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WHERE IS THE LAW IN RESTORATIVE JUSTICE?

by Val Napoleon, Angela Cameron, Colette Arcand, & Dahti Scott

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WHERE IS THE LAW IN RESTORATIVE JUSTICE?[1]

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1. WAYS OF THINKING ABOUT LAW

1.1. Introduction

Restorative justice is seen by some as an important tool in moving towards, and sustaining, Aboriginal self-government.[2] The main purpose of this paper is to explore whether restorative justice can be usefully considered an expression and form of practice of local law. We explore this question with a view to its implications for Aboriginal self-government.

Specifically, the paper explores how our analysis changes when we shift from understanding restorative justice as a "program" to considering it an expression of local law, and therefore a critical aspect of on-the-ground self-government. The paper addresses experiences and trends in the implementation of local law by examining the work of the Alexis First Nation Justice Committee (the Committee) in the Nakota community of Alexis First Nation, just outside of Edmonton, Alberta.[3]

Considering the work of the Committee as being founded on local and/or Nakota law[4] could enable Alexis First Nation community members to (1) find other expressions of local and Nakota law at work in the community, (2) extrapolate how the legal obligations, legal norms, and legal principles of local and Nakota law might be applied elsewhere, perhaps to local governing institutions, and (3) critically examine how legal norms, obligations, and principles might be applied to other issues or conflicts. These are self-governing acts and are part of what self-government should encompass.

The paper will first develop a legal framework within which to discuss the concepts of local law and, to a lesser extent, restorative justice. This framework will then be applied as a lens to discern and describe the parameters and functions of local law that derive from the work of the Committee.

1.2. Legal Framework

A legal framework can be understood as a way of talking, thinking about, and working with laws and legal orders—in this case, Indigenous. Such a conceptual framework is formed, in part, by asking critical and unsentimental questions about the sources[5] and functions of law, the legitimacy and authority of law, the ways in which laws change, and the internal power imbalances and oppression within legal orders.[6] This legal framework advances an understanding of law as whole and separate from the dominant understanding of formal, centralized law created and perpetuated by the common and civil law in Canada. It asks how Indigenous laws and legal orders relate to these dominant understandings of law.[7] When applied to Nakota law, this legal framework helps us to better understand local manifestations of Nakota law in Alexis, identify and deal with internal contradictions and conflict, and develop non-colonial relationships between Aboriginal peoples and Canada.

The process of carving out an understanding of local law is in itself an exercise in self-determination. We are encouraging Aboriginal people and groups to create the political space in which they can consider such critical questions as: What are we beyond our resistance to colonialism? What do we want our contemporary legal institutions and laws to look like? and How do we develop the political space that is necessary for the exercise of intellectual capacity to articulate, interpret, and apply indigenous laws to contemporary issues?[8] At the end of the day, indigenous societies (like every healthy society) must have the political space in which to consider and manage their own laws and legal orders. It follows, similarly, that indigenous legal orders and law are fundamentally about citizenry—and therefore part of the collective social capital.[9]

1.3. Restorative Justice

In Canada, the term "restorative justice" is applied to a wide variety of theories and practices ranging from justice committees to victim-offender mediation.[10] It is a term commonly used by Canadian federal and provincial governments and courts to describe criminal justice programs for Aboriginal people in conflict with the law.[11] There are a large number of restorative justice programs across Canada with varying degrees of control and participation by and from Aboriginal people. The Alexis Justice Committee is one such program.

Understanding the link between restorative justice and Aboriginal self-government is confusing for several reasons. First, most restorative justice programs in Canada are not run autonomously by an Aboriginal group. While federal and provincial governments may grant certain levels of autonomy to Aboriginal groups deploying a restorative justice program, such as the Committee, the reality is that any potential for self-governance is often curtailed by extensive government reporting requirements, lack of resources, and indirect control (e.g., qualification criteria, evaluation standards, etc.).[12] Second, most government-sanctioned restorative justice programs, even those that deal exclusively with non-Aboriginal clients, acknowledge or claim roots in pan-Aboriginal[13] concepts of justice or law.[14] Meanwhile, they are completely unrelated to the local Indigenous peoples, ignoring the laws and legal orders of the Indigenous peoples where they function. Finally, while Aboriginal and restorative justice initiatives are obviously considered to be about justice, they generally say nothing about Indigenous legal orders and law. Usually the only references to law are statements that are diametrical opposed to the western criminal justice system. This binary approach is founded on the erroneous assumption that there is only one type of law—that of centralized states with formally enacted systems of law.[15] Thus, a false dichotomy between restorative justice and the western criminal law is created, which unfortunately constrains other creative possibilities for Indigenous peoples.

This paper argues that despite the ways in which restorative justice programs may be administered as ambiguous tools of self-governance, Indigenous laws and legal orders may still form the foundation for these programs. In other words, Indigenous laws and legal orders may continue to function and flourish just beneath the visible surface of the justice programs at an implicit and informal level. The Committee is recognized by the Alberta government as a restorative justice program closely linked to the criminal justice system and operating within limited parameters. However, in talking to the people who

work within the Alexis program, it is evident to us that the Nakota legal order and laws[16] are alive within this primarily Nakota community, and are (in part) responsible for the successes of the restorative justice program.

The label "restorative justice" does not reduce crime, or heal offenders and victims. The rhetoric or descriptions in government working papers and evaluations, or the *Criminal Code*[17] do not make changes in Aboriginal communities.[18] In fact, the rhetoric of restorative justice usually obscures forms of local law. We understand government-mandated restorative justice as a political, economic, legal and institutional scaffold that supports and, at times, distorts local law within Western law and politics. While the tenets and rhetoric of restorative justice may at times overlap with, or add to, the ways in which local laws are functioning, we argue that local laws themselves are more interesting and promising in terms of strengthening self-governance.

1.4. Local Law

As authors we come from a variety of cultures and legal traditions. Three of us are Aboriginal, but none of us are Nakota, nor do we live in the Alexis community. This has been both a great source of insight and a challenge.[19] In this project of trying to understand forms and functions of law across cultures (i.e., Western, Cree, Dunnezah, Dene, and Nakota), we must begin by recognizing our own cultural blinders and accepting that these may impair our efforts, no matter how well intentioned our desire to understand.[20]

The Committee is constituted by an agreement with the Province of Alberta to provide services and support to people in Alexis who are charged with criminal offences.[21] The work that the Committee does is, in its relation to Canadian law, created and bounded by this agreement. However we argue that much of the work that is being done by the Committee is better viewed within a different framework—that of local law.

Alexis local law is historically rooted in but no longer identical to Nakota law. Nakota law is part of a complete Nakota legal order[22] that historically extended more broadly (geographically and normatively) across the larger Nakota society and its territory. As with all law, Nakota law is not static, but is constantly changing. Local law consists of the ways that Nakota law is presently understood, interpreted, and practiced in the specific geographic community of Alexis. In other words, the settlement of Alexis in its present geographic location has caused Nakota law to localize into the single community of Alexis First Nation. This situation is further complicated because, with ongoing intermarriage with other Aboriginal and non-Aboriginal peoples, Alexis is no longer completely Nakota.[23] Today, Alexis is geographically separated from other Nakota groups and surrounded by Cree communities in historic Cree territory.[24] The ways that Nakota law is understood and used in social interactions is influenced by historic and contemporary realities that are unique to Alexis.

Local law locates law in the on-the-ground, day-to-day self-governance performed by Aboriginal people according to Aboriginal laws and legal orders. Local law operates simultaneously with Western law, but is usually either invisible or only visible in the form of traditions, customs, or practices.[25] A local law framework turns the focus away from what is happening in relation to the provincial and federal governments, and instead examines Aboriginal laws and legal orders, and the ways that they function as

institutions in and of themselves. In this paper we examine the work of the Committee, and ask ourselves whether what they are doing on a day-to-day basis can be understood as an expression and form of practice of local law deriving from Nakota law.

