us to venerate will over reason. The liberal does not imagine we go beyond good and evil, *creating* the good life, but that we are on a quest to *discover* the good life, using our "light of reason" in this task. Finally, the liberal engineering project only makes sense if there are individualized good ways of living for which individual searches are carried out. The *sense* of the liberal project rests on allegiance to the place of reason in discovering value, for if the search were about nothing more than the act of choosing, where that which is chosen is not chosen for our estimation of its goodness, society would not need to be structured so as to facilitate an open-ended search for the good life. One could as easily (or more easily) engineer society so that a suitably expansive but

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26. For example, communitarians challenge the liberal conception of the self (as capable of stepping back from values, beliefs and ends) by arguing that such a conception of the self is both one not accessed through self-awareness, and one inconsistent with the notion of the embedded self, that notion best supported by reason and experience. Kymlicka responds to this challenge by arguing that the self need not be able to actually remove itself from values, beliefs and ends, but just be capable of reflecting on these, such that it can then choose to modify, or even deny, these if deemed unreasonable [*Liberalism, Community and Culture, supra* note 8, at 15-17]. This ignores, however, the argument Sandel lays out in the first section of his text, that the concept of the autonomous self employed by the liberal (for example, the "thin" concept used by Rawls) is still subject to the charge that it is Kantian in that it posits a self which must be in some deeply meaningful sense be "free" [*Liberalism and the Limits of Justice, supra* note 11 at 2-7 and 47-65]. One will look in vain in Kymlicka's work for a defense of the sort of self-reflective and *essentially free* being he posits as the self. While this may reflect Kymlicka's attachment to a Millian form of liberalism, as Sandel notes, it ignores the need to ground liberalism's claim to neutrality in a deontological ethics because,

> [o]n the full deontological view, the primacy of justice describes not only a moral priority but also a privileged form of justification; the right is prior to the good not only in that its claims take precedence, but also in that its principles are independently derived. This means that, unlike other practical injunctions, principles of justice are justified in a way that does not depend on any particular vision of the good.

Liberalism and the Limits of Justice, ibid. at 2.

finite number of options for ways of living were available (where what these options were would be unimportant), so that individuals would have the opportunity to choose how they might live. Complaints about the lack of "real" options would not make sense, as there would be no sense to the notion of better or worse ways of living, and so no sense to the notion that individuals were not being offered real choice. An individual who claimed she wanted the opportunity to do something beyond the choices offered would be asked what value she saw in this: did she think there was some value in the opportunities she wished to have open? To have open "real" opportunities, to have "real" choice, implies that opportunities are being offered which would be *reasonably* preferred over others, which are likely *better* for at least some individuals.

While liberal theorists acknowledge the need to posit an autonomous self searching for things with value in the world, they have trouble (a) providing a non-transcendental notion of the self up to the task of explaining why the self is the source of value and (b) resolving the tension between the concept of the autonomous self and the need to locate a source for motivation sufficient to drive it towards the project of searching for good ways of living in the world. This tension is exacerbated by the link between liberal theory and the liberal project. Liberal theory is meant to uphold the liberal project of social engineering, of constructing society so as to maximize freedoms necessary to our individual searches for good ways of living. While the liberal theorist wants to tie the autonomous self down to the search for good ways of living, the engineering project places minimal limits on what the individual may elect to pursue,[27] as placing external limits on freedom would be to disrespect the individual. Liberal avoidance of arbitrariness and relativism boils down, then, to a *wish*, a hope that individuals will use their reasoning capacities to see the good in certain ways of living. As the basic blueprint for society is the creation of a context of choice, control over individual choice must be avoided. With minimal external constraints on how each individual may choose to live his or her own life, the door is open to irresponsible action. Liberal theorists would seem, however, to accept this outcome, as the price society must pay to respect the individual.

This overview of liberal theory concludes with a brief look into how liberalism plays out into the liberal project hinted at above. It is in this movement from theory to practice that the law plays a crucial role, as theories about the right and the good, and about the self, the community and state come together into a vision of how the law aids in the construction of the liberal state.

Law and the Liberal Project

Liberal theory rests on a vision of the autonomous self engaged in the project of searching for the good way to live, for otherwise liberal theory invites relativism and arbitrariness and its project fails to make sense. Liberal theory grounded in

27. As individuals will inevitably pursue projects which conflict with the projects of others, some principle of "harm" regulating individual action will be necessary.

principles about human nature leads to a vision of the role of the state in meeting our "essential interests." The state must recognize the freedoms necessary for our moral enterprise, ensuring that we are all free to constantly re-evaluate our beliefs and values, free to cast aside beliefs and values we find wanting, and free to remake ourselves in light of new beliefs and values we now find personally meaningful. In the interests of discovering which values and beliefs might be questionable, and which valuable, the state should ensure that each is free to espouse her views on the matter, so we can all learn from the ensuing dialogue on the nature of the good life. We should all be free, as well, from unwanted attempts to coerce us into believing or valuing certain ends or projects—others may attempt to educate us, but ultimately we must be free to make up our own minds.[28]

The law functions to ensure that these freedoms are respected and protected, that each individual is recognized as a locus of meaning, worthy of equal respect and protection in the pursuit of the good life. For those individuals who unreasonably interfere with others in their pursuit of the good life, the law must step in to provide redress (and perhaps to attempt to deter such behavior). In cases in which several distinct legitimate efforts at pursuing projects deemed valuable and meaningful contest over resources required to advance these pursuits, the law may be called upon to weigh the individual interests, allocating resources between the contestants as fairly as can be accomplished.[29] This balancing may not be simply aggregative, as the interests may be deemed to hold varying degrees of import.[30]

This illustrates how the law may act as an institution to promote particular values.[31] The values are those "at the bottom," the essential interests we all have in living the good life and so on. More particularized values are promoted not through particular legal enactments, but through the law maintaining a social structure which facilitates the pursuit of these particularized interests by individuals. By and large, liberal values and principles animate the law by providing the theoretical underpinning guiding its development and giving it meaning and purpose.

Inevitably there will be problems in implementing a liberalized legal structure in a democratic context. While essential interests and fundamental

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28. The process of education can be a troublesome matter for liberal theorists. They would likely prefer moral education be a matter of choice, and be restricted in application to mature and rational individuals, those not easily susceptible to coercion or subtle manipulation. The problem of education is explored in a later section.
29. In a liberal democracy in the first instance this would be a task of the state. The law may be called in to resolve disputes over this allocation.
30. In "Can Collective and Individual Rights Coexist?" (1998) 22 Melbourne University L. Rev. 310 [hereinafter "Collective and Individual Rights"], Leighton McDonald addresses concerns over the interaction of collective and individual rights, as some argue that collective rights may override or undermine individual rights. McDonald notes, however, that between rights of any sort there will be conflicts, and these are resolved by considering the intrinsic worth or value of the interests the rights are intended to protect.
31. It must be born in mind that a divide of unknown dimensions separates law as an attempt to crystallize liberal theory in practice and liberal theory itself.

principles can guide the design of the law, there will be difficulties in accommodating all the interests society may find worthy of protection. For example, society may find it worthwhile to afford protection to minority populations, to allow them to flourish culturally and socially. A legal system animated by liberal theory may struggle, however, to find a coherent and plausible basis on which to afford protection to the interests of *collections* of individuals, especially when these may conflict with both the interests of individuals outside the collective and the interests of individuals within the collective.[32]

Two fundamental tenets of liberalism are respect for the autonomy of the individual and the principle of equality. Unlike less sophisticated forms of utilitarianism, which may be willing to authorize the sacrifice of the well-being of a few to further the interests of the many, liberal theory rests on deep respect for the individual. The individual is conceptualized as the locus of moral worth, a being in whom value inheres, a fundamental source of value and meaning in lives lived.[33] To sacrifice an individual in the name of some abstract notion as "the greater good" is seen as misguided. Furthermore, each individual demands respect simply by virtue of being an individual moral agent, which requires that each be accorded equal stature. Liberal theory cannot countenance, then, differential valuing between individuals, such that one (or a few) may be sacrificed for the good of the many, or such that the interests of the many may be sacrificed for the few.[34]

Imagine, for example, measures to protect a minority cultural community from the disadvantage inherent in their immersion in larger political communities. One measure might be to introduce citizenship and voting rights in the minority community in such a way as to maintain local community control reposed in the hands of the cultural group.[35] Other local people not members of the cultural community would be restricted from full membership in the local governance structures, and to some degree prevented from engaging fully in local political power. How could liberal theory, manifest in the law, endorse such measures?

Would this not be to sacrifice the rights of the non-members, as individuals, to the interests of a community? Is this not to disrespect the individual in the interests of a collective? Would this not introduce an unreasonable measure of inequality into society? What if, further, the local cultural community were to

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32. "Collective and Individual Rights", *supra* note 30.
33. To speak of the moral agent as the source of value and meaning must be taken to mean, again, that while the individual searches for better ways to live (and does not create value in itself), it is in freely choosing good ways of living that value in living is generated.
34. Interests may be differentially valued, such that one person's interest in free expression may be weighed more heavily than another's interest in preventing picketing outside her store, but liberalism will not allow that the store-owner herself be treated as worth less than the picketer.
35. Such measures could be achieved through simple local governance, if the local population were sufficiently of the minority cultural group, or by restricting citizenship and voting rights in relation to certain powers and institutions to members of the minority cultural group, if there are large numbers of non-members in the local population. As the latter presents clearer problems for liberalism, we will focus on these sorts of situations and measures.

decide to regulate its local education regime, forcing monolingual education up to the high school level in the language of this cultural community? As much as this might anger local residents who are non-members of the cultural community, would this not also limit the possibilities of choice for members of the community who might question the value of living in the greater political community with children whose first tongue would not be that of dominant society?

Liberal theorists can approach these sorts of problems in several ways. First, they may deny that there are such collective rights—rights which the law would have been enjoined to protect. Absent such rights, minority cultures would have to find other means to protect these sorts of interests. Second, liberal theorists may argue that more sophisticated and nuanced articulations of liberal theory support the existence of collective rights of this nature. The problem then would be merely one of coordination, working out how collective and individual rights can best be mutually accommodated in a multi-cultural society. Third, liberal theorists may acknowledge that from within their vision of the right and the good there are no means by which to support the notion of such state-sanctioned collective rights, but agree that a pluralist foundation for the law may acknowledge the legitimacy of such rights. That is, society may be seen as capable of supporting a legal regime built on a pluralist moral foundation, with some mechanism for resolving disputes that might arise between competing moral visions of the good and the right. As we turn to how Aboriginal peoples' relationship to the law has been conceptualized and institutionalized we will have an opportunity to see which of these responses the domestic legal system has embraced.

III ABORIGINAL COMMUNITIES AND THE LAW

The Constitutionalization of Aboriginal Rights: Resource Rights

After the constitutionalization of Aboriginal and treaty rights in 1982, the law's relationship to Canada's Aboriginal peoples went through a transformation.[36] Aboriginal and treaty rights that had not been extinguished prior to 1982 came to be "recognized and affirmed" in the Constitution. Over the past 20 years

36. Section 35(1) of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11. states that:

> The existing Aboriginal and Treaty rights of Canada's Aboriginal Peoples are hereby recognized and affirmed.

considerable jurisprudence has built up over the definition of, and protection accorded to, such rights.[37]

Aboriginal rights are acknowledged to be "rights," but categorized as unique, of a nature that they "cannot ... be defined on the basis of the philosophical precepts of the liberal enlightenment."[38] For example, they are not rights held in virtue of the holder being a rational agent, deserving of respect, rights universal in their application to individual humans. Aboriginal rights are firmly grounded as *Aboriginal* rights, meant to provide protection for the *"Aboriginality"* of Aboriginal communities,[39] those elements that predate the arrival of Europeans and the influence of their culture.

Much of the litigation over Aboriginal and treaty rights has involved traditional practices such as hunting and fishing, as Aboriginal peoples have challenged government regulation of activities claimed to be integral to Aboriginal culture. The test for defining what counts as an Aboriginal right focuses on the notion of elements of culture, and Aboriginal peoples have to demonstrate that the activity they wish to protect was, before European contact, an integral part of their distinctive culture, a practice that goes to the heart of their cultural identity.[40]

With these sorts of claimed rights, the tension between collective rights and individual interests is not readily apparent. First, the right itself, while described as collective, is individualizable—while the right is held by communities, it is exercised by individual members of the community.[41] Such rights can be contrasted to other collective rights, such as language rights, held by the group

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37. *R.* v. *Sparrow*, [1990] 1 S.C.R. 1075 [hereinafter *Sparrow*], explored the meaning of the expressions "existing" and "recognized and affirmed," and set out a test for determining when legislative infringement of Aboriginal rights would be justifiable. *R.* v. *Van der Peet*, [1996] 2 S.C.R. 507 [hereinafter *Van der Peet*], set out tests for defining and establishing Aboriginal rights, and established a framework for understanding the nature of Aboriginal and treaty rights based on the notion that the purpose of section 35 was to facilitate the reconciliation of the prior presence of Aboriginal peoples to the sovereignty of the Crown. *R.* v. *Badger*, [1996] 1 S.C.R. 771 [hereinafter *Badger*], held that the *Sparrow* test for legislative infringement could be applied to treaty rights, while *R.* v. *Adams*, [1996] 3 S.C.R. 101 [hereinafter *Adams*], established the nature of the relationship between Aboriginal rights and Aboriginal title. Aboriginal title was defined in *Delgamuukw* v. *British Columbia*, [1997] 3 S.C.R. 1010 [hereinafter *Delgamuukw*].
38. *Van der Peet, ibid*. at para. 19.
39. *Ibid.* at paras. 19-20.
40. *Ibid.* at paras. 44-74.
41. In "Collective and Individual Rights", *supra* note 30, McDonald argues that hunting and fishing rights are collective in that they are not individualizable. To make this claim, however, he conceptualizes such rights as integrally tied to the culture of the people exercising them, such that the very meaning of the practice is derived from the cultural aspect of practice. While this conceptualization would make such rights truly "collective," it is not a conceptualization under which the Supreme Court of Canada operates. Key to such an articulation of collective rights is the significance of the practice to the people for whom it is culturally significant—the Supreme Court, however, does not define an Aboriginal right in terms of the significance of the practice to the people in question. This was an approach advocated in dissent in *Van der Peet, ibid.*, but not adopted by the Court. The Court only examines the import of the activity to the people when determining the existence of the right, not when it turns to defining the nature of the right.

and only exercisable collectively.[42] Second, as the Supreme Court has defined Aboriginal rights, the right to hunt or fish attaches to an *activity*, not the autonomy of the community whose culture grounds the activity, and exercising the right does not directly threaten the ability of non-Aboriginals to exercise their ability to choose to engage in projects they deem valuable. If the right were to centre on the ability of the collective to decide how the resource in question were to be used, it might manifest into management regimes unreasonably interfering with the pursuit of the good life by other individuals (or collections of individuals) in society.

An Aboriginal right of this nature, what we can term an Aboriginal resource right, is essentially corrective in nature, directed towards what the law has acknowledged to be the disadvantageous position of Aboriginal peoples. Over the past few centuries the Crown gradually assumed control over the allocation and management of resources. As Aboriginal peoples had previously enjoyed the use and benefit of resources in Canada, in doing so, the Crown placed itself in a fiduciary position vis-à-vis Aboriginal peoples, a fiduciary relationship recognized in post-Constitutionalization jurisprudence.[43] In this fiduciary position, the Crown falls under a general duty to act in the best interests of those whose interests have been taken up. Insofar as the Crown has not done so, it is now enjoined to put Aboriginal peoples into a position which respects the fact that they existed in Canada prior to the arrival of Europeans. In continuing to control the allocation and management of resources, the Crown must continue to act in the best interests of Aboriginal peoples, who have some legal claim to the use of these resources.

Only if the claimed Aboriginal right makes excessive demands on the resources being used could tension arise between these "collective rights" and the rights of others. In such situations one might argue, from a liberal vantage-point, that the protection of these minority rights would unfairly interfere with the ability of others in the larger society to attempt to pursue their projects. In such circumstances, as when, for example, the right is found to be exclusive in nature, thereby potentially limiting others in their enjoyment of the use of the resource, the Supreme Court has found that the Crown may limit the collective right in the interest of protecting the rights of others with valid claims to the resource in question.[44]

Such situations are likely to be quite rare. It is not just that there are few situations in which Aboriginal peoples could demonstrate that, prior to contact with Europeans, they engaged in practices integral to their cultural identity which today could be characterized in such a way as to potentially exclude non-Aboriginals from freely pursuing their interests in the resources being used. In

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42. Denise Reaume, "Official-Language Rights: Intrinsic Value and the Protection of Difference" in W. Kymlicka and W. Norman, eds., *Citizenship in Diverse Societies* (Oxford: Oxford University Press, 2000) 245.
43. *Guerin* v. *The Queen*, [1984] 2 S.C.R. 335; *Sparrow, supra* note 37; *Van der Peet, supra* note 37; *R.* v. *Gladstone*, [1996] 2 S.C.R. 723 [hereinafter *Gladstone*]; and *Delgamuukw, supra* note 37.
44. *Gladstone, ibid.* at paras. 62-64.

relation to Aboriginal resource rights what primarily minimizes tension between collective Aboriginal rights and the individualized rights of non-Aboriginals is the remarkably thin conception of culture the Supreme Court has deployed. While the Court has spoken as if it were attempting to protect "Aboriginality"—the core of Aboriginal identity—by defining culture in terms of pre-contact activities and customs the law has effectively isolated culture from identity.

Culture, Identity and Governance Rights

The Supreme Court has decided that at particular moments in time, moments just prior to contact with Europeans,[45] the many varied communities of people in Canada were engaged in certain activities which the Court claims "define" the nature of these "traditional" peoples. To protect this identity, the Court maintains, the continued practice of these activities must be protected. This is far removed, however, from considerations about the identities of the peoples in question.[46]

There are two general problems with this approach. First, distancing *contemporary* Aboriginal peoples from their "true" identities, fixed at a distant point in the past, removes what the Court fixes as the "cultures" of Aboriginal peoples from their contemporary identities. Second, and more importantly, even were we to accept that the "true" culture of an Aboriginal people is found at that point in time moments before contact with Europeans, Aboriginal peoples engaged in the sorts of activities they did, in the ways they did, for *reasons*. These reasons, and not the activities, would have formed the core of their cultural identities (and *ex hypothesi*, would form the core of their "traditional" identities today). An Aboriginal people—as with any cultural community— should be defined not on the basis of their having hunted at night with torches, or fished with particular sorts of nets and hooked spears, but on the basis that they carried out these activities at certain times and in certain ways because they believed and felt certain things. If the law were interested in protecting Aboriginality, it would be interested in aiding Aboriginal people in protecting their ability to continue to believe and feel as they have for generations, all the while recognizing that it is unacceptable to simply equate contemporary identities with past cultural practices.

As it is, Aboriginal rights are tied to a shadow of cultural identity, and then "protected" in such a way as to minimize friction between these rights and the

45. There are many such moments, as peoples across Canada first encountered Europeans at different times.

46. R. Barsh and J. Youngblood Henderson, "The Supreme Court's *Van der Peet* trilogy: Naive Imperialism and Ropes of Sand" (1997) 42 McGill L.J. 993; John Borrows, "Frozen Rights in Canada: Constitutional Interpretation and the Trickster" (1998) 22 Am. Indian L. Rev. 37; John Borrows and Leonard Rotman, "The Sui Generis Nature of Aboriginal Rights: Does It Make a Difference?" (1997) 36 Alta. L. Rev. 9.

interests of non-Aboriginal individuals in society. Or at least that is how things have developed, by and large, to this point. The language of the test for Aboriginal rights is fairly general and there is certainly room to include in the expressions "activities," "practices" and "customs," elements of Aboriginal cultures that do go more directly to their core identities—those forms of identity which underlie transformation over time. For example, Aboriginal peoples would have had at the time of contact with Europeans customs related to *control* of their community membership. They would have had ways in which they defined themselves, such that they could identify members and non-members of their communities.

Today these sorts of customs could translate into claims for Aboriginal rights to control over citizenship and citizenship's attendant rights. These would be included in a potentially broad category of Aboriginal rights, "Aboriginal governance rights." While the judiciary has yet to deal extensively with claims to such rights, they have been translated into rights contained in modern treaties, the product of prolonged and exhausting negotiations between the Crown and a few Aboriginal peoples.[47]

The potential tension between Aboriginal governance rights and the rights of individuals should be more readily apparent. The hypothetical scenario introduced earlier was built around the possibility of just such rights, as we noted that a minority community could use power over citizenship and voting to restrict the ability of both non-community and community members to pursue their individual interests. Devolving a measure of political control to a local cultural community could lead to local "non-liberal" regimes, local societies established so as to prioritize the interests of the community over those of resident individuals, both members and non-members of the community alike. It is not just that in particular instances the interests of the community could be held above those of the individual,[48] but that society might be structured so as to promote a societal good and not the rights of individuals.

While control over citizenship is one element necessary for the creation of potentially non-liberal regimes, the membership of the community must also have the power to make decisions about such matters as resource allocation, education, service provision and the like. Again, the judiciary has yet to deal extensively with rights to the control of such matters, which would fall under the umbrella of Aboriginal governance rights.

However, the Supreme Court has begun to deal with one form of Aboriginal right which will clearly present difficulties for liberal theory. Aboriginal title lies

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47. See, for example, chapter 2 of Canada, British Columbia and Nisga'a Nation, *Nisga'a Final Agreement* (Victoria: Ministry of Aboriginal Affairs, 1998), online: <http://www.gov.bc.ca/tno /negotiation/nisgaa/docs/GENERALPROVISIONS.htm>. It would be more accurate to say "something like such rights" has been translated into powers contained in this agreement, as a citizenship regime established under this agreement is subject to the *Charter of Rights and Freedoms*. This goes to illustrate the thesis developed in the next section of this paper.

48. This can be so in liberal societies, as when limits are placed on the exercise of some person's individual rights in the interests of, for example, the safety of others, as when one is prohibited from yelling "fire" in a crowded theatre.

on one end of the spectrum of Aboriginal rights.[49] At one end are those rights which are not connected in any way to land—for example, the exercise of a right to speak an Aboriginal language is in no way linked to any considerations about land. In the middle of the spectrum are those Aboriginal rights which must be carried out over some tract of land, but which are not tied to any particular piece of land. For example, an Aboriginal people may have a right to hunt over a large territory, but not have the right to hunt over any particular area within this territory, and may have no ownership claims to much of the lands over which they can hunt. Finally, at the far end of this spectrum rests Aboriginal title, a right to land, a right to the exclusive use and occupation of lands traditionally held by Aboriginal peoples.

The protection of Aboriginal title could interfere with the ability of non-Aboriginals to use title-lands to pursue their projects. Furthermore, Aboriginal title includes the right to decide the uses to which title-lands are put, a right exercised by the community.[50] Aboriginal title-holders have, then, the right to determine uses to which their lands are put, a power of self-governance which could lead to decisions adversely affecting the ability of Aboriginal and non-Aboriginal individuals alike to pursue projects they deem valuable and worthwhile. Furthermore, it is not just that these decisions could limit the ability of some particular individuals to pursue some individual projects—the Aboriginal title-holder, the Aboriginal community, may make decisions which put in place a *structure* restricting individual choice in general. Aboriginal communities could conceivably use this right to create non-liberal regimes.

Before we explore this possibility (under the general concern that Aboriginal rights might contain governance rights which could conflict with the liberal program), let us flesh out a remark made earlier about the power of Canadian governments to limit Aboriginal collective rights when they threaten the interests others may hold, wrapping up this overview of Aboriginal rights and title with a few words on the power of the government to infringe these rights.

Some expected that the constitutionalization of Aboriginal rights would significantly strengthen protection for Aboriginal rights such that legislative infringement would become difficult, if not impossible, to justify.[51] In *Sparrow*, however, the Supreme Court announced that Aboriginal rights would be subject to legislative interference and began to devise a test for justifying infringement.[52] Refined in recent cases,[53] one can summarize the situation by stating that when the exercise of an Aboriginal right threatens the continued use of a resource by others with deemed-legitimate interests, the legislature may bring concerns about economic development and regional fairness to the fore,[54] and institute legislation which promotes these objectives (so long as the Crown ensures that it meets its

49. *Adams, supra* note 37 at para. 25; *Delgamuukw, supra* note 37 at paras. 137-138.
50. *Delgamuukw, ibid.* at para. 168.
51. B. Slattery, "The Constitutional Guarantee of Aboriginal and Treaty Rights" (1983) 8 Queen's L.J. 232.
52. *Sparrow, supra* note 37 at paras. 62-83.
53. Most significantly, in *Gladstone, supra* note 43 at paras. 61-64.
54. *Ibid*. at para. 75.

fiduciary obligations, "respecting" the existence of the Aboriginal rights[55]). Conversely, when exercise of the right makes limited demands on the resource in question, the legislature may only control the right in the interests of such matters as conservation and safety.