Frequently within Western law, Aboriginal laws and legal orders are reduced to essentialized and simplistic rules or practices such as prayer or smudging.[26] We want to examine what gives those practices meaning and what the information is that underlie the traditions.[27] In other words we might ask, for example, "Why is that smudge conducted at this particular time?" Our focus is not on the rules themselves, but on the intellectual and reasoning processes that are necessary for the collaborative practices of law, management of conflict, and governance generally.[28]

Our view is that underlying the practices or "rules" are a set of philosophical and legal norms that are constantly accessed and interpreted. We want to look closely at processes such as legal reasoning, deliberation, and interpretation of laws, rather than at the bare rules or practices alone.[29] It is hard to see these intellectual processes, or at least harder than to see Western legal reasoning, as local law does not have a separate dedicated institution (such as a law school) to explain and teach it. The law instead derives from and rests within the everyday social interactions, practices, traditions, lives, place names, and kinship relations of Indigenous groups.[30]

In every legal culture, including Aboriginal laws and legal orders, the ways that we understand and fulfill these norms are constantly contested and debated. Law lives in each new context. In fact, one of the most important things to understand about law is how it changes in our own and in other cultures.[31] It has to change in order to fulfill an effective governance function—it must be appropriate to new context and circumstances or it will lose its legitimacy. This contestation of legal norms occurs as societies themselves change and face new challenges or new ways of being together as people.[32] In part, local law functions as a dispute management system when these norms are contested. It is local law that provides the mechanisms that ensure such ongoing contestation happens within boundaries generally accepted by that culture. Moving from focus on the practice itself to the philosophical basis of the practice allows us to see more clearly the norms that are at work, the ways that those norms are contested, and the dispute management mechanisms, or local laws, that mediate this contestation.

Indigenous laws and legal orders are not static or frozen in historical rituals or practices. Understanding and using local law is not about trying to go back in time, but about drawing on strengths and principles of the past to deal with modern problems and situations.[33] We think that the Committee does this in several important ways, and we discuss examples of their application of local law below. We also find places where local law could be used to address modern problems and situations, but where it seems not to have been applied—in particular in assisting the victims of domestic violence in that community.

2. ALEXIS FIRST NATION

2.1. A Little Bit of History

The specificities of Alexis local law lie in part in the history of this group of people. We include some of this history here for two reasons related to self-governance: First, stereotypes about Aboriginal peoples abound, including the notion that Aboriginal "traditions" exist only in the frozen past. Discussing the complexities of Aboriginal history provides a more flexible, nuanced understanding of where local laws come from, how laws may have changed, and how they may continue to change. Second, as with all peoples, the history of Aboriginal groups shapes the conflicts, laws, and understandings held by them today. This history needs to be acknowledged and understood to provide context for further positive social change.

The Alexis Nakota Sioux Nation is situated on the north shore of Lac Ste Anne, approximately 72 kilometres west of Edmonton, Alberta. By adhesion, Alexis is a signatory to the historic numbered treaty, *Treaty 6*, signed in 1876. Alexis is situated in an area that is traditional Cree territory. The history and circumstances of how this band of Nakota Sioux came to be formally established in its present location provides some context to their cultural uniqueness and the development of local law. For the purposes of this chapter, the Nakota Sioux settlement in Cree territory was made possible by the operation of Nakota Sioux and Cree international laws and protocols. According to Alexis First Nation,

> In August and September 1876, Canada sent Treaty Commissioner Alexander Morris, the Lieutenant Governor of Manitoba and the North-West Territories, together with fellow Commissioners James McKay and W.J. Christie to meet at Fort Pitt, Fort Carlton, and Battle River with "the Plain and Wood Cree and the other Tribes of Indians" to negotiate Treaty 6. From Canada's perspective, the purpose of the treaty was to open up the 121,000-square-mile Treaty 6 area for settlement, immigration, and other purposes and to establish "peace and good will" between the Indians and the government. In exchange for the Indians' surrender of their rights to this territory, Canada agreed, among other things, to "lay aside reserves for farming lands, due respect being had to lands at present cultivated by the said Indians… ."[34]
>
> The following year, on August 21, 1877, in the presence of interpreter Peter Erasmus and three other witnesses, Chief Alexis Kees-kee-chee-chi and Headman Oo-mus-in-ah-soo-waw-sinee executed an adhesion to Treaty 6 on behalf of the ancestors of the present-day Alexis First Nation.
>
> To fulfill the Crown's obligations to provide reserve land, Dominion Land Surveyor George A. Simpson laid out IR 133 on the north shore of Lac Ste Anne for the Alexis Band in October 1880. Comprising 23 square miles, the reserve was confirmed by federal Order in Council… .[35]

It is more difficult to piece together the history of the Alexis Nakota Sioux prior to the signing of the adhesion to *Treaty 6*. The archival records contain conflicting accounts of the migration of the Sioux in Canada.

According to the Alexis Nakota History and Culture Program, "the Alexis Nakota Sioux Nation is the most northern member of the Siouan language family. Although closely related to their Cree neighbours through intermarriage and centuries of neighbourly interaction, Alexis maintained its cultural uniqueness as a Nakota Nation."[36]

According to Alexis First Nation, the history of Alexis begins in the east:

> The Assiniboine group detached themselves from the rest of the Siouan family. …The Jesuit Relations of the seventeenth century document the schism within the Sioux parent stock and the existence of a subdivision, *warriors of the Rock*, who were called Poulaks and lived on the western shore of the Mississippi River. Inhabiting the country between the Poulak and the Assinipoulak were the Nadouechi or eastern Sioux.[37]

This group of Sioux had alliances and intermarriage ties with the Saulteaux (Chippewa-Ojibwa)[38] and the Cree.[39] Smaller groups of people moved westward to Alberta with the fur trade. Alexis members contend that their ancestors were Nakota who broke away from the other divisions of the Sioux and migrated westward during the fur trade.

This account is variously supported and refuted by other historical sources. The two main points of variation are geographical origins and international alliances. Alexis First Nations' assertion that they originated in the East, near the Mississippi, is supported by Peter Grant.[40] However both Paul Carlson[41] and Helen Buckley[42] contend that the geographical origins of the current northwest Nakota are in the Great Plains and then the forests of Minnesota. According to Alexis First Nation, they were members of the Sioux nation and had alliances with the Cree and Saulteaux. According to Peter Grant, however, the Sioux were historically at odds with the Saulteaux.[43] And according to Carlson, the northern Nakota became the enemies of the Sioux, from whom they originally separated in the Great Plains.[44] According to all accounts, however, the Nakota Sioux had allied relations with the Cree, a pattern of international conduct that continues today in Alexis.

There is also historical debate surrounding the geographical movements of the Nakota Sioux once they arrived in the northwest. Carlson suggests that the Nakota settled in Saskatchewan, in order to hunt bison.[45] Alexis First Nation, however concludes that they settled farther west than Carlson's account allowed:

> Based on the records of fur traders and explorers in the seventeenth century, it is apparent that the Assiniboine [Nakota] had either ventured westward or were in occupation of lands far to the west of the original Sioux homeland.[46]

In support of the Alexis position, Buckley contends that the Nakota (Assiniboine) came to settle in the foothills of the Rockies in the nineteenth century when trading relations broke down, warfare increased, and disease became epidemic.

> In Canada, the Assiniboine [Nakota] lost whole bands and the Blackfoot two-thirds of their population. The former, thought to have numbered around 28,000 at the beginning of the nineteenth century (counting both Canada and the U.S.), were down to 2,600 in a 1904 count, largely because of losses in the 1830s. One of the bands that came through the epidemic gathered as many orphaned survivors from other bands as it could find and fled, through Blackfoot territory, to the foothills of the Rockies. The descendants of this band, now known as the Stonies, live there to this day.[47]

Other historical records suggest that, in the mid-1700s, this group of Nakota Sioux (Assiniboine) may have been farther north on the Saskatchewan River near present-day Edmonton.[48] Two other groups of Sioux also appear in the historical record, but seem to be unrelated to the Alexis Nakota Sioux. One migrated much later in the 1800s and is now located in the Rocky Mountains area.[49] Another Sioux group appeared near Winnipeg in the late 1800s. At that time, a reserve on Lake Manitoba was proposed to the Sioux, but they were unwilling to settle there because of their history with the Saulteaux,[50] supporting Peter Grant's account of international relations.