When the Aboriginal right at issue is Aboriginal title, the power of Canadian governments to justifiably infringe is at its maximum, as title is exclusive in nature, potentially interfering with other deemed-legitimate interests in the lands in question. Legislatures may, then, act to limit this title in the furtherance of such objectives as economic development and regional fairness, acting to promote, for example, hydroelectric projects and the "settlement of foreign populations."[56] In so acting, the Crown must meet its fiduciary obligations to the title-holders, which the Supreme Court has spelled out as requiring that the Crown, depending on the fact situation and the nature of the title-interest being disrupted, (a) involve the Aboriginal community in the infringing activity, (b) consult with the title-holders to determine their interests (and perhaps integrate these interests into the contemplated use of the lands), and (c) compensate if an economic aspect of title is unavoidably disrupted.[57]

With this overview of the process by which the Crown may justifiably infringe Aboriginal and treaty rights (especially those which may vigorously interact with the interests of non-Aboriginals), the ground is laid for an investigation into how the law translates liberal theory into an approach to both defining the problem around, and setting out the solution to, Aboriginal interests in Canada.

Liberalism Defines the Problem and Sets out the Solution

The emerging nature of Aboriginal rights illustrates the thesis that liberal theory underlies the law. We can pull back a step to note the law does not attempt to address centuries of colonial rule or attempt to address the question of the justification of the exercise of authority over Aboriginal peoples.[58] These are questions to which the law is not only reluctant to turn, but with which it is said to be ill-equipped to deal.[59] Often the reluctance is said to be a matter of competence, as such matters are said to be essentially political, not judicable.[60]

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55. *Ibid*. at paras. 62-63.
56. *Delgamuukw, supra* note 37 at para. 165.
57. *Ibid.* at paras. 167-169.
58. "Sovereignty's Alchemy"*, supra* note 1; "Interpretative Monopolies"*, supra* note 1, Kent McNeil, "Envisaging Constitutional Space for Aboriginal Governments" (1993) 19 Queen's L.J. 95, reprinted in K. McNeil, *Emerging Justice?: Essays on Indigenous Rights in Canada and Australia* (Saskatoon: Native Law Centre, 2001) 184; Patrick Macklem, "First Nations Self-Government and the Borders of the Canadian Legal Imagination" (1991) 36 McGill L.J. 382.
59. The Court attempts to sidestep such issues with these sorts of claims: see, for example, *Calder* v. *British Columbia (A.G.)*, [1973] S.C.R. 313 [hereinafter *Calder*].
60. Courts may take notice, for example, of the Act of State doctrine, which is a procedural bar to any domestic action challenging the manner by which the sovereign power acquired territory or jurisdiction. This doctrine was considered, though found inapplicable on the facts in *Calder, ibid*.

Why the law refuses to consider these much larger issues is not essential here.[61] The key point is that the law sets itself out as capable of dealing with certain sorts of matters *within* society, the assumption being that larger issues about the legitimacy of the state and its history of dealings with Aboriginal peoples are not its province. What the law turns to, then, are essentially problems it can define in liberal terms. It sets itself the project of finding the appropriate accommodation for Aboriginal rights within society.

This is an essentially liberal project in two respects. First, the problem is conceptualized as one about interests, interests which may be such as to ground rights if they are recognized as legitimately imposing obligations on others.[62] Aboriginal people are thought of as having legitimate interests in (a) resources and, perhaps, (b) a degree of control over these resources and certain aspects of their lives. Second, the fact that Aboriginal peoples have valid claims to resources and control is understood to require no more than that an appropriate accommodation for these claims be forthcoming. This was evident in our discussion of justifiable legislative infringement of Aboriginal rights.

The law is conceptualized as essentially an ordering system (and is built around this conception); its primary task is to ensure the fair allocation of resources to parties with valid interests, so they may then pursue projects involving these interests, thereby facilitating the self-creation of their lives. As much as possible the law is not employed to dictate what sorts of projects parties might consider, as that would interfere with their autonomy, their essential nature as self-creating beings.[63] Similarly the law, as much as possible, is not used to promote any particular project(s) in which individual parties may engage. The law acts as one institution in a liberal society, a society whose structure is meant to facilitate the individual pursuit of what each deems to be worthy projects.

We have seen that the general conceptualization of Aboriginal rights, as collective in nature, fits uneasily into this vision of the law. We have also seen that the law has reacted in such a way as to minimize the tension between collective Aboriginal rights and individual rights. Over the past twenty years it has (a) generally restricted the scope of Aboriginal rights to activities, thereby minimizing opportunities for direct challenges to non-Aboriginals as they go about using resources in furthering their projects, (b) protected Aboriginal resource rights along liberal lines, thereby maintaining the liberal structure of society, (c) balanced what little protection it offered with the power of the legislature to interfere with these rights, promoting the distribution of resources

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61. This is not to say, of course, that these are not the most important questions facing Canada as a constitutional democracy, as they go to the heart of its ability to justify its existence and internal authority. See, on the question of authority, "Authority of Law"*, supra* note 5.
62. This is to work within the interest theory approach to understanding rights, which seems appropriate, given the treatment of rights in such cases as *Gladstone, supra* note 43. See Leon Trakman and Sean Gatien, *Rights and Responsibilities* (Toronto: University of Toronto Press, 1999) [hereinafter *Rights and Responsibilities*] for an assessment of this approach to rights within a liberal framework and an argument for an alternative approach to rights focused on responsibilities.
63. The law may restrict the pursuit of projects when these unjustifiably interfere with the well-being of other individuals. Making such decisions may require resolving conflicts between rights.

from potentially non-liberal Aboriginal communities to non-Aboriginals, all in the name of treating legitimate interests equally and (d) avoided those claimed rights, Aboriginal governance rights, which might seriously challenge the very liberal structure of society.[64] In conceptualizing the problem as one about the fair allocation of resources, so that parties may get on with the business of pursuing value-generating projects, the law has attempted to envelop the situation in liberal garb.

This begins to explain the source of the perception that the law acts to hinder Aboriginal peoples' aspirations. To argue, though, that this points to something problematic, that this perception indicates a problem with the structuring of Canadian society, requires much more. Some might argue, for example, that justice requires no more than that Aboriginal rights be protected in the manner which the courts have developed, as this allows Aboriginal peoples to continue to live as their ancestors did,[65] while assisting in the liberalization of their societies, thereby creating conditions necessary for the protection of the essential interest each Aboriginal person has in living a good life. What grounds the perception that the law is both alien and oppressive? Is it simply misguided, based in an unwillingness to accept that the law is working towards a fair accommodation of Aboriginal interests in Canadian society? What could be problematic about the project of liberalization, since it offers Aboriginal people an opportunity to "modernize" their societies, creating regimes which provide individuals the freedom to both re-evaluate their projects and beliefs, and to reconstitute themselves and their lives accordingly? Is this not the only way by which individuals can work towards bettering their lives?

IV LAW, THEORY AND ABORIGINAL PEOPLES

The Liberalization of Aboriginal Societies

The perception of oppression is grounded in the liberalization of Aboriginal society. The problem lies with both liberal theory itself, as a theory about how people *ought* to structure their communities and societies, and its application to Aboriginal peoples. It is the liberalization of Aboriginal societies through the application to their interests of a liberal legal regime that generates problems, and hence the perception. These problems can begin to be understood from within liberal theory, though full appreciation comes from acknowledgment of cultural differences ignored by liberalism. Consider, for example, the question of autonomy. Liberalizing Aboriginal societies through the deployment of a legal regime which translates Aboriginal claims into rights to be ordered in society

64. It should be noted as well that the judiciary has consistently and forcefully called for negotiations as the solution to the problem of working out the place of Aboriginal peoples in Canada. See *Delgamuukw, supra* note 37 at para. 186; and *R.* v. *Marshall* [1999] 3 S.C.R. 533 [Motion for Rehearing] at para. 22.

65. The best that can be accomplished, given the many demands on resources in a modern capitalist state.

seems to come rather close to the imposition of belief-structures on Aboriginal peoples.[66] What of the liberal injunction against imposing on individuals theories about how to live their lives? Where do we find in the project of liberalization respect for the autonomy of Aboriginal peoples?

Problems around cultural differences are more difficult to articulate. It is not just that Aboriginal peoples live within belief-systems that prioritize the community over individuals, though when understood correctly that is so.[67] It is that fundamental principles underlying liberalism are alien to the belief-structures of Aboriginal peoples. Emerging from a combination of wisdom gleaned from mythological time and thousands of years spent reflecting on the best ways to live are visions of ways of life which are considered completely adequate to the task at hand. Reasons liberal theorists advance for structuring society around the notion of a "context of choice"[68] are absent in Aboriginal communities. While some experimentation in living is both inevitable and worthwhile, within Aboriginal societies the broad strokes of how to live the good life have been worked out. Liberalizing Aboriginal societies is, then, both inappropriate and threatening. If Aboriginal societies were naturally structured according to theories of the right and good grounded in the same reasons and considerations grounding fundamental liberal principles, laying down over these societies a legal liberal regime would not be an imposition, for it would coincide with the nature of Aboriginal societies. It would not act to displace their sense of who they are, their power of self-definition. This is something liberal theorists should be able to acknowledge, but only if they can understand and accept that other societies may be grounded in belief-systems completely distinct from their world-views.

We will consider these two problems in turn, though as we explore the suggestion that the liberalization of Aboriginal societies disrespects the autonomy of Aboriginal peoples we will inevitably slide into the second objection. The gulf separating the cultures of Aboriginal peoples from the "culture" of liberalism feeds into the disrespect propagated by liberalism, disrespect that can be couched in the language of oppression and denial of autonomy.

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66. See, for example, Leon Trakman, "Transforming Liberal Rights: Taking Account of Native Cultures" (1997) 42 Buffalo L. Rev. 189, reworked into Chapter 5 of *Rights and Responsibilities, supra* note 62.
67. On the dangers of unreflectively using concepts grounded in the Western tradition to understand Aboriginal institutions and structures, see *Peace, Power, Righteousness, supra* note 1; "Interpretative Monopolies"*, supra* note 1; and *Journeying Forward*, *supra* note 1.
68. *Liberalism, Community and Culture, supra* note 8 at 10-13 and 162-181.

Concerns About Autonomy

Disrespecting the Autonomy of Aboriginal Communities

Can it make any difference that we are considering the restructuring of societies and not attempts to force any particular individual to live his or her life in some particular way? Something like this is offered by Will Kymlicka as a solution to the problem of apparent imposition in both *Liberalism, Community and Culture*[69] and *Multicultural Citizenship*.[70]

In constructing a liberal defense of the protection of culture Kymlicka has to demonstrate that cultures have some value. While one could try to locate a measure of intrinsic value in culture, Kymlicka dismisses that project, for cultures are simply not moral beings, those entities which have value inhere in them—only individuals are capable of possessing intrinsic value.[71] Cultures, then, must be argued to have some instrumental value, some value located in their role in providing value to individuals. Kymlicka finds such value in the manner by which culture provides the context wherein individual choice can be made. Culture provides both the setting in which individuals make choices and a range of options from which individuals can choose.[72]

Insofar as Aboriginal societies constrain individual liberty, liberalizing Aboriginal societies, Kymlicka argues, does not remove something valuable from the lives of Aboriginal peoples, for any pre-existing non-liberal cultures they might enjoy bear no value whatsoever, either intrinsic or instrumental.[73] Rather, the liberalization of Aboriginal societies is conceived of as the bestowing of a great gift—indeed the greatest gift that could be offered—in that it transforms worthless cultures into worlds in which Aboriginal people, from within, can begin to find meaning and value in their lives.

Of course Kymlicka denies that the liberalization of Aboriginal societies would radically transform the cultural bases upon which Aboriginal peoples structure their lives. He maintains that liberalization only opens up non-liberal societies, allowing individuals within to flourish and grow.[74] The basic cultural markers, however, would remain constant, as language, narrative and group identity would all remain untouched. Certain customs would undoubtedly have to change (customs which unduly limit the ability of individuals to engage in self-transformative quests to examine and, if necessary, recreate their lives), but such changes would not undercut the cultures of Aboriginal peoples, for cultures

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69. *Ibid*.
70. *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Clarendon Press, 1995) [hereinafter *Multicultural Citizenship*]. In this later work Kymlicka seems to find reason to believe in certain circumstances (of systemic disadvantage felt by "national minorities," those peoples not immigrant populations), liberal societies would be acting improperly if they were to go against choices exhibited by these cultures (at 113).
71. *Liberalism, Community and Culture, supra* note 8 at 162.
72. *Ibid*. at 165-171.
73. *Ibid*. at 169-171.
74. *Ibid*. at 163-164, 172.

routinely and consistently alter incrementally over time, with no suggestion that such incremental change impacts on the continuity of these cultures.[75]

Does it matter if Aboriginal peoples think that something valuable is lost in the process of liberalizing their societies? Can the liberal apologist maintain that any perception of loss is misplaced, that nothing of value is being eliminated and that the process of liberalization is for the best for Aboriginal societies, regardless of how these societies might view the matter? Can the liberal apologist continue to maintain this position if liberal transformation seems to unhinge Aboriginal societies, leaving them bereft of their former cultural foundations, mere vessels for lost souls? These questions will be reintroduced when we turn to the issue of the differential between liberal theory and the underpinnings of Aboriginal societies.

For the moment let us consider concerns of a general nature with the universal claim that no culture has any inherent value. This claim has fostered considerable discussion over the last few decades—being at the heart, for example, of the debate between liberals and communitarians. Communitarians have argued, in a wide variety of ways,[76] that culture plays a vital role in forming the individual and that liberalism's apparent privileging of the individual is mistaken.[77] Liberals have responded of late with strategies akin to Kymlicka's, arguing that cultures do have an important role to play in forming the individual, but restricting this role to an instrumental position.[78] The locus of moral value remains the individual moral agent. Kymlicka's approach makes much not only of the instrumental value of culture, but of a corollary, the interchangeability of culture. Only the "super-culture," the liberal culture which may encompass many sub-cultures, has any static value (though again, the value lies not in the liberal structure itself, but in its ability to foster personal self-examination and growth). All other cultures only have value insofar as they are currently vested with value by moral agents.

But can the liberal theorist deny the possibility that a non-liberal cultural community may be structured such that its community members live lives which are generally good? Can the liberal theorist argue that the only possible way to lead a good life is from within liberalized societies? Can the liberal theorist argue that living in a liberal society is a necessary condition for living a good life, indeed for there being value in one's life? The point is not so much about the chances of living a good life—after all, chances may be greater in liberal societies, though that is at least debatable—but about our purported inability to know what the good life entails, upon which both liberal theory and the liberal

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75. *Ibid.* at 167: Kymlicka provides the example of the "radical transformation" of French-Canadian culture in the 1960's.
76. See, for example, Charles Taylor, "Atomism" in *Philosophy and the Human Sciences: Philosophical Papers,* vol. 2 (Cambridge: Cambridge University Press, 1985); *Liberalism and the Limits of Justice, supra* note 11; Alasdair MacIntyre, *After Virtue*: *A Study in Moral Theory* (London: Duckworth, 1985); and Roberto Unger, *Knowledge and Politics* (New York: Free Press, 1975).
77. Something along the lines of this debate, though particularized, will be engaged when we turn to the nature of Aboriginal societies and their fundamental opposition to certain foundational liberal tenets.
78. See, for example, Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986).

project rest. Given that we do not know the nature of the good life, how can the liberal theorist be convincing when arguing that non-liberal societies cannot be structured so as to generally facilitate the attainment of good modes of living? Is it sufficient to argue that a non-liberal society cannot *know* it promotes forms of living which are good? Would it not be sufficient for a non-liberal society to respond with claims of deep-rooted beliefs in the value of its ways of living, and the deep sense of meaning (and attendant sense of well-being) that living within these ways fosters? What measure of success in living good lives would the liberal theorist employ? If the liberal theorist has a means whereby she can measure the success of any particular mode of living for its "goodness" quotient, such that she can argue convincingly that a non-liberal society is actually not fostering good ways of living, why the need for liberalized societies, for the creation of a context of choice?

We noted earlier several possible liberal responses to this challenge. First, the liberal theorist may argue that our fallible faculties prevent us from erasing all doubt about whether our current values and beliefs about living are mistaken. Absent certainty in this matter we must all live within liberal societies, which facilitate our re-examination of values and beliefs currently held, and the transformation of our beliefs if found wanting. Second, the liberal theorist may argue that a precondition for living a good life is having chosen that way of life, so even if the way of living is "good," it cannot have value unless chosen by the individual in society. The liberal theorist may focus attention on the act of choosing ways of living, arguing that what is important is not just that there are, objectively speaking, good ways of living, but that there are potentially good ways of living, each subjectively determined, which crystallize into good ways of living when freely chosen. That is, one might imagine the liberal theorist arguing that it is the *act of choosing* to live a certain way that essentially vests that mode of living with value (for me). The good way of living is just that way of living I have reasoned to be valuable and currently chosen to follow. Since non-liberal societies (purportedly) deny individuals the ability to choose the ways of life they may wish to adopt, such societies cannot foster good ways of living.

As we noted earlier, however, the latter argument places the liberal enterprise on the thin edge of a sword, for it threatens to empty the concept of the "good life" of any meaning, making the liberal project nonsensical. If what is a good life is deemed to depend too heavily on the act of choosing how to live, even if this is based on my rational assessment of the goodness I perceive in this way of living, all ways of living may come to be seen as potentially good. The only strong constraint on my living a good life would be circumstances, as I might find myself incapable of living a life I would freely choose (I may find myself in prison, for example). Once I had chosen to live a certain way, however, I would have stamped that life with value (to me), until the day I decide it is no longer worth that stamp (the reasons for my so deciding being fairly unimportant, other than that they are "my reasons"), and I move on to another way of living, thinly grounded in reason. Furthermore, if the distinction the liberal wishes to make does not hold, and the good life is dependent too heavily on having been

chosen and not so much on its having been discovered, we might imagine society more efficiently structured so as to provide for a range of options (the content of which is relatively unimportant), so that each could exercise his or her will in choosing. The liberal theorist, however, does not envision individuals going beyond good and evil, self-creating not only their ways of living but the very values upon which they decide their lives are worth living. The liberal theorist desperately wants to maintain the key distinction, to adhere to the notions that there are ways of living which have some measure of inherent goodness, and that there exists a valuational spectrum of ways of living. There may still be a measure of subjectivity, in that this way of life that is good for me may not be as good for another, but that would be the result of differences between the constitution and/or circumstances of me and the other, not the value of the way of life for people like me, situated in my sort of circumstances. As such the liberal project must offer the individual the opportunity to search as far and wide as possible, for a valuable thing—a good way of living—is sought, and we must not place barriers in the way of discovering it.

The liberal theorist can continue to advance the notion that the individual must choose the values and projects which structure his or her life in order for that life to have meaning and value to that individual, arguing perhaps that ways of life chosen are in themselves objects possessed of value, but such that they must be chosen in order for that value to be realized. This, however, will not suffice to buttress the liberal project of constructing society in order to facilitate our individual searching for good ways of living, for a much deeper explication of the link between value in living a way of life and the process of choosing that way must be forthcoming in light of the existence of non-liberal societies in which the members believe they know how to lead good lives. For such societies—in which people believe that if a way of life is *known* to be good, and living through this way is *fulfilling*, then this is sufficient for this way of life to be good—the liberal project is not necessary. If ways of life *known to be good* can be used as guides in the construction of society, if the knowledge about how to lead good lives can be appropriately passed from elders to the young and furthermore, if individuals living in these societies have other opportunities for the exercise of their capacities as rational and free moral agents, would it make any sense to sacrifice the societal good thereby generated in the world so that individuals can pursue individual searches for the good life, searches which are unnecessary? This is a particularly troublesome contention when we consider a society structured around the transmission from elders to the young of knowledge about how to live good lives, transmission which is non-coercive and enlightening, and which merely leads the young to knowledge, which they then freely and independently accept.

We will return to this later, when we explore the cultural differences tied up in this argument, those which underscore the non-liberal evaluations providing the necessary strength. First, we need to consider the possibility that a form of liberal theory could (a) acknowledge that the autonomy of Aboriginal peoples is threatened by the imposition of liberal structures on Aboriginal societies, yet (b)

devise a liberal response. One attempt is by way of developing a theory of group autonomy to explain the nature of the problem which ensues when one culture attempts to impose its cultural choices on another.

The Notion of Group Autonomy

In examining inter-cultural struggles, Denise Reaume takes issue with Kymlicka's liberal defense of culture, arguing that Kymlicka only argues for the protection of *some* culture, culture "in the abstract."[79] His approach provides no protection for the content of any particular culture. This is understandable, given that Kymlicka has an instrumental vision of the value of culture, but Reaume argues this vision conflicts with the claim that culture is valuable in that it acts (partly at least) to form the identity of the individual. Reaume suggests moving away from the claim that "culture is constitutive of identity"[80] (at least as a basis for defending culture) to the notion that any particular culture is the expression of the will of the cultural community, and so demands respect as expressive of group autonomy.

Reaume locates value in culture by claiming that the community is analogous to the individual and arguing that cultural communities make decisions about the values they cherish and wish to promote, decisions which exhibit the group acting as a moral being.[81] As we value the autonomy of individuals and respect their choices, so too must we value the autonomy of the community and respect its choices. In this way, Reaume argues for the protection of particular cultural instantiations as expressive of the autonomy of the cultural community.[82] Once cultural communities are acknowledged to have value because of their ability to make choices, the task of the liberal state is re-imagined, for it must work out some structure wherein both individual and community pursuits of the good life may be promoted. Reaume suggests, then, that this is the first step on the road to developing an appropriate theory of justice between cultures.[83]

There are those who challenge this sort of approach to the protection of culture as inventing metaphysical beings. Dworkin, for example, questions approaches which posit moral beings beyond the human individual.[84] In what sense is there an actual collective being, some piece of furniture in the moral universe capable of forming beliefs and sensing value, of thinking about options

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79. Denise Reaume, "Justice Between Cultures: Autonomy and the Protection of Cultural Affiliation" (1995) 29:1 U.B.C. L. Rev. 117, reprinted in N. Larsen and B. Burtch, eds., *Law in Society: Canadian Readings* (Toronto: Harcourt Brace, 1999) 194 [hereinafter "Justice Between Cultures"].
80. *Ibid*. at 201.
81. *Ibid*. at 204-206.
82. *Ibid*. at 206.
83. *Ibid*. at 210-211.
84. Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Cambridge, Mass.: Harvard University Press, 2000) [hereinafter *Sovereign Virtue*].

and setting out plans, of "experiencing a life" independent of the individuals that make up the collectivity?[85]

There are other concerns more germane to this work.[86] One concern with this approach to the perception that liberalizing Aboriginal society is oppressive is that it is prescriptive, not descriptive. The law does not imagine itself protecting Aboriginal rights because this is required to respect the autonomy of Aboriginal communities. It acts to protect these rights because Aboriginal peoples were "here first," they find themselves in a disadvantageous position, and they need an opportunity to work their way into liberal society in a fair manner. If the law were interested in protecting Aboriginal rights because doing so respected the autonomy of Aboriginal peoples, it would have a more sophisticated view of culture (allowing for the evolution of Aboriginal society past contact with Europeans, so that Aboriginal rights would be grounded in contemporary Aboriginal societies currently exercising their decision-making ability[87]) and it would be working to develop a sophisticated theory of justice between cultures. Its project, however, is to pull Aboriginal peoples into liberal culture, whether they want to be within or not.

Of course, being prescriptive is not a problem with this approach, but with the state of the law. More problematic is the vision of the law were the law to incorporate this approach. As a (purportedly) liberal solution to the perception of oppression, not only would it likely lead to roughly the same level of protection Aboriginal interests currently enjoy, it too is both misguided and oppressive.