As this section illustrates, the present location of the Alexis First Nation is the result of a complex and turbulent history that spans hundreds of years and thousands of miles. Despite the often harsh historical experiences, the Nakota have maintained a political and cultural identity, and a strong sense of collectivity. This is the historic backdrop to the present-day community of Alexis First Nation.

2.2. Alexis First Nation Justice Committee

Colette Arcand, Angela Cameron, and Val Napoleon met several times with members of the Committee in January 2007. The discussions were open-ended, with a series of questions intended to prompt conversation. We asked about the members' roles and responsibilities, relationships and kinship system, conflicts and community issues, and historic connections with other peoples and communities. Our goal was to encourage critical discussions about how the Committee members understood their legal obligations according to local and/or Nakota law. We also asked about contradictions in local and/or Nakota law, and whether the members saw the Alexis Court Project as a way to fulfill their legal obligations according to local and/or Nakota law.

By and large, the Committee members found it very difficult to respond to or engage with the questions. There are two reasons for this discomfort: First, the committee members are used to discussing their work as a restorative justice program—not as law. This is the usual basis for their relations with government and the judiciary, as well as program evaluators, other Aboriginal groups, and outside researchers. Second, the term "law" became a major stumbling block because they associate it with their work with the *Criminal Code* and the courts. Given this experience, it was very difficult for the

Committee members to imagine law in terms of being local and/or Nakota. This is discussed further in the next section.

Under the Court Services Division of Alberta Justice and Attorney General, Alexis First Nation has had provincial court sitting in the community for many years. Referred to as the Alexis Provincial Court, the Alexis program is described on the Alberta government website as follows:

> A unique First Nations Court and Restorative Justice Initiative has been developed at the Alexis First Nation where Provincial Court Judges and Stony Plain Crown prosecutors share information about the criminal justice system and court procedures with the Alexis Justice Committee, Elders, and other community members. In turn, judges and prosecutors have the opportunity to build relationships with the Aboriginal community and learn about its culture, traditions, and social resources. This relationship building and sharing of knowledge supports a community-based approach to justice that promotes respect for the law and safe communities.
>
> The court, working with the community and justice stakeholders, has incorporated court-ordered supervision of offenders, interim reviews, and accountability to the community into the Alexis Restorative Justice process. The justice committee acts as a sentencing resource that augments pre-disposition or pre-sentence reports by identifying cultural and social resources available at the Reserve. The justice committee also assists the probation officer in monitoring the probation of some offenders, and in providing the court with community reviews of the probationer's compliance. These interim reviews are an important and unique component of the Alexis Restorative Justice process.[51]

Under the Alberta Solicitor General and Public Security, Alexis First Nation has a formally established Youth Justice Committee, a Community Tripartite Agreement under the First Nation Policing and Law Enforcement Initiatives, an Aboriginal Crime Prevention Program, and a Community Supervision Program for Aboriginal Offenders.[52] According to the online description, this latter program emphasizes community accountability and seeks to reflect the "culture, language and traditions of the local communities." Supervision is provided to "Aboriginal persons with probation, temporary absence, pre-trial or fine option status."[53]

In 2003, a government-funded evaluation of the justice committee concluded that the restorative justice program had been successful on a number of fronts during its ten-year existence. In particular the evaluation notes that "the offenders find the structure of the sentences…and the ongoing support from the Justice Committee and Probation Officer to be critical in changing their behaviour and lifestyles. The recognition by the Justice personnel of the underlying causes of their lifestyle and the upfront willingness to assist the offenders to reintegrate into the community are keys to success."[54]

3. LOCAL LAW IN ALEXIS—EXPERIENCES AND ISSUES

3.1. It Is Hard to Talk About Law

> Indigenous law flows from sources that lie outside of the common law and civil law traditions. As described in 1973 in the *Calder* case by the Supreme Court of Canada, such a unique source resides in the fact that "when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries." These laws have no need for dependence "on treaty, executive order or legislative enactment." They are "pre-existing" and have their own logic, as the Court said, "indigenous to their culture [though] capable of articulation under the common law."[55]

The purpose for meeting with the Committee was to engage in a discussion about how the Committee members understand their work in the community and whether this understanding reflects their local and/or Nakota laws. Local law in this context is the way community members manage themselves as a group over time. Historically, Nakota society's governance was decentralized without a hierarchical or centralized authority. In keeping with the theory of law that recognizes law as deriving from social interaction rather than solely from centralized formal state processes,[56] local law is about how people make decisions and conduct themselves in a social context. Local law may be described as "a language of interaction" that is necessary for people's social behaviour to be meaningful and predictable over time. It is this language of interaction that makes possible social settings where people's behaviours generally fall within expected or known patterns.

This is a more complex and subtle way to think about local and/or Nakota law. Since much of this law is implicit or beneath the surface of our consciousness, it usually remains invisible. It becomes that which we do not know that we know. However, Indigenous societies also made implicit law explicit, complete with collective processes for deliberation, reasoning, interpretation, and application. We know that these processes have been damaged and undermined by recent history. Consequently, most indigenous peoples including Alexis have difficulty discussing indigenous law and legal orders in any critical, rigorous, and practical way.

Our starting premise is that local law and Nakota law in Alexis (and the equivalent in other communities) can be drawn out by examining the activities and experiences of the Committee members. In this way, legal norms and legal obligations can be discerned in people's behaviours over time—that network of tacit understandings and unwritten conventions that are rooted in the soil of social interaction.[57] According to Gerald Postema, "We cannot fully understand law, we cannot appreciate its dynamic character, the role it plays in human affairs, or the kind of public good it offers, if we fail to attend to this implicit dimension of law."[58] Postema contends that implicit rules do not arise from conception, but from conduct:

> Although implicit rules arise from the conduct of determinate agents, typically they have no precise date of birth and no determinate authors.

> They presuppose no relations of authority and subordination; thus, their practical force depends neither on authority nor on enactment, but on the fact that they find "direct expression in the conduct of people toward one another."[59]

So, while the Committee members were unable to explicitly discuss local and/or Nakota law, it is arguable that their examples demonstrated a fulfillment of legal obligations and are a form of local and/or Nakota law at work. The committee members' language conveys the implicit nature of this particular discourse: "That's how things are," they say, and "It's natural." In this way, what people know is "how things are" and "natural" and invisible. Some members described their local and Nakota laws as a way of life, again exemplifying a more internal perspective and a more holistic way of understanding.

For the most part, the Committee members discussed their work within the boundaries of a justice program intended to deal with people charged with criminal offences. This is congruent with their mandate as a formalized, community-based Aboriginal justice initiative under the Criminal Justice Division of Alberta Justice and Attorney General. As previously outlined, the community is actively involved in various Aboriginal justice initiatives in many areas, and from the committee's perspective, it makes good sense that the committee discuss their work within these terms of reference.

As the discussion began about local and Nakota law being applied in the committee's work, we observed that the committee members were uncomfortable with the language of "law" and were having difficulty in articulating their own laws. We did introduce our questions by explaining that in our theoretical framework, law is not just rules, it is how law is practiced and how it is thought about. Further, we hoped that by looking at the interactive process of the Committee, we could learn how people figure out how to interpret and apply the rules, and how to act on the rules generally. The authors listened to the committee members as they discussed why they care about the work they do.