Reaume argues for a liberal defense of something like protective walls around minority sub-cultures within a culturally pluralist society. The vision is of Aboriginal communities immersed in liberal society, but protected from cultural interference by protective barriers. The walls, however, are only designed to prevent certain sorts of outside interference and are porous to other intrusions. Why this might be so is perfectly clear—in grounding value in culture in the autonomy of cultural communities, Reaume places communities on par (metaphysically speaking) with individuals. Aboriginal peoples, collectively speaking, would then be treated as moral beings. While this may sound pleasing, the ascription of moral agency in the context of a liberal society would translate into roughly the same sort of protection Aboriginal rights currently enjoy in the

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85. *Ibid.* at 223-227.

86. Besides the difficulty with the metaphysical status of "group-beings," Reaume's approach also runs parallel, in certain respects, with that of C. Larmore in *Patterns of Moral Complexity* (Cambridge: Cambridge University Press, 1987), a confluence which opens Reaume's approach to the sort of challenge to Larmore launched by Kymlicka. To transport Kymlicka's critique of Larmore to this context, grounding cultural rights in respect for group autonomy would not make sense of liberalism's deep attachment to the freedom of individuals to "dissent and convert" and does not provide an explanation for why members would be concerned with such freedoms as that of expression. See *Liberalism, Community and Culture, supra* note 8 at 59-61.

87. The current test for Aboriginal rights discounts claimed rights if they are found to be the product of European influence (as they are not then "Aboriginal"). Grounding Aboriginal rights in the autonomy of the community, however, would allow for contemporary rights with European influences, when the nature of these rights is recognized to be the product of autonomous choices of the community.

law.[88] As moral beings inhabiting a liberal society, Aboriginal communities would see their interests treated in the same way as the interests of individual moral agents in liberal societies, which translates into the protection of some interests and not others, depending on the circumstances and the nature of the interests.[89] While Reaume has yet to see how a theory of inter-cultural justice would fully develop, within a liberal society its broad outlines should be clear enough: the rights of Aboriginal communities would be weighed and balanced against those of both individuals and other communities exhibiting the necessary features of decision-making.

This is really only to note how Reaume's approach attempts to fit itself under liberal theory. How this is a peculiarly dangerous matter to Aboriginal societies is discussed in the next section, when the philosophical underpinnings of liberal theory (as one intellectual stream in the Western tradition) are explored in relation to Aboriginal world-views. At this juncture we can focus on how this approach misplaces concern over group autonomy. Aboriginal peoples hold an interest in having their collective decisions respected, and so one could say they adhere to the notion that group autonomy ought to be accorded value.[90] The autonomous powers Aboriginal societies would hold most dear, however, are not powers to make decisions about how to live their collective lives (though obviously these are enormously important powers that should demand respect), but rather powers necessary to maintain and strengthen their identities. Insofar as decisions about how to live their collective lives are manifestations of their assertions of identity, these sorts of decisions are vitally important. But the power to control their destinies *as Aboriginal peoples*, to maintain control over their self-definition, must be fundamental, for otherwise we could imagine a people being constructed by another. If Aboriginal communities lose the power to control their self-definition they lose themselves—they effectively become "another." This is the dissolution of the self (here a collective self, culturally defined), a loss of autonomy which spells out into a loss of self.

One can appreciate the priority of the power of self-definition by contrasting two situations. Imagine a people completely constrained in relation to what they might choose to do, yet still in retention of the power to control who they are—these people press on, moving towards the hopeful day when they can live as they would decide to do. Contrast this with a people "free" to do as they please, but no longer in control of the tools and structures necessary to maintaining their sense of who they are. These people will struggle to continue on *as a people*.

While talk of a line between the power to control how to live and the power over self-definition makes sense, it should be born in mind that the two are intimately paired, for a people will generally define themselves as a matter of

88. Patrick Macklem offers a similar defense of Aboriginal rights (to be worked into the constitutional order of Canada) in his *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001).

89. A similar outcome can be noted when liberals attempt to defend collective rights on the basis of collective interests. See "Collective and Individual Rights", *supra* note 30.

90. Which group would not wish to have their collective decisions respected?

how they decide to control how they live. Regardless of this interrelation, however, the distinction must be made, for otherwise those who focus on the autonomous self as that which demands respect shift attention away from the self as primarily a self-defining being. Reaume, for example, undertakes to focus attention on the autonomy of Aboriginal peoples insofar as they decide how to structure their lives, finding value in their being analogous to individual autonomous beings, and thereby averts attention from the autonomy of Aboriginal peoples insofar as they control *who they are* (and live accordingly).

The danger is obvious when one notes that the liberal-minded focus of Reaume's approach will naturally act to promote Aboriginal societies as liberal-beings, entities acting to make decisions about how to live the good life, entities constituted as "selves" which have plans, which think about the values that underlie these plans, which consider the possibility that their value-system may be mistaken, and so which continue in their search for better ways to live, according to carefully examined and re-examined values.[91] While Aboriginal peoples may wish to play around at the edges of how to live their collective lives, they may not wish, however, to define themselves in terms of the liberal vision of the ever-searching, creative and choosing agent. They may wish to retain control over how they define themselves, for otherwise—as they well know—they *cease to be* as "selves," as beings in the world.

Kymlicka's attempt to argue that liberalizing Aboriginal societies is not disrespectful seems unsatisfying by itself, for one is left unclear, given liberal indeterminacy about the nature of the good life, how Aboriginal societies could be *assumed* to be devoid of value in themselves (in encompassing forms of life in which individuals enjoy meaningful and valuable good lives). Insofar as liberal theorists hold to the existence of good ways of living, they must not fixate on the act of choosing which way to live (as this threatens to prioritize will over reason, leaving value in the world suspect) and they must demonstrate how Aboriginal ways of living are not themselves capable of providing for fulfilment for those living in these non-liberal communities. As liberalization threatens to undercut these societies it seems, then, to be an unjustified interference with the autonomy of Aboriginal peoples. Liberal attempts at making sense of this attack on autonomy are themselves suspect, as they focus our attention on a vision of Aboriginal communities as individuals writ large, as beings concerned with searching for the good life. Given that such strategies threaten to undercut the autonomy of Aboriginal communities desirous of retaining the power to self-define, they too seem oppressive.

To buttress these claims, however, we need to go a level deeper, to explore cultural differences between Aboriginal societies and liberal culture, to explore how liberalization can be seen to threaten the very existence of Aboriginal peoples. We begin by considering how Reaume's approach to arguing for the protection of Aboriginal cultures within liberal societies is a peculiarly liberal solution to the threat of disrespect for the autonomy of Aboriginal peoples. To

91. This is if Reaume's picture is fit within the larger liberal vision, though with Aboriginal communities accorded moral status as individuals writ large.

better understand the perception of the oppressive nature of liberal theory we need to dig below liberal theory, considering this vision of the place of value and the nature of the self. We carry this project to completion, then, by exploring conceptions of knowledge, truth and the self revealed through the contrast of liberal thought with "strong" objections which arise within the Western intellectual stream.

Concerns About Cultural Differences

The misguided and oppressive nature of Reaume's approach are seen when considered in its liberal aspects. Once again we must appreciate how liberal theory and the liberal project underpin this approach, replete with the liberal vision of the function of the state and the role of law in society. Aboriginal communities, as moral agents, would be protected from culturally oppressive acts because they are seen as engaged in the sort of good work that goes on in liberal societies, the quest for the good life. Since we do not know what the good life entails, particular cultures—manifesting choices made by collectivities—must be protected as fellow travellers on this voyage of discovery. It is interesting to note that value does not lie in the content of the cultures being protected (though Reaume occasionally speaks as if this might be so[92]), but in the capacity of the cultural community to evaluate its own beliefs, principles and projects, all in the name of self-improvement and self-creation. To envision Aboriginal cultures as essentially creative moral agents is to impose a conception of the value of moral agency and culture on Aboriginal peoples, an imposition which has two flavours. On the one hand, Aboriginal peoples might believe they have no need to be on such a grand journey, one they believe essentially completed untold generations ago. On the other hand, even if they had a comparable vision, to *require* that *this* be their vision is to impose conditions on how they come to think of themselves and to put limits on their ability to self-define.

The perception of oppression through the application of a liberal structure through the law ultimately rests on incompatible theories of (a) knowledge, (b) the place of value in the world and (c) the self and its relationship to others. Of these, the contrast between theories about knowledge is fundamental, as beliefs about the nature of knowledge and its acquisition infuse and ground the differing world-views of Aboriginal peoples and liberal theorists. The application of liberal theory through the law must be seen as essentially an attempt to overcome fundamental cultural differences by sliding below the cultural divide a "universal" epistemology. This point can be illuminated by considering the source of theories of knowledge at work in the liberal vision, an illumination which also serves to illustrate the bottomless divide between the world-views of

92. "Justice Between Cultures", *supra* note 79 at 206.

Aboriginal peoples and the Western world. Looking at the source of liberal theory's tenets shows that while liberal theory may be usefully put to the task of addressing questions of oppression relating to minority cultures that *come into* a liberal society,[93] it cannot be used in addressing concerns about the interests of Aboriginal peoples in Canada, as the forced liberalization of their societies is the act of oppression at the root of the problem.

Both the depth of the cultural divide and the role it plays in generating the perception of oppression are illustrated by focusing on a legal theory critical of liberalism's content and epistemological grounding, and by considering its ability to address concerns over perceptions of disrespect of Aboriginal autonomy. We will see that such a legal theory, seen from an Aboriginal perspective, exists on the other side of the cultural divide from Aboriginal world-views. We will also see that until and unless alternative perspectives develop theories of respect and tolerance grounded in acknowledgment of their own cultural limits and the potential danger posed by ignoring such limits, they are as potentially oppressive as those of a liberal stripe.[94]

Criticism of Liberal Legal Theory

We begin with the claim that the liberalization of Aboriginal societies is oppressive in that it fails to respect the autonomy of Aboriginal societies and threatens to undercut the ability of these societies to both determine how they will live their lives and how they define themselves. How does this challenge to liberalism sit with critical theoretical challenges to the law which have emerged over the last few decades? What is the relationship between critical analyses of the law and this challenge to liberalism? The short answer is that there is little relationship between them, for the claim of oppression does not challenge the worth or value of liberal society to those who choose that form of societal structure, to those whose sub-cultures comfortably exist within the larger liberal culture. Aboriginal peoples' challenge to the *theory* of liberalism, as mistaken or misguided, is secondary; the primary contention is with the application of liberal legal regimes to their interests. A longer answer launches us into an exploration of the divide that separates the intellectual traditions of Aboriginal societies from the Western world. This provides an opportunity to make clear a number of points alluded to in previous sections, and to intermesh these with an examination of ways in which liberal society (and the law) may more appropriately interact with Aboriginal peoples in Canada.

We are not here so much interested in how critical legal theories criticize the liberal project and liberalism's visions of the self and its relationship to community and the state. While these arguments have some practical utility for Aboriginal peoples, the concern is that these criticisms might be Trojan horses,

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93. Kymlicka himself makes this distinction in *Multicultural Citizenship*, *supra* note 70, in his distinction between national minorities and ethnic communities.
94. This argument attempts to follow and advance some of the lines of argumentation laid out by Mary Ellen Turpel in "Interpretative Monopolies", *supra* note 1.

ostensibly gifts from apparent well-wishers, bowel-laden with threats to Aboriginal peoples. We must focus on the epistemic and metaphysical commitments of critical theorists, and inspect the grounds from which critical legal theorists launch their attacks on liberal theory and the liberal project. Bearing in mind that critical theorists are committed to these fundamental philosophical positions, two questions arise: (1) can the critical legal theorist recognize a problem when one legal regime built on a particular philosophical vision of the good and the right attempts to transform societies built on separate and distinct philosophical visions, a problem which may go so far as to threaten the existence of the second society? (2) if it can recognize this problem, can it offer a satisfactory solution? These questions are deliberately stated in general terms, for critical legal theorists must be prepared to acknowledge that their own approach to these sorts of issues may be as threatening as liberal theory.

Foundations of Critical Legal Theories

Discussions of critical legal theories typically begin with remarks about the wide variety of critical positions and the impossibility of saying anything that applies to them all.[95] With this in mind, I want to look at what I take to be certain shared philosophical premises upon which rest many "second generation" critical legal theories,[96] those grounded, to a greater or lesser degree, in the postmodern perspective.[97] Critical legal theorists challenge the liberal picture of truth and good life, the self and community.