John Borrows provides some useful examples from Anishinabek law that are helpful to our consideration of local or Nakota laws at work in Alexis. Borrows explains that Anishinabek legal traditions use precedential, standard-setting criteria to guide and judge action. He finds that the trickster Nanabush is a useful intellectual instrument for teaching law: "Nanabush turned to what was there, what was familiar, what was nearby, and he was able to take those things that were familiar and nearby and transform them—transform them in such a way that he got people involved with what was going on in the community."[60]

The Committee incorporates sacred ceremonies when the members work with offenders. It may also arrange to have clients work closely with Elders in the community as part of their community supervision. One example provided by committee members was how a thirty-day continuous fire was employed to inspire the youth in the community and promote spirituality. One Committee member explained that the Committee "takes what works and uses it." These are examples of what Borrows describes as expressions of normative values being reflected in day-to-day affairs. Borrows writes, "The professionalization of the decision making through lawyers takes law out of the hands of people, like I was describing in that Windigo story. Why should you need to hire

somebody at $100 an hour when through kin, through story, through ceremony, through speaking with elders, you can deal with challenges on other bases?"[61]

These are the sort of processes used by Alexis to deal with circumstances that are presented to them by the actions of their community members. Alexis is drawing on legal principles of legal obligation to one another in order to confront problems. There are similarities between the work of Alexis and how Borrows discusses Anishinabek law and interactions: "Go with our friends; form a council; be unanimous; and act in such a way that you take responsibility for the decision you make."[62] The Committee has decided what they will do. They meet with clients, discuss the circumstances, make recommendations to the court, and are involved with follow-up with clients via interim reviews to the courts. Borrows explains:

> You study indigenous words and you get a world view focused on relationships people should have with one another in terms of their obligations and responsibilities. This is the case with environmental law; there are things that people are trying in the criminal justice context. In fact, as Morris Rosenberg mentioned, the idea of sentencing circles has some of its roots in indigenous legal traditions, in gathering together and trying to come to a resolution in that format.[63]

In Alexis, the Committee reconciled an internal community conflict in the early 1990s that resulted in the ongoing acceptance of diverse spiritual practices. One committee member described this as a heated political issue that affected the Committee's work. Another Committee member described how the Committee decided to work through this issue because they needed to cooperate to help the people. The members discussed how they worked this out themselves without the provincial judge who usually participates in the Committee meetings. They described how they came to consensus about prayer, higher powers, and the acceptability of different means and practices as an individual's personal choice. Now, spirituality among Alexis community members is generally some form of Christianity, or Nakota traditional spirituality, or a blend of the two. This acceptance of spiritual diversity by the Committee is an example of successful ongoing conflict management.

Spirituality is supported because the members believe it is more important to nurture spirituality rather than worry about how an individual practices it. Today, for example, all members support the idea that programs like Alcoholics Anonymous are just as effective as a traditional sweat ceremony. No one method is better than the other, just different—the method does not matter so much as ending up with sober people. From the committee members' discussion about this experience, it becomes apparent that they were involved in an active and deliberative process to find solutions to their conflicts. The experiences of the Committee are similar to how Postema describes interactive processes involving informal and implicit law:

> Because parties engaged in interaction frequently face new situations and new practical problems, they must adjust, reinterpret, or even replace existing rules. These revising activities are possible only because the parties develop shared abilities to negotiate the network of expectations

> and together to arrive at new, relatively stable understandings. Participating in such practices we learn how to anticipate the solutions our counterparts will hit upon as they attempt to anticipate our decisions and actions. Interpretation and extension or contraction of existing rules in such a practice, then, is itself an essentially interactive process.[64]

If we follow Postema's and Fuller's line of argument, the importance and effect of the presence of implicit law in modern legal systems becomes even more substantial and critical to thinking about self-government for Alexis. According to Postema, Fuller's claim is that "dependence on implicit interactive practice is a common feature of modern law, but also that law is not possible without it, that it is essential to our idea of legal order."[65] According to Fuller's congruence thesis, "a substantial degree of congruence between enacted laws and background informal social practices and conventions governing horizontal relations among citizens is necessary for the existence of law."[66] In Alexis, the Committee's social interactions are congruent with the understood rules or social norms in the community. In other words, the explicit work of the Committee is founded inextricably on the implicit and informal law that derives from Nakota law. Again turning to Postema: "Legal norms and authoritative directives can guide self-directed social interaction only if they are broadly congruent with the practices and patterns of interaction extant in the society generally."[67]

Alexis legal norms are not just "understanding the meaning of the words in which [they are] formulated, but understanding the institutions, practices, and attitudes of the community to which [they are] addressed."[68] In other words, legal norms only make sense as "practical guides for self-directing agents…only when they are set in a context of concrete practices, attitudes, and forms of social interaction."[69]

There are times and circumstances when a projected norm does not make sense. For example, statements about "respect" were made during the meeting with the Committee. One member talked about respect for other people's ways, and another talked about treating offenders with respect. Members also talked about the importance of not judging clients, not kicking someone who is down, and giving all people a second chance. These comments are important. However, when respect is articulated in an abstract form, problems can be created because of the difficulty in understanding the contextual and relational subtleties of "respect." Julie Cruikshank provides an example in her discussion about her work in the Yukon, in which one speaker of a panel addressed the audience at an environmental conference:

> A second speaker adopted a different strategy, one that works effectively in many meetings. He spoke of the concept of respect—respectful behavior toward other human beings and between humans and nonhumans. Accustomed to using this language to speak to large audiences, he may have seemed to some to overgeneralize by using such phrases as "we always respected our elders" and "we always respected our women." When an audience member requested a clearer definition of the term "respect," this panelist responded, again conventionally, that it is impossible to translate some concepts from indigenous languages to English. The previous panelist, trying to formulate a more optimistic

> response, proposed that while "respect" is indeed an English word used only recently, it might be thought of as referring to attention to subtlety, especially in the relationships among humans, and between humans and other living things.[70]

Cruikshank's point is that in attempting to reach broad audiences "who come with universalistic expectations and expect to understand what they hear, familiar strategies are inevitably the most effective in the short term, but they too have costs."[71] The cost Cruikshank is referring to is when the abstract formulation becomes an obstacle to making the practical sense of the norm known. She writes: "The inescapable lesson seems to be that removing oral tradition from a context where it has self-evident power and performing it in a context where it is opened to evaluation by the state poses enormous problems for understanding its historical value."[72]

At Alexis, one Committee member explained that people used to tell stories that contained laws, but these did not work out when interpreted in English. She talked about the old teachings that were based on having to answer for one's actions in the spirit world after death. Another example is about the purpose and meaning of the smudge at the beginning of a meeting. The Committee members explained that the smudge and prayer at the beginning of a meeting are important to settle the room, settle peoples' minds, and humble the participants (i.e., where are we in the universe?). Before a court hearing, the smudge settles the room, humbles the young people, and helps to deter aggressive behaviour by reminding them of their relationship to the Elders in the room. Postema apprehends this process: "Law has a social depth which we must recognize if we are to understand adequately the nature and modes of functioning of these salient surface phenomena. By its very nature, law is deeply implicated in the practices and conventions of the communities it governs."[73]

Borrows argues that there is a crisis in the rule of law in Aboriginal communities—not because Aboriginal peoples do not have the rule of law, but because the legitimacy of the rule of law in Aboriginal communities has been undermined.[74] For Alexis, this is not the only difficulty. It is also difficult to describe how local or Nakota law works because these institutions and constructs have been displaced, damaged, and arguably distorted by western law (more on this later). However, what remains in Alexis (and in other similarly situated Aboriginal communities) is the underlying implicit and informal law.

Another difficulty that became apparent in Alexis is that it is difficult even to find a useful language with which to create constructive (i.e., non-colonial) intellectual bridges between Nakota law and western law. Also, it is difficult to discuss either local or Nakota law solely on the basis of what was shared during the meeting with the Committee. Local law and Nakota law are deeply embedded in the practices and day-to-day interactions in the community. Without participating first-hand in the Committee's activities over time, and without further information from the Committee, it can only be argued that there is evidence of local and Nakota law at work in this community—but dialogue is elusive.