Truth and the Good Life

Many critical legal theorists can be described as epistemically anti-foundationalist in that they reject the modernist project of grounding truth and knowledge in a foundational bedrock built of empirical, logical or linguistic bricks. They exist in a stream of contemporary life whose force is carried along

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95. In *Jurisprudence: Theory and Context* (London: Maxwell, 1999) at 203, Brian Bix writes that,

> the advocates placed under a single label—'critical legal studies' ... share only that (the label), and a certain distance on some matters from mainstream legal theory. The point is that on almost any substantive issue or question of methodology, there will be as much variation or disagreement within those groups as there will be between those groups and other theorists.

96. Gary Minda, *Postmodern Legal Movements: Law and Jurisprudence at Century's End* (New York: New York University Press, 1995) at 116-122 [hereinafter *Postmodern Legal Movements*]. First generation critical legal theorists were by and large concerned with deconstructing legal discourse to reveal tensions and contradictions, many finding the "fundamental contradiction" to be between community and autonomy. Second generation critical legal theorists recognized the inconsistency in talking of "fundamental contradictions" and the hierarchy of meaning such language introduced, and concentrated their attentions on deconstructing legal discourse to reveal *all* patterns of hierarchy, with the intent of opening up dialogue, illustrating "the infinite possibilities of human existence."

97. Dennis Patterson offers a clear and concise "analytic account" of postmodernism and its relation to modernism and legal theory in *A Companion to Philosophy of Law and Legal Theory* (Oxford: Blackwell, 1999) at 375-384.

by a deeply felt skepticism about the foundationalist project. This skepticism is so deep it manifests in the belief that there will never be success in the modern project, that truth claims will never be satisfactorily shown to be descriptions of an independent external world.[98] The problem is not so much about the truthfulness of propositions—where truth is understood as correspondence between propositions and the world they purport to represent—rather, it is a problem in establishing an acceptable process for assessing that correspondence. It is not that I may not say truthful things, but that I cannot know that I know of what I speak.

The foundationalist project and critical responses to it have their origins in fundamental concerns about the status of empirical knowledge. Arguments underlying moral skepticism differ in form, but tend to be cut of the same cloth: the focus is on the impossibility of ever adequately identifying objectively true moral claims, an impossibility tied to the impossibility of ever adequately establishing a means of measuring the veracity of these claims. Given that we have no way of knowing what might be a moral truth, some theorists move beyond the skeptical stance to embrace the denial of moral truth, when understood as a matter of correspondence. Rather than holding that something is morally good when it corresponds in some way to "goodness" in the world, the critical moral theorist redefines what being good might mean, the possibilities being wide and deep. Generally speaking, however, the possibilities will relate to the "inner" lives of moral agents, to their beliefs, feelings and interests. It is the project of defining moral terms in relation to an independent and external world that is forsaken.

It is difficult for the critical theorist to avoid commitment to some form of moral relativism, as much as some may wish to do so.[99] They can attempt to

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98. See, for example, Alan Hutchinson, "From Liberal Chatter to Democratic Conversation" in *Law and the Community, supra* note 8. At 167 he writes: "Linguistic concepts are not terms through which to view and describe an independent reality, but actually constitute that reality."

    Richard Rorty, in explaining how the pragmatist responds to those who define truth as correspondence between certain sentences and the world itself, pointed out that the "the pragmatist can only fall back on saying, once again, that many centuries of attempts to explain what 'correspondence' is have failed." *Consequences of Pragmatism, supra* note 15 at xxvii.

99. The first wave of postmodern critical legal scholars were criticized for focusing all their critical energies on deconstruction, such that the movement seemed to "... engender a politics of quietism and irresponsibility that will be long on personal angst and short on social solidarity." Alan Hutchinson, *Waiting for CORAF: A Critique of Law and Rights* (Toronto: University of Toronto Press, 1995) at 225 [hereinafter *Waiting for Coraf*]. Hutchinson is describing a critique of critical legal studies launched by Joel Handler.

    Hutchinson undertakes a reconstructive project in *Waiting for Coraf*, endeavouring to move beyond deconstructive imperatives, arguing for meaningfulness that can embrace political activism even when no "external" goal founded in the Truth and elucidated by Reason is present. Throughout this work he advocates forcefully for a loosely defined "popular democracy." Relativistic implications of the underlying skeptical stance can be seen, however, in the last few paragraphs where he admits:

translate claims about objective moral truths into claims about deeply held beliefs, suggesting that what we may dearly believe to be the moral truth of a matter is just something we refuse to give up, one of a set of beliefs that may go, for example, towards forming our self-image, that set of propositions that self-referentially determines who we believe we are. Critical theorists could argue that these beliefs would then be "true" for us, just as much as anything may be said to be "true" when understood in this way. These "objective" moral truths could then be used to evaluate other beliefs, acting as a "higher" set of beliefs and functioning in a special way within our sphere of beliefs and propositions.[100] Alternatively (or simultaneously), the critical theorist could appeal to shared moral beliefs, attempting to find objectivity in universality. The first strategy seems, however, to align itself with one understanding of moral relativism, that what we claim to be "good" is just which we deeply believe, while finding objectivity in universality requires that universality be forthcoming. While on some level of abstraction it may be said that we share beliefs about the nature of the good, this level may be so general as to be practically meaningless.

Alan Hutchinson illuminates one postmodern route around or through this problem, as he posits a world of localized truths (truths specific not only to particular times, but to places and peoples), and then advocates that society be constructed around the project of open and free debate about how we can live together in light of the plurality of "truths."[101] Unfortunately, Hutchinson provides neither clues as to why people in multi-cultural societies would be motivated to work towards such an idealized community, nor suggestions as to how we would even begin to move towards a society structured according to this vision.

One might wonder how far apart critical legal theorists and liberal theorists need be. One might ask, for example, what prevents the liberal theorist from tossing aside the foundationalist project—accepting that we can never be said to "know," in the classical sense, of what we speak—and replacing this with the

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> [S]trong democracy is not put forward as a candidate to replace liberalism as Canada's natural self-image: postmodernism eschews the belief in any single or accurate historical vision of community. Instead, I champion unreconstructed democracy because it provides the least-worst match with the non-foundationalist project for a truly pluralist polity and ensures that transformative struggle will change social conditions as well as the way we talk about them [at 228].

100. In "How Law is Like Literature" [in W. J. T. Mitchell, ed., *The Politics of Interpretation* (Chicago: University of Chicago Press, 1983)], Ronald Dworkin advanced a theory of law as interpretation. In *A Matter of Principle* (Cambridge: Harvard University Press, 1985) at 168, Dworkin noted that his theory could be challenged as developing a notion of interpretation which had it be "… no different from invention. The distinction between these two activities presupposes that in the case of interpretation a text exercises some constraint on the result. But on [Dworkin's] account the text itself is the product of interpretative judgments." Dworkin responded by carefully setting out how, under his theory, interpretative acts embody two levels of conviction, convictions about form and about substance, with the former serving to constrain the latter. Drawing on an analogy to a "familiar thesis" in the philosophy of science, Dworkin argued that certain privileged propositions (fixed and deeply held) serve to ground interpretations, just as "facts" in science (themselves held to "theory-dependent") act to constrain scientific theory. See pages 168-171.

101. *Waiting for Coraf, supra* note 99 at 20-27, 154-183.

notion that we have deeply held shared beliefs in the sort of moral "truths" proclaimed under liberalism.[102]

Two points clearly distinguish these theories at their roots. First, let us consider and expand upon an earlier point. There is no room in the critical theorist's picture for a metaphysically-objectively determined "good life," some way of living which is objectively good for the individual. While an expression of the nature of the good life may form a deeply held belief, it is nothing more than this, for there is no possibility of its corresponding with a way of living which is actually "good." The critical theorist must translate the quest for the good life into an expression of the will towards certain plans for living which one deeply believes to be worthwhile. The contemporary liberal theorist, on the other hand, will find it very difficult to forsake the foundationalist project, however impossible the quest for the good life may be (in that we do not seem to have any means by which to measure the success of our findings). The liberal engineering project only makes sense if there are individualized good ways of living for which individual searches are being carried out. We noted earlier that understanding the search for the good life in terms of *creating* valuable ways of life rather than *discovering* ways of life places will over reason, and that the *sense* of the liberal project rests on the search being about more than allowing for the act of choosing. Engineering society in line with the liberal vision requires that individuals be free to choose how to live, and that choices range as widely as possible, since what is sought is in itself valuable.

The second point distinguishing critical from liberal theorists centres on the difference between liberal and critical notions of the self.

The Self

Critical theorists hold to notions of the self distinct from those of liberal theorists. For the liberal theorist the self is a distinct and independent being, *holding* values and *having* interests, capable of reflection and self-examination, essentially interested in "living a good life." Furthermore, while the individual may be partially formed within a culture (or a plurality of cultures, overlapping in a complex pattern), she is still essentially independent, a potentially creative and dynamic force within the world. The critical theorist challenges this conception, arguing that there is nothing "essential" about the self, and that there is no sense to the notion that the self exists independently of the beliefs and

102. This is a plausible reading of Rawls' mature position. See John Gray, "Rawls's Anti-Political Liberalism" in *Endgames, supra* note 6 at 51-54. Coming at this from the other direction, Hutchinson can be read as someone concerned that the doctrine of individual liberty has been used by those with power to subvert the liberal ideal of equality. See *Waiting for Coraf, supra* note 99.

thoughts by which she is constituted.[103] To say there is something essential is itself to go against critical dogma, for essentialist claims are meant to express truths (in the sense of correspondence) about the nature of the human being as moral agent. A relationship is marked out between talk of fixed characteristics (necessary qualities of a thing) and there being some objective truth of the matter (in the foundationalist sense), with this relationship contrasted to that between talk of fluid characteristics (all qualities of a thing being contingent) and there being only language and rules, interpretation and re-interpretation. Critical theorists understand selves, then, to be essentially conceptual loci of language, power and meaning, themselves subsets of propositions within spheres of propositions, those subsets of propositions relating to the expression of "self-hood."[104]

The self, then, is not some sort of fixed, transcendent being, but a fluid and dynamic subset of propositions, some perhaps fairly stable, but many—expressive, say, of our interests and desires—ever-changing, ever-shifting. With this in mind it should be clear that critical theorists can reach out and embrace certain communitarian positions, for they can easily enough accept that the self is constituted by relationships with others, that not only is there not some shining light within that is the "I," but that the fluid and dynamic self is defined in terms of the community and the interrelationships between members of the community.[105] Regardless of whether critical theorists reach out to communitarians, they oppose the liberal vision of the state, for they question the liberal picture of the self, some metaphysically objective being that "has" interests and beliefs, with an "essential interest" in living a good life, searching

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103. Postmodern legal theorists challenge the notion of "grand" theories, theories which purport to explain the ultimate nature of the self, the community and the law. Hutchinson's attack on liberalism focuses on the both the false and unsatisfactory theories of the individual and community it proclaims (*Waiting for Coraf, supra* note 99 at 24-25), and the manner by which it has employed such grand theories to ensnare, control and strangle social democracy (*Waiting for Coraf, supra* note 99 at 7-24). Hutchinson, however, is not merely arguing that these false theories should be replaced with True ones, for all theories, on the postmodern account, are "local" and "contingent."

Where does this leave the self? Under Hutchinson's "Foucaultian-inspired account of power" the self is constructed within a local power-matrix: "These matrixes help to create the individuals who use and are used by power, the needs power feigns to satisfy, and the Truth in whose name power claims to speak." A. Hutchinson, *Dwelling on the Threshold* (Toronto: Carswell, 1988) at 270 [hereinafter *Dwelling on the Threshold*]. If "the self" existed independent of the particularized social contexts in which these power-matrixes ebb and flow, an objective notion of the "essential" self might be possible. This Foucaultian line of analysis has as one pillar, however, the argument that "... the 'individual' is a modern invention; the subject is not a fiction, but an artifact." *Ibid.* at 275.

104. As discussed in note 103, critical theorists often reject the notion that there is a separate thing called "the self," some mysterious metaphysical being sitting behind propositions and beliefs, some "soul in the machine" which expresses propositions and has beliefs, though not itself a thing within the sphere of propositions and beliefs. A line of thought emanating from the empiricist has also questioned this notion, as such a thing can be hard to locate. The self must be found within the sphere of propositions and beliefs, as when I introspect (itself a conceptual affair), I find not some sort of being looking back at myself looking in, but merely more beliefs and propositions. This picture of the self can be traced back at least as far as Hume: see David Hume, *An Enquiry Concerning Human Understanding* (New York: P. F. Collier & Son, 1910).