3.2. Kinship

Local law functions as a conflict management tool during the contestation of social norms. In Alexis, it derives in part from and rests within the kinship system. At the same time, kinship units have been flexible, allowing this form of local law to act as a primary form of conflict management.

Nakota society is organized along kinship lines with extended family groupings that are fluid, enabling people to operate and move within the larger group according to matrilineal, patrilineal, or bilateral lines of descent. These kinship relationships provide members with their identities and determines their rights and obligations to one another. Historically, this social organization determined the distribution of goods; regulated the utilization of resources; provided domestic, political, and spiritual leadership; and established standards of behaviour and punishments for deviation.[75] In describing the Dakota Sioux, Ella Cara Deloria wrote, "The ultimate aim of Dakota life, stripped of accessories, is quite simple: One must obey kinship rules; one must be a good relative. … Without that aim and the constant struggle to attain it, the people would no longer be Dakotas in truth. They would no longer even be human."[76]

3.2.1. Kinship and responsibility

It was clear that most Committee members viewed the work they did as more than just working within the Alexis restorative justice program. This was evidenced in part by the ways that members carried their "committee" work with them outside of the time and space allotted to restorative justice work. For instance, several Committee members noted that they get visits at home from young clients in crisis seeking guidance. There was a clear sense among the members that the work within the Alexis restorative justice program was primarily the work they were already required to perform as a good relative. This was closely tied to local legal understandings of responsibility for young people within that kinship system, extending well beyond the nuclear family.

For instance, one female participant notes that she cares about the Committee's work in part because she is the second oldest girl in her family. She had the responsibility to look after her younger siblings and the younger children in her extended family, and as an adult she still has that kind of responsibility. Another female member, with eleven children and thirty-four grandchildren, joined the Committee in part because her children are all grown up, leaving her time and energy to fill a (grandparent) role for other young people in Alexis. She notes that this is the work she does because "that is what parents and grandparents did."

Committee members actively teach kinship principles to young people who participate in the Alexis restorative justice program. One male member talked about kinship language and the names used to address particular family members such as nephew, cousin, brother, little brother, etc. He noted how young people do not use the names from the language, and that they tell clients that they are going to have to learn because they are going to have to teach their own kids. A female member echoed that laws were oral, passed on in the conduct of individuals in their relationships with their families and communities.

3.2.2. Gender roles, parenting, and grandparenting

Several Committee members referred to the existence of gender roles within Nakota law. One female member talked about how the male offenders do their individual work with male elders and female offenders with female elders to provide a setting for learning gender roles and proper protocols. Nakota kinship laws established gendered norms within families and the larger community, allocating responsibilities and duties to one another, as well as the division of work.[77] For instance, one female member noted that older sisters were seen as second mothers, and brothers as second fathers. Verbal greetings by these names locate each person in the kinship network.[78] Each role and relationship carries legal obligations, including setting out who will be responsible for the welfare of children in case of future harms to the parents.

In Alexis, a number of circumstances have challenged these norms. For example, the demands of contemporary living have disrupted the practice of dividing work and responsibility along gendered lines. Rather than accepting this practice as a static "rule," Alexis local law has maintained and fulfilled the philosophical basis of the practice (teaching children how to be a good relative) while allowing for gendered norms to be contested. Importantly, the underlying philosophy has remained intact and guided the changes to the practice itself. This ensures that Alexis children who lack a relation of a particular gender have others in the community fulfilling that role. The social circumstances that supported the gendered division of responsibility have changed, and therefore so have the practices and norms.

Contemporary pressures on gender roles reflect a number of social changes. Also, there is a dearth of adults of either gender who understand and follow Nakota laws about kinship responsibility generally. Alexis local law has intervened to allow gendered norms to be fulfilled within that challenging contemporary context. In several cases, this has meant that committee members of one gender will perform the kinship work of the opposite gender in order to ensure that children in Alexis are learning Nakota kinship principles. In addition, paid work generally has provided opportunities for several Committee members of both genders to teach Nakota kinship principles and responsibilities to Alexis children. The responsibilities of kinship extend beyond the particular young people who come before them in committee.

For instance, some women Committee members choose to work outside the home, sharing their role as Nakota woman/mother with other roles as a paid worker. One female Committee member spoke about preparing the smudge before court, which she described as a man's job. One female member said that being a school bus driver and raising her own kids fulfills her role as a Nakota woman, and her contribution to Alexis Another female member says that she has had to play a grandfather role in her paid work because some of the youth don't have a grandfather who can do this. She notes that this "isn't her role" and reiterates that she is in fact a "younger sister." Another female member talked about how she plays the role of grandfather to her grandson, whose father is deceased, and the need for these roles.

3.2.3. Reciprocation, respect, and role modeling

Throughout the roundtable discussion, several other principles of Alexis local legal traditions emerged. These were discussed either in terms of reasons for joining and staying with the Committee, or as tools used to teach and guide young people who came before the committee.

There was a sense among some members of the importance of reciprocity, or giving back. One male member was helped by the Committee and then joined as a member afterwards. One woman stated she got involved as a way to give back because they had accepted her when she married a community member. Another woman said that work on the Committee is her way of giving back to the community in general.

Over the course of the roundtable, the word "respect" was used frequently to characterize good relations within families and within the Alexis community. Elders were seen as an important source of knowledge for how to conduct yourself with respect. A female member said, "There are three Ls in "Indian country"—Look, Listen, Learn—and try to be as good as the practicing Elders." There was an acknowledgement that Elders are important, and several members expressed fears about losing their Elders as they pass on. One female member stated that the Elders are an important part of the Committee. Another female member said that the Elders maintain the history and remember the changes. This was echoed by another woman who said that the Elders watch who makes changes and breaks unhealthy patterns.

Finally several Committee members understood their work on the Committee to include being a role model. The Elder male Committee members in particular discussed their commitment in terms of acting in ways to model the behaviour of a good relative. One male Committee member talked about how he felt that was important, otherwise who would listen to him? Two male Committee members talked about how they did not want their grandchildren to perceive them as alcoholics, but instead as models of how to remain sober. One elder female noted that having used alcohol herself, and knowing how to overcome it, gives her knowledge to share with younger people on how to get clean.

Two younger members—a man and a woman—also talked about being good role models and teachers to their own children and to other children in Alexis. They said that they in turn look to Elders as role models and as sources of knowledge. According to one man, being a good role model also goes beyond yourself, as you are representing your family.

3.3. Gender

A recent evaluation of the restorative justice program in Alexis,[79] discussions with justice officials, and our roundtable discussion with Committee members revealed a lack of adequate resources available for the victims of crime. The evaluation reported that most of the program's strength lies in treating offenders, and that dealing with victims is a serious challenge.[80] For example, the report notes that "some victims find it difficult to provide statements and evidence in front of their own community" and "some victims are fearful of providing statements since the offender's family might be in court."[81] The evaluation also highlights how the Alexis restorative justice model is not including victims in the process to the extent that it could, and that the Committee and the criminal

justice service providers recognize this gap and are attempting to acquire funds to start a victim services unit on the reserve.[82] The evaluation goes on to recommend that victim services be developed to enhance the Alexis restorative justice model.

In a recent conversation with an Alexis community member who does paid work with the Committee, the problem of victim services was raised and recognized. A lack of financial and human resources were identified as key factors contributing to this problem. Although Committee members have received government training on how to deal with offenders, they currently do not have government training to address the needs of victims. In the past, the Committee tried to establish a subcommittee to work with victims. Unfortunately, it proved to be beyond the capacity of the Committee, and resulted in an unmanageable workload for the Committee members. The Committee member also mentioned that the Committee has tried to recruit other agencies to help them improve the situation for victims, but the substantial commitment required between agencies to allow for such an alliance with the Alexis program has not yet been achieved. This means that victims have limited options when seeking local resources. The nearest victim services facility is located in Mayerthorpe, which is approximately a forty-five minute drive west of Alexis.