105. See, for example, Richard W. Bauman, "The Communitarian Vision of Critical Legal Studies" in *Law and Community, supra* note 8, 9.

for both what this good life may entail and for the means by which she can bring this good life into being.

Critical Legal Theory and Aboriginal Peoples

Critical legal theorists of various stripes challenge the epistemic and metaphysical foundations of liberal theory, arguing not only that the self is not an individualizable atom and "the good life" an impossible goal, but that fundamental metaphysical notions of the self and of "essential interests" are themselves in need of rethinking. Furthermore, critical legal theorists challenge how we think of legal discourse, discourse taking place within and about the law. Legal propositions are seen as existing in outer layers of spheres of beliefs, constantly challenged, constantly being revised and rejected. They are "essentially contestable;" their very meaning is dependent on who has influence over the task of providing a platform for communication between language-users.[106] The common slogan that "law is politics" refers to the notion that at core, the law reflects nothing more than ongoing power-struggles between competing interests. This can be put in terms of hegemonic discourse, with legal discourse seen as directed towards persuasion or coercion, to the gaining or maintaining of power. Those currently with the requisite power over others use this power to form the law to their advantage, while those oppressed by the powerful turn to the law as one means by which they may attempt to bring the powerful down, so they may assume control over the sort of power that allows *them* to then turn to using the law as a means of maintaining their new-found or reclaimed power.

We have noted that in the least a cousin of moral skepticism is at the core of the liberal tradition, as indeterminacy in relation to moral knowledge (if not skepticism itself[107]) is one pillar upholding this tradition. Critical alternatives do not resolve this problem and even encourage further skepticism—and indeed, sometimes, moral nihilism.[108] This pillar of moral skepticism is missing in the Aboriginal world. In the traditions of Aboriginal peoples lies the wisdom needed to live good lives.

There is an intellectual tradition to the cultures of Aboriginal peoples that places value in the ability to think clearly and carefully, but it is not privileged as

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106. See, for example, *Dwelling on the Threshold, supra* note 103 at 262 ("Legal rationality is no less constructed than the courts of law themselves. Objective interpretation, bounded or otherwise, is oxymoronic"); and at 278 ("... different technologies of power not only formalize and organize knowledge, but ensure its possibility, intelligibility and parameters. As the study of legal reasoning shows, power finds different ways to produce and hide in the discursive regimes and practices of knowledge-making.").
107. *Foundations of Liberalism, supra* note 14 at 150.
108. Hutchinson acknowledges the challenge of nihilism, and puts great effort into persuading his audience that even on a Foucaultian path one can see a bright and promising future. See *Dwelling on the Threshold, supra* note 103 at 261-293. That he has to expend vast amounts of argumentative energy in trying to be persuasive demonstrates the depth of this challenge. I leave it up to others to decide whether he succeeds.

it came to be in the West, for the intellectual tradition is seen as intermingled with spiritual traditions, emotional traditions and physical traditions.[109] Something is known, something is beyond mere subjective assertion of opinion, when it satisfies a complex web of criteria, some of which are tied to its having rational grounds, some to the "feel" and beauty of the truth of the assertion, some to the connections of this assertion to established ways of living, ways laid down by "original instructions" and bolstered by the wisdom of those of experience and reflection.[110] From within this tradition not only is much known, but both means for assessing and a process for coming to knowledge are at hand.[111] There are many things which are acknowledged to be beyond the reach of our knowledge-gathering abilities, much that is simply "mysterious," but again the general extent of knowledge is known, as Aboriginal peoples circumscribe their knowledge with clear boundaries.[112] Within these boundaries systems of belief provide essential guidance in the task of living good lives, lives which provide

109. The comments made over the next few paragraphs about "Aboriginal cultures" are fashioned on a very general level, and are not meant to reflect knowledge about the detailed content of any particular Aboriginal culture, knowledge which I would not be in a position to claim to possess. From my limited exposure to Aboriginal traditions of various peoples across Canada, I am comfortable making such general claims and backing them up with written sources. These are claims about the general framework of beliefs, on such a level of abstraction that they (a) likely apply to most if not all Aboriginal communities across North America and (b) would most certainly be accepted as lying within "of what someone may speak" were this test applied to most people with some knowledge of Aboriginal belief-structures. I always try to limit what I say to what I know, and here what that encompasses is so primarily because of its generality.

110. See, for example, Peggy V. Beck and Anna L. Walters, *The Sacred: Ways of Knowledge Sources of Life* (Tsaile (Navajo Nation), Ariz.: Navajo Community College Press, 1977) [hereinafter *The Sacred*]; J. Bopp *et al*., *The Sacred Tree* (Lethbridge: Four Worlds International Institute, 1984) [hereinafter *The Sacred Tree*]; Eddie Benton Banai, *The Mishomis Book: The Vision of the Ojibway* (Minnesota: Indian Country, 1988) [hereinafter *The Mishomis Book*].

111. See, for example, Charles A. Eastman (Hakadah), *Indian Boyhood* (New York: Dover, 1971) (originally published in 1902) [hereinafter *Indian Boyhood*]; N. Thorpe *et al*., *Thunder on the Tundra: Inuit Qaujimajatuqangit of the Bathurst Caribou* (Vancouver: Generation Printing, 2001) [hereinafter *Inuit Qaujimajatuqangit*]; M. Boldt and J. Anthony Long, eds., *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (Toronto: University of Toronto Press, 1984) [hereinafter *Quest for Justice*] (see especially Oren Lyons, "Traditional Native Philosophies Relating to Aboriginal Rights"); Jean-Guy Goulet, *Ways of Knowing: Experience, Knowledge and Power Among the Dene Tha* (Vancouver: University of British Columbia Press, 1998) [hereinafter *Experience, Knowledge and Power*]; and *Alaska Native Ways: What the Elders Have Taught Us* (Portland: Alaska Northwest Books, 2002) (photos by Roy Corral, introduction by Will Mayo, text by Natives of Alaska) [hereinafter *Alaska Native Ways*].

112. See, for example, Basil Johnston, *The Manitous: The Supernatural World of the Ojibway* (New York: Harper Collins, 1995) [hereinafter *The Manitous*]; "My Indian Grandmother" in *Indian Boyhood, ibid.*; *The Sacred, supra* note 110; *The Mishomis Book, supra* note 110; *The Sacred Tree, supra* note 110; *Inuit Qaujimajatuqangit*, *ibid.*; and *Alaska Native Ways, ibid.*

meaning and beauty for both individuals living through them and communities out of which such lives grow.[113]

This is not to say that living a good life ever was or is an easy matter—in Aboriginal communities the ways of living valued and promoted are such as to require years of gentle instruction, a process of maturation aided by a community's careful system of guidance.[114] Central to this process of moral education is building a core sense of responsibility, one which would come to be an integral part of one's sense of personal identity.[115] One threat of liberalism *and* many critical alternatives is to that core sense of responsibility.[116] This sense must be carefully instilled, carefully nurtured and carefully maintained. An individual possessed of this sense will know what to do and how to act so as to travel the good path, to live a good life.[117] This involves, essentially, doing as one must towards fellow beings, both human and non-human. The introduction of liberalism threatens to undercut this carefully balanced existence, for it suggests to the individual that the community has no inherent value, that others only have value in relation to one's own self-examined beliefs and that one has no inherent responsibilities to any being other than oneself. Critical alternatives, on the other hand, suggest that the relationship between Aboriginal peoples and the law is nothing more than a struggle over power, and that the struggles of Aboriginal

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113. See, for example, Don Talayesva, *Sun Chief: The Autobiography of a Hopi Indian*, ed. by L. W. Simmons (New Haven, Conn.: Yale University Press, 1942) [hereinafter *Sun Chief*] (see especially "Learning to Live" and "The Making of a Man"); *Indian Boyhood, ibid.*; George Blondin, *Yamoria the Lawmaker: Stories of the Dene* (Edmonton: Newest, 1997) [hereinafter *Yamoria*] (see especially "Yamoria's Great Dene Medicine Laws"); Marie Battiste and James Youngblood (Sákéj) Henderson, *Protecting Indigenous Knowledge and Heritage* (Saskatoon: Purich, 2000) [hereinafter *Protecting Indigenous Knowledge*] (see especially "What is Indigenous Knowledge"); *The Sacred, ibid.*; *The Mishomis Book, ibid.*; and *Alaska Native Ways, ibid*.

114. See, for example, "Learning to Live" in *Sun Chief, ibid.*; *The Mishomis Book, ibid.*; *The Sacred Tree, supra* note 110; and *Alaska Native Ways, ibid.*

115. See, for example, *Yamoria, supra* note 113; *The Sacred, supra* note 110; *Alaska Native Ways, ibid*.; and Lee Maracle, *I Am Woman: A Native Perspective on Sociology and Feminism* (Vancouver: Press Gang, 1996) (see especially "Law, Politics and Tradition").

116. > Traditional Indian society understood itself as a complex of responsibilities and duties. The [Indian Civil Rights Act of the United States] merely transposed this belief into a society based on rights against the government and eliminated any sense of responsibility that the people might have felt for one another.
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> Vine DeLoria and Clifford Lytle, *The Nations Within: The Past and Future of American Indian Sovereignty* (Austin: University of Texas Press, 1984) at 213 [hereinafter *The Nations Within*], quoted in *Rights and Responsibilities, supra* note 62 at 164. See, as well, *The Sacred*, *ibid.*

117. How an individual came to this knowledge would vary from Aboriginal society to Aboriginal society, but both broad principles of education and the content were uniform: "Immediately, and for some time after (discovering they were to be parents), the sole thought of the parents was in preparing the child for life. And true civilization lies in the dominance of self and not in the dominance of other men." Luther Standing Bear, "Land of the Spotted Eagle" reprinted in F. Turner, ed., *The Portable North American Indian Reader* (New York: Penguin Books, 1973) at 570 [hereinafter *North American Indian Reader*]. As Taiaiake Alfred notes (*Peace, Power, Righteousness, supra* note 1 at 133), "The sources and guiding beacons of [I]ndigenous governance remain the traditional teachings. While specific techniques are unique to each nation, there is a basic commonality in their essential message of respect." See also, as examples, *Alaska Native Ways, supra* note 111; *The Sacred Tree, supra* note 110; *Inuit Qaujimajatuqangit, supra* note 111; and *The Mishomis Book, supra* note 110.

peoples should amount to no more than an attempt to overcome the oppressive attacks launched by a legal system controlled by dominant society. There is no question that the relationship between Aboriginal peoples and Canadian society and the state has been marked by relentless assaults by Canadian institutions on the integrity of Aboriginal ways of life, and that now energy should go into regaining control over lives and self-identities. Yet below the struggle lies an Aboriginal vision which rests on claims to knowledge of the good life, a vision irreconcilable with the epistemic foundations of critical alternatives.

Critical theorists attack the liberal notion of the self, the independent and prior entity which has beliefs and values, substituting in its place the fluid, dynamic and experientially-determined self. There are no "essential interests," no aspect of the self that is necessary or fixed, as the self is conceived as entirely contingent, a mere vessel for "possibility" itself. This can be a very attractive notion of self for contemporary Aboriginal people, for it permits an unlimited amount of free play to infuse the modern self-identity of Aboriginal individuals. In this modern world of inter-mixed and inter-mingled cultures, with Indigenous peoples around the world struggling to maintain their identities in the face of massive cultural shock and relentless efforts at cultural assimilation, Aboriginal people can grasp onto this critical notion of the self, protecting the sense that there still are many Aboriginal people surviving in the midst of the larger cultural milieu. Just as there is no self that is fixed and determinate, there is no culture that is fixed and determinate—the edges of selves and cultures are blurred, with even the centres open for revision, as cultures meet and interact.

One might wonder, though, what becomes of being Aboriginal. If Aboriginal people are both individually and collectively little more than contingently arranged characteristics, all of them "up for grabs," what ultimately is the marker of difference between Aboriginal and non-Aboriginal societies and the people that make them up? Here we witness critical theories in their attempt to slide *universal* claims under the cultural chasm separating Aboriginal and non-Aboriginal societies, threatening the very existence of Aboriginal peoples *as Aboriginal peoples*. Unlike the threat from liberal theory, which demands that Aboriginal peoples see themselves as autonomous entities engaged within the liberal project, critical theory demands that Aboriginal peoples see themselves as products of free play. This extends the sense of freedom at play in liberal theory; as individuals themselves resist being cast in stone, freedom is extended along lines laid out by critical theorists' adherence to deeper skeptical beliefs.

Aboriginal peoples, though, have solid ground on which to walk. Tracing back intellectual footprints reveals a belief system centred on ways of knowing and bodies of knowledge, which serve to ground both Aboriginal societies and Aboriginal peoples' senses of identity. At the heart of Aboriginal belief systems are senses of responsibility demanding that Aboriginal peoples resist being re-conceived, either as liberal moral agents or as free-floating, self-creating boundary-less beings. While Aboriginal people may feel comfortable with the communitarian leanings of the critical theorist's vision (for individuals in Aboriginal societies are seen as interwoven into intricate webs of relationships,

the self being defined in its relation to others), nevertheless individuals are conceptualized in Aboriginal societies as *nodes* in these webs, as relatively *fixed and determined beings* connected by strands of the web. The identity of these individuals (and the various communities they collectively comprise) is provided by the responsibilities they have, which work to weave the web of which they are parts. There are, quite simply, things the individual *must* do, responsibilities to family, clan and community that *must* be respected and that *must* lead to action.[118] Responsibilities act to define a core of the identity of the individual, just as the existence of a society centred around responsibilities defines the identity of Aboriginal communities.

We can clearly see the insufficiency and inappropriateness of critical legal theory in explaining the nature of the law as it is seen by Aboriginal peoples by considering this picture of how Aboriginal communities would traditionally structure their societies and how they would pass on knowledge about how to live good lives from one generation to the next in light of an argument raised by Michael Sandel in *Liberalism and the Limits of Justice*.[119] In discussing Rawl's *Theory of Justice*,[120] Sandel suggests that the "circumstances of justice" (those empirical conditions which must be present before the need for justice as a virtue arises) could be absent in a society, in which case the need for justice would be diminished. In particular, the presence of conflict over scant resources, a condition required to explain the need for distributive justice, could be minimized in societies wherein moral education grounded a deep sense of

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118. As noted in the core of this paper, Aboriginal societies rest on theories of knowledge and truth distinct and incommensurable with the West. While an individual brought up in a traditional society would be careful about what she came to believe as the truth, and it was expected that each individual would come to the truth about matters by herself, there was an unwavering belief in certain fundamental moral truths. Once an individual is cognizant of these truths, many of which involve the need to be responsible and to act appropriately in one's role in society, questioning them makes little sense. Those individuals who might do so would likely not have received the sort of careful moral schooling at work in Aboriginal families, clans and communities. What can be said to someone who, after years of instruction in mathematics, questions whether when two apples are put together with two other apples the resulting collection is of four apples? What can one say to someone who fails to see the truth in the goodness of meeting responsibilities necessary for the healthy maintenance of the community? This provides a glimpse into how certain issues prominent in the debate between liberal theorists and communitarians look from an Aboriginal perspective. Liberals demand a right to exit for those cultures protected within liberal society, so that individuals within liberalized Aboriginal societies would have the option of leaving should they come to re-evaluate their own vision of the good life and find their existence within the Aboriginal community no longer in line with their goals and values. This right to exit would serve as one essential linchpin in the project of making Aboriginal societies acceptable sub-cultures within the greater liberal culture.

    But besides the fact that allowing for a right to exit permits individuals to forsake their responsibilities to family, clan and community (so the community suffers on exit, not the individual), this act of exiting makes little sense to a balanced traditional community. The individual would have the sense of responsibility internalized, not on the basis of ideological inculcation, but as a matter of her moral upbringing and education. For an individual to contemplate exiting, she would have to not see the wisdom and value in the way of life of the community, and in her role in maintaining that balance. An Aboriginal community would likely not stop an attempt at exiting, but not because they saw value in a right to exit, but because they would find the individual lacking in moral sense.

119. *Liberalism and the Limits of Justice, supra* note 11 at 28-35.

120. *A Theory of Justice, supra* note 13. The circumstances of justice are discussed at 128-130.

benevolence towards others. Indeed, Sandel continues, if we imagine such a society, then actions which undercut the presence of such a society-wide sense of benevolence, thereby creating the need for justice, could be argued to be particularly immoral. In Aboriginal societies the sense of benevolence was fostered through careful education in the wisdom of accepting and living one's life in concert with fundamental responsibilities. Canadian society and the Canadian state devised numerous strategies over the last few centuries designed to undercut Aboriginal cultures, and in particular Aboriginal processes of moral education. The result is a world in which the need for justice in Aboriginal communities *between Aboriginal people* is overwhelming, but where most observers do not acknowledge the role that non-Aboriginals have played in creating the circumstances of justice making this so. The only moral response is not to provide justice in Aboriginal communities, as this accepts (even endorses) the enormous wrong committed. Rather, it is to allow Aboriginal communities to re-connect with their traditions around moral education and to re-institute these traditions in their communities. This "allowance" would require more than a space of non-interference, but as well resources suitable to the enormity of the task.

All of this, however, conflicts with the basic principles espoused in most "second-generation" critical legal theory. It is an open question, then, whether critical theorists can acknowledge the existence of a problem when a legal regime built on a particular theory of the good and the right and grounded in a particular vision of the self and knowledge is transposed onto a society built on alternative visions of the self and knowledge. Critical theorists' visions of identity, either of the self or the community, are in conflict with Aboriginal visions. Could these theorists come to understand the need for, and so lend support to, a legal regime acknowledging the cultural gap?

V CONCLUSION

Attempts to liberalize Aboriginal societies constitute threats to Aboriginal peoples as peoples. Aboriginal people must resist efforts to replace their fundamental belief structures with visions of the good and the right when these visions rest on epistemic and metaphysical notions alien to the foundations upon which rest Aboriginal ways of life. Aboriginal people must also be careful, however, not to simply turn to critical alternatives, as some are as potentially threatening as liberal theory itself. They too rest on epistemic and metaphysical beliefs alien to the foundations upon which rest Aboriginal ways of life, and might ground on such foundations legal regimes which unilaterally define the "problems" Aboriginal people face and the "solutions" the law develops.

What then is the path forward? The first step was laid out clearly by Mary Ellen Turpel in *Interpretative Monopolies*:

> When we think of cultural differences between Aboriginal peoples and the Canadian state and its legal system, we must think of these as problems of conceptual

> reference for which there is no common grounding or authoritative foothold. Necessarily, we can't 'decide' the substance of cultural differences from a position of a particular institutional and conceptual cultural framework; each culture is capable of sensitivity to the basic condition of difference, and should develop cross-cultural relations accordingly. ... There is ... the possibility for toleration of differences and the recognition of autonomous or incommensurable communities. [121]

The existence of a condition of difference demands action from both sides of the cultural divide. On the one side is the requirement that further attempts to impose universal visions of the nature of knowledge, the self and its relation to community be curtailed. Critical theorists would likely argue this is asking much of liberalism, as they argue (quite persuasively, a realist might say) that liberalism is not so much a theory underlying and animating the law as an ideology, a mask for deeper mechanisms aimed at placing and maintaining wealth and power in the hands of a small ruling class. Critical theory itself, however, is entirely capable of more of the same, as it is easily bent to the task of subverting Aboriginal power, especially in relation to the power of self-definition, the power which must be protected above all others. For second generation critical legal theorists to move beyond the activity of "trashing," for their work to contribute to the struggle of Aboriginal people to find an appropriate place in Canadian society, they must develop a theory of inter-cultural relations beginning from the imperative of cultural difference.

On the other side of the cultural divide there is much work for Aboriginal people. One responsibility incumbent on all Aboriginal people is that set by the need to resist attempts by others to undercut Aboriginal peoples' senses of identity, which means resisting attempts to remove the link Aboriginal people must always maintain to traditional notions of knowledge, of ways of coming to know, of the self, and of the place of the self in community. In a sense, then, Aboriginal people can only continue to be Aboriginal people to the extent they can maintain within them a deep sense of responsibility to their ancestors and their descendants. One particular responsibility lies in guarding against attempts by the state to use the authority of the law and the power of legal discourse to determine the nature of Aboriginal interests, and how they might be protected by the law.

It is difficult to say who has the greater task. Liberalism is unlikely to acknowledge the imperative of cultural difference, especially if critical analyses pointing to its underlying nature as an ideological mechanism for oppression are correct. The only glimmer of hope lies in the ability to awaken individuals working and living within the liberal system to the nature of the threat the liberalization of Aboriginal societies poses to the essential interest Aboriginal peoples have in maintaining control over the power of self-identification. Perhaps the moral sense of such individuals could be put to the task of re-conceiving the design of the liberal state, its architectural principles being reconfigured along lines respecting the cultural divide between Aboriginal and

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121. "Interpretative Monopolies"*, supra* note 1 at 14, 45.

non-Aboriginal peoples in Canada. To be frank, given the predominance of liberalism in contemporary society we do not need to consider at this time what impact critical alternatives could have on the relationship between the law and Aboriginal people.[122] As much, though, as critical legal theorists' eschew "grand theory," they should be willing to sketch out how their position could accommodate recognition of the imperative of cultural difference.

Aboriginal peoples, on the other hand, have to begin by reconfirming the existence of, and implications emanating from, the cultural divide separating their ways of life from those built on certain Western precepts. In other words, they need to reaffirm the validity of their perception that the law is alien and oppressive and come to terms with the reasons for the validity of this perception.[123] They then need to acknowledge the *responsibilities* attendant on this reconfirmation and re-invigorate their societies in alignment with traditional wisdom, but in ways which provide for the complexities inherent in living in the contemporary world.[124] The enormity of this task is difficult to grasp, encompassing as it does (1) the need to avoid the much easier paths laid out by such seductively attractive alternatives as liberalism and critical theories, while both (2) rebuilding and strengthening ways of living which are good in themselves, ways of life which have suffered through relentless assault during the colonial period and (3) living according to these pathways. While all this re-building and re-thinking is going on, Aboriginal peoples must somehow find a way to live surrounded by peoples living in societies which allow their members —even encourage them—to be as irresponsible as they wish. Nevertheless, if Aboriginal peoples are to continue living as Aboriginal people, to hold to the value of the ways of living of their ancestors, honouring their wisdom and sacrifice, they must resist coming to think of themselves as simply collections of

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122. There are those who argue, however, that liberalism is already in the process of reforming itself, as western societies begin to construct "post-liberal" structures, perhaps along postmodern lines. Two who argue in this manner (though with different visions of the nature of "post"-liberalism) are Gary Minda in *Postmodern Legal Movements, supra* note 96 and John Gray in *Endgames, supra* note 6 and *Post-Liberalism, supra* note 16.

123. Sákéj Henderson puts this in terms of moving towards a postcolonial mentality: see *Postcolonial Indigenous Legal Consciousness, supra* note 1.

124. This program of re-invigoration along traditional lines in the modern world is called for by Vine DeLoria in *Custer Died For Your Sins: An Indian Manifesto* (Norman: University of Oklahoma Press, 1988) and *The Nations Within*, *supra* note 116. Much of Alfred's work, *Peace, Power, Righteousness*, *supra* note 1, is an extension of this thought. In discussing representations, especially those constructed by "histories," DeLoria writes:

> There must be a drive within each minority group to understand its own uniqueness. This can only be done by examining what experiences were relevant to that group, not what experiences of white America the group wishes itself to be represented in … Even though minority groups have suffered in the past by ridiculous characterizations of themselves by white society, they must not fall into the same trap by simply reversing the process that has stereotyped them.

Vine DeLoria Jr., "We Talk, You Listen", reprinted in *North American Indian Reader, supra* note 117 at 595-596.

people with interests in and claims to certain rights within the framework of the Canadian polity, or as communities whose identities can be entirely fluid and contingent.

Finally, on top of these two separate endeavours is the task of working out the appropriate relationship between Aboriginal and non-Aboriginal societies in a multi-national Canada. Little can be said *a priori* about the contours of this relationship, as it would arise at the confluence of two separate worlds, each coming to terms with enormous responsibilities and tasks that lead them into this final endeavour.