It also became clear to us that very many of the generic "victims of crime" referred to in the evaluation and by the Committee are women who have been assaulted by their intimate partners.[83] In our opinion, this represents a piece of the larger pattern of violence against women, which cuts across cultures in Canada and which warrants particular attention and analysis. Violence against women is a gendered crime, regardless of the community where the crimes occur, and helps to perpetuate and entrench the legal, social, economic, and cultural subordination of women. Framing the issue within Aboriginal self-government does not erase the need to address these issues in a gendered way. Issues that have been marginalized and ghettoized as "Aboriginal women's issues" need to be contextualized within the larger Aboriginal political frame, and Aboriginal political issues, including self-government, require a gendered and feminist analysis.[84]

The efficacy and safety of restorative justice in cases of intimate violence[85] has been explored from various positions,[86] with particular attention to the survivors[87] of intimate violence. In this chapter, however, we are interested in the ways that local law has (not) dealt with women survivors of intimate violence. We argue that, to an important extent, the funding and parameters of the restorative justice project have also set boundaries around the functioning of local laws and legal orders in relation to these issues. The availability of financial and human resources earmarked for offenders, albeit limited, has steered the Committee towards local legal work that supports offenders. We argue also that Alexis local law itself has the potential to assist women survivors in similar ways.

All law, including local law in Alexis, changes over time. In order to maintain its legitimacy as a governance function, local law provides parameters within which norms can change and adapt to contemporary social issues. We discussed above how Nakota norms of gendered kinship roles have adapted to contemporary challenges. In the context of intimate violence, Alexis local law has the potential to adapt in similar, helpful ways to cope with this contemporary social issue outside of the parameters of the restorative justice project. This must be done, in part, through legal reasoning—by applying Alexis local law to this issue in ways that are intellectually rigorous, critical, flexible, and

inclusive of women. Committee members have already done this to some extent with offenders.

Solving contemporary social issues will likely require Alexis local law to continue to recognize and adapt resources from non-Nakota sources. For instance, in treating/healing offenders, many committee members referred to the extensive and successful use of Alcoholics Anonymous. Survivors of intimate abuse also require such services; including specialized victim service providers with training in the gendered dynamics of intimate abuse, and resources such as individual counselling.[88]

There remains, however, the important issue of resources. In helping offenders, Committee members give above and beyond the paid parameters of their work. They speak of this extra work in terms of a local legal kinship obligation. The restorative justice program, however, also plays a role. It acts as a scaffold for the local law at work in Alexis and simultaneously provides limited financial and human resources, which the committee stretches into use in their kinship work. The Committee, and the paid staff who support them, are already stretching these resources to an incredible extent and using them to do far more local legal work than the restorative justice program demands of them. These resources, however, are simply insufficient to meet the needs of survivors as well. We argue that, given some restorative justice resources specifically earmarked for survivors, Committee members would and could stretch them beyond their programmic capacity, and use them to augment local legal work. With these resources, in conjunction with the conscious, critical application of Alexis local law to the circumstances of women survivors, the Committee has the potential to fill a legitimate local governance role in relation to crimes of intimate violence.

3.4. Norms versus Values

> All legal orders, of whatever kind, have to have mechanisms for fashioning these collective positions out of the welter of disagreement. This does not undermine the key insights of the theorists of social law, but it does warn us against the tendency to treat the social law as natural, as emerging harmoniously from practice. Instead, it insists on the existence of contestation and dissent and focuses attention on the means by which contestation is settled. … Indeed, the very essence of law—and of normative orders generally—involves the fashioning of an emphatically social outcome in the face of disagreement[89]

This section considers the implications of focusing on values, rather than on norms, within the restorative justice field. It then asks, what difference would a focus on norms make, if any? The primary concern here is whether the focus on values might represent a failure to recognize agency in the interpretation of values. There are some similarities as well as wide variations between the identified values in the following list, but they are all described as basic beliefs underlying the practice of restorative justice, including many discussions, conferences, and government and community programs. And yet this critical, predominantly values-based approach remains unquestioned.[90]

Within the vast literature on restorative justice, much is written about the importance and centrality of values. For example, in a recent book on peacemaking circles, the “circle values” are listed as forgiveness, love, respect, honesty, humility,

sharing, courage, inclusivity, empathy, and trust.[91] The authors argue that each individual must strive to "shift to living more mindfully aligned with our values" and "learn how to act in more value-consistent ways."[92] The peacemaking circles are spaces where, among other things, one can learn to act in harmony with one's values.[93]

Barb Toews works inside penitentiaries. From her perspective, restorative justice is grounded in four core values that affirm and build strong webs of relationships: respect, care, trust, and humility.[94] According to Toews, acting on these values in restorative justice practice requires recognizing other needs and behaviours such as accountability, healing, responsibility, restoration, honesty, dependability, and confidentiality.[95]

From a national Canadian perspective, the former Law Commission of Canada identified restorative justice values as: participation, respect for participants, community empowerment, commitment to agreed outcomes, and flexibility and responsiveness of process and outcomes.[96]

From an international perspective, Daniel Van Ness draws a distinction between normative values and operational values.[97] The list of normative values includes active responsibility, peaceful social life, respect, and solidarity. The operational values are directed to the parties affected by the offence and include amends for the harm, assistance to become contributing citizens, collaboration to develop solutions, empowerment, encounter, inclusion, moral education, protection, and resolution.[98]

The Alexis evaluation report refers to incorporating cultural and spiritual values into sentencing and to restoring moral values to the community.[99] During the discussions in Alexis, Committee members referred more generally to traditional, cultural, and moral values. From the perspective of the Committee members, the term "value" seems to express deeply held beliefs about their work, culture, community—basically, that which is good and to be aspired to as people, sometimes including that which is held sacred.

It is not our intent to question the deeply held beliefs of the Alexis people or anyone else. Rather, because our interest is law, we are concerned with the questions of individual and collective agency. People can only interpret values according to their experiences and circumstances, and within their cultural horizons. In the restorative justice discourse, these propounded values are assumed to be absolutely universal, leaving no place to consider how people are interpreting them. Nor is there any place to consider whether people disagree with the values or how they weight them when values conflict (e.g., family versus work). Also, within the prevailing restorative justice discourse, it would be exceedingly difficult for anyone to actually disagree or acknowledge contradictory values. Interpretation of values matters because this determines what our expectations are insofar as ultimate success or failure of our experience with restorative justice. Specifically, failing to recognize interpretive differences can lead to conflict about whether particular restorative justice requirements have been fulfilled.[100]

Why, then, does agency matter to law? If we understand that there are different forms of law beyond centralized, formal state law, then we can imagine decentralized and collaborative law that is more reflective of decentralized, non-state indigenous societies. And if we understand law as an intellectual process that subsumes rules and practices by including legal reasoning and interpretation, then we need to recognize individual and collective agency as integral to a thinking citizenry.

From this perspective, it makes more sense to consider norms, in this case legal norms that carry an obligation. Legal norms are a part of what makes law. And, all norms are constantly contested and change over time. The health of a legal order is determined by whether it can withstand the ongoing contestation and whether the citizens recognize the legal order as legitimate. According to Jeremy Webber, all law, including non-state as well as state law, is inherently non-consensual:[101]

> The socially-grounded law is portrayed as a unified and harmonious body of norms, highly adapted to a particular social milieu and exempt from disagreement and contention. It is not so much that disagreement is denied but that it has no point of entry into the theory. The law is given directly by social interaction, not by processes of human debate and decision-making.[102]

When we shift our analysis from restorative justice to considering local law, we create the necessary space in which to think critically about agency and norm contestation as integral to law. Such a shift enables people to deliberately take into account the importance of citizenry, intellectual capacity, and conflict management. In other words, such an approach encourages communities to build their social capital in the form of local law.

To conclude, in order to remain alive and therefore legitimate, indigenous legal orders and law must be able withstand internal challenges and change. It is this ongoing challenge to norms that keeps a culture alive and vital—and ensures continued relevance for younger people. Otherwise, indigenous law will fail to be useful in today's world, and there will be no point in teaching or practicing it. All that will be left will be cultural remnants.

4. Conclusion: Local Law and Self-Government

Fundamentally, law is about governing ourselves—managing ourselves in large groups and determining how we relate to other people from other large groups. It is the thesis of this chapter that we might learn about local or indigenous law by changing how we look at contemporary community practices such as the Alexis Court Justice project. To take this argument one step further, recognizing the contemporary manifestations of local law creates opportunities to support and strengthen it—as opposed to inadvertently continuing to obscure it in the language of programs.

There is a troubling general perception that there is a broad dichotomy between the level of sophistication of Aboriginal societies and the Canadian state. On the one side, there is an assumption that the Canadian state possesses complete systems of governance, law, economics, and social structures. On the other is the assumption that, although Aboriginal peoples possess values, practices, and various notions of culture, they lack complete systems of governance or law or anything else, except perhaps spirituality. This supposed asymmetrical relationship is founded on a usually unstated,[103] but very real, assumption of various cultural deficits on the part of Aboriginal peoples. In the case of "Aboriginal justice," for instance, Aboriginal values and practices have usually been "extracted" from Aboriginal culture and added to the *Criminal Code*. Removing these

from the complete systems that give them meaning is a distortion and should be recognized as such.

So what might a symmetrical relationship look like? Such a relationship would be founded on an understanding that Aboriginal peoples have complete systems of governance and law (albeit damaged by recent history), and that practices and norms have to be appreciated from within that which gives them meaning. So rather than imagining Canadian criminal law relating to Aboriginal values and practices, there would be some effort to take a pluralist approach, relating Canadian criminal law to how Aboriginal peoples dealt with harms and offences in their entirety. This is not about trying to go back in time, but about starting the conversation between Aboriginal people and the state at a different place rather than from an assumed cultural deficit.[104]

For Alexis First Nation, perhaps considering the work of the Alexis Justice Committee as being founded on local and Nakota laws could provide community members with an opportunity to rigorously and critically examine them, Then they would be in a position to consider how their own laws might relate to those of Canada and Alberta on a corresponding basis. In other words, perhaps this is a way that the internal conversations among Aboriginal citizens will change the nature of the external relationships between Aboriginal peoples and Canada.[105] This work of deliberating on local and Nakota law does not require the sanction of the state until Alexis (or other Aboriginal community) decides to formalize these aspects of their relationship with the state.

One ongoing issue before Alexis and other small Aboriginal communities is that of scale. For the most part, these questions about self-government require Aboriginal peoples to go beyond band structures in order to consider scale—the concepts of the public good and personal interests,[106] accountability, and the full extent of the relationships and responsibilities within the society. The reserve boundaries created by the *Indian Act*, which divided and grouped indigenous peoples into bands, cut across indigenous legal orders. This division of indigenous peoples and lands has undermined the management of our legal orders and has undermined the application of indigenous laws. At the band level, the larger legal order becomes unworkable, and some co-operative arrangements must be established to enable bands to draw upon broader-based relationships at a national level to more effectively implement their laws. For Alexis, this might involve international alliances with the Cree.[107]

Notes

1. The authors are grateful to Sandra Potts and the other members of the Alexis Justice Committee who so generously shared their experience, knowledge, and laughter with us.
2. For instance, see generally, Wanda D. McCaslin, ed., *Justice as Healing: Indigenous Ways* (St. Paul, MN: Living Justice, 2005); P.A. Monture-Okanee and M.E. Turpel, "Aboriginal Peoples and Canadian Criminal Law: Rethinking Justice," special edition, *U.B.C. Law Review* 26 (1992): 248; and A.C. Hamilton, *A Feather Not a Gavel: Working Towards Aboriginal Justice* (Winnipeg: Great Plains, 2001). Others are more cautious about the role of restorative justice as it is currently practiced in the self-government project. See for example, Jonathan Rudin, "Aboriginal Justice and Restorative Justice," in *New Directions in Restorative Justice: Issues, Practice and Evaluations*, eds. Elizabeth Elliott and Robert M. Gordon, 89–114 (Portland: Willan, 2005); and Larissa Behrendt, "Lessons from the Mediation Obsession: Ensuring that Sentencing 'Alternatives' Focus on Indigenous Self-Determination," in *Restorative Justice and Family Violence*, eds. Heather Strang and John Braithwaite, 178–90 (Cambridge: Cambridge University Press, 2002).
3. Alexis First Nation is an Indian Band pursuant to the *Indian Act*, R.S.C. 1985, c. I-5.
4. The distinction between "local law" and "Nakota law" is examined in section 1.4.
5. This is an important question for Indigenous peoples who had decentralized forms of governance.
6. See generally, Christoph Eberhard, "Towards an Intercultural Legal Theory: The Dialogical Challenge," *Social and Legal Studies* 10, no. 2 (2001): 171–201.
7. See generally, Law Commission of Canada, *Indigenous Legal Traditions in Canada* by John Borrows (Ottawa: Law Commission of Canada, 2005).
8. Boaventura de Sousa Santos views the naming of non-officially recognized law as emancipatory in an even broader sense. According to de Sousa Santos, by naming Indigenous laws and legal orders, we add to the global "ecology of knowledges," disrupting binary or "abyssal" categories fostered by modern, liberal Western thought, which support and sustain socio-political inequality. De Sousa Santos points to "other" forms of knowledge—such as Indigenous laws and legal orders—as key to challenging universality because they provide positions from which to see real alternatives to capitalism and other forms of dominant neo-liberalism. See Boaventura de Sousa Santos, "Beyond Abyssal Thinking: From Global Lines to Ecologies of Knowledges" (paper, Demcon Conference, University of Victoria, December 1, 2006), 19.
9. Javier Mignone describes social capital in the context of northern Manitoba First Nation as the extent to which resources are socially invested—a culture of trust, norms of reciprocity, and collective action are present; participation is facilitated; and inclusive, flexible, and diverse networks are in place. See Canadian Institute for Health Information, "Measuring Social Capital: A Guide for First Nations Communities" by Javier Mignone (Ottawa: Canadian Institute for Health Information, 2003), University of Manitoba, http://www.umanitoba.ca/faculties/human_ecology/family/Staff/pdf_files/Measuring%20social%20capital%20A%20guide%20for%20FN%20Communities-1.pdf (accessed May 21, 2007).
10. Susan Sharpe, "How Large Should the Restorative Justice 'Tent' Be?" in *Critical Issues in Restorative Justice*, eds. Howard Zehr and Barb Toews, 17 (New York: Criminal Justice, 2004).
11. For example, see *House of Commons Debates*, vol. IV (1st Sess., 35th Parl.), 5873 (Minister of Justice Allan Rock); *R. v. Gladue*, [1999] 1 S.C.R. 688, para. 21; *R. v. Wells*, [2000] 1 S.C.R. 207, para. 27.
12. One notable exception was the Hollow Water Healing Circle Process, which functioned with minimal oversight from outside of the Aboriginal group that it served (Native Counselling Services of Alberta). See, Solicitor General Canada and Aboriginal Healing Foundation, *A Cost-Benefit Analysis of Hollow Water's Community Holistic Circle Healing Process* by Joe Couture and others (Ottawa: Solicitor General, 2001), Solicitor General Canada, http://www.sgc.gc.ca (accessed April 2007).
13. This is also the case with "cultural" programs in penitentiaries. For an excellent example, see Joane Martel and Renée Brassard, "Painting the Prison 'Red': Constructing and Experiencing Aboriginal Identities in Prison," *Br. Journal of Social Work*. advance access (October 31, 2006), University of Alberta, http://bjsw.oxfordjournals.org.login.ezproxy.library.ualberta.ca (accessed May 22, 2007).
14. Jonathan Rudin, "Aboriginal Justice" (see n. 2).
15. Warwick Tie, *Legal Pluralism: Toward a Multicultural Conception of Law* (Aldershot, UK: Dartmouth, 1999), 248.

16. This includes any local version of the Nakota legal order and laws. See section (4) Local Law.
17. *Criminal Code*. R.S., 1985, c. C-46
18. "Aboriginal communities" here refers broadly to settled geographic communities and cultural groupings of Métis, First Nations, and Inuit peoples. With further thought and research, this local law approach might be helpfully applied to the more diffuse and "intercultural" urban Aboriginal communities.
19. However, Colette Arcand worked with the Alexis Justice Project for some years, and is closely connected to some community members. While this work of cross-cultural understanding is difficult, it is crucial to socio-political change. According to Boaventura de Sousa Santos, this difficult work requires "a theory or procedure of translation, capable of creating mutual intelligibility among possible and available experiences." ("A Critique of Lazy Reason: Against the Waste of Experience" (paper, University of Victoria, December 1st, 2006): 4.)
20. See generally, "On the Limits of 'Grand Theory' in Comparative Law," *Washington Law Review* 61 (1986): 945–56.
21. Alberta Justice, *Alexis Restorative Justice Model: An Evaluation* by Barbara Allen and BIM Larsson and Associates, (Edmonton, 2003), 3.
22. Indigenous legal orders are characterized by law that is embedded in the social, political, economic, and spiritual aspects of each person's everyday life, rather than in a separate institution with legal experts who are wholly responsible for law. See Harold J. Berman, *Law and Revolution* (Cambridge: Harvard University Press, 1983), 49–50.
23. However, international relations, trade, and intermarriage have always been a part of Aboriginal societies.
24. There are four Nakota communities in Alberta. See section 2.1 for a more detailed history of the Alexis First Nation.
25. Gerald Postema, "Implicit Law," special issue, *Law and Philosophy*, 13, no. 3 (Aug., 1994): 361.
26. For a discussion on the dangers of essentializing the law in legal pluralism, see Brian Z. Tamanaha, "A Non-Essentialist Version of Legal Pluralism," *Journal of Law and Society* 27, no. 2 (2000): 296–321.
27. H. Patrick Glenn, *Legal Traditions of the World, Sustainable Diversity in Law,* 2nd ed. (Oxford: Oxford University Press, 2004), 13–14ff. Glenn argues that tradition is not merely rote or a practice, but rather should be perceived as information. That is, tradition is composed of information and there are important questions about the nature of the information that constitutes the tradition. As such, tradition is constitutive of identity and society.
28. For a broader discussion of indigenous legal traditions, see John Borrows, "Indigenous Legal Traditions" (on file with author, University of Victoria); and Law Commission of Canada, *Justice Within: Indigenous Legal Traditions* by John Borrows (Ottawa: Law Commission of Canada, 2007).
29. Gerald J. Postema, "Classical Common Law Jurisprudence (Part II)" *Oxford University Commonwealth Law Journal* 3, no. 1 (2003):1, 3–10. According to Postema, there are six distinctive features of legal reasoning in the common law:

(i) It focuses on problem solving.
(ii) There is deliberate regard for the larger public good beyond individual interests.
(iii) It requires skilled and knowledgeable adjudicators or mediators.
(iv) It cannot be turned into technical formulas to be followed by rote without thought.
(v) There is a deliberate and planned reasoning process.
(vi) The legal reasoning and decisions are considered common or shared among the collective.

30. See for instance, "The Habitat of Dogrib Traditional Territory: Place Names as Indicators of Bio-Geographical Knowledge," West Kitikmeot Slave Study, http://www.wkss.nt.ca/HTML/08_ProjectsReports/08_habitat/08_habDogribTT.htm (accessed April, 2007). Also see Glenn, *Legal Traditions*, 20 (see n. 27). Glenn argues that tradition and the human behaviour surrounding it ought to be considered a source of information: "The necessity of massaging the information of tradition thus extends through the entire range of attitudes towards it. It occurs amongst the most faithful of adherents to it, as they seek to perpetuate it; it occurs amongst the most vigorous of opponents to it, as they seek to overcome it; and it occurs between both groups. In the theoretical discussion of tradition, this emerges in the conclusion that tradition never reaches definitive form, but rather, in the present, a series of interactive statements of information."

31. See Katharine T. Bartlett, "Tradition, Change, and the Idea of Progress in Feminist Legal Thought," *Wisconsin Law Review*, 1995, 303–343.
32. See generally, Roderick Alexander Macdonald, *Lessons of Everyday Law* (Montreal: McGill-Queen's University Press, 2002).
33. Bartlett, "Tradition," 331(see n. 31).
34. Canada, *Indian Treaties and Surrenders* (1905; repr., Saskatoon: Fifth House, 1992), 2:35–37, quoted in Canada, Indian Claims Commission, *Alexis First Nation Inquiry: TransAlta Utilities Rights of Way Claim* (Ottawa: March, 2003) 12, Indian Claims Commission, http://www.indianclaims.ca/pdf/Alexis_English.pdf. (accessed 24 May, 2007)
35. Indian Claims Commission, ibid., 13.
36. Alexis Nakota History and Culture Program, Alexis Nakota Sioux Nation, http://www.alexisnakotasioux.com/default.aspx?ID=0-6. (accessed April 14, 2007).
37. Alexis Nakota Sioux Nation, *Escabi (Alexis Stoney)* by Fedirchuk McCullough & Associates, (Cultural Properties Study—Cheviot Mine Project, January 1996), 29, Alexis Nakota Sioux Nation, http://www.alexisnakotasioux.com/5/general-history.pdf. (accessed April 14, 2007)
38. "Saulteaux" is the common spelling in Canada. Members of the Saulteau First Nation living at Moberly Lake, BC omit the final *x*. Historian Peter Grant (see n. 40) uses the spelling "Salteau."
39. Alexis Nakota Sioux Nation, *Escabi*, 31 (see note 37).
40. Peter Grant was a fur trader who commented on the division of the Sioux from the perspective of circa 1804 in his chapter, "The Salteau Indians about 1804" in *Les Bourgeois de la Compagnie du Nord-Ouest*, ed. L.R. Masson (New York: Antiquarian Press, 1890). See Alexis Nakota Sioux Nation, 30 (see n. 37) for excerpts.
41. Paul H. Carlson, *The Plains Indians* (College Station, TX: Texas A & M University Press, 1998), 2.
42. Helen Buckley, *From Wooden Ploughs to Welfare: Why Indian Policy Failed in the Prairie Provinces* (Montreal: McGill-Queen's University Press, 1992), 28.
43. Alexis Nakota Sioux Nation, *Escabi*, 30 (see n. 37); Peter Grant, "Salteau Indians," 346–47 (see n. 40).
44. Carlson, *Plains Indians*, 34 (see note 41). According to Carlson,

> Dakotas (as they called themselves), or Sioux, …formed part of the larger Oceti Sakowin, or the Seven Council Fires, a group of distinct peoples who under pressure from the Ojibwas in the 1600s separated into three broad divisions. The eastern or Santee division, living on the prairies and woodlands of Minnesota, included four groups: the Mdewakantonwan, Wachpekute, Wachpetonwan, and Sisitonwan (Sisseton). The middle division included two groups, the Yankton and Yanktonai, who lived on the prairies and plains stretching west to the Missouri (and who are sometimes called Nakota). The western division included only the nomadic Lakotas (Tetons), but representing about half the Oceti Sakowin population, it was the largest, with some of its subgroups (Oglalas and Brules) having populations larger than most of the other council-fire peoples (ibid. 5).

45. Ibid. 34.
46. Alexis Nakota Sioux Nation, *Escabi* 31(see n. 37).
47. Buckley, *Wooden Ploughs,* 30 (see note 42).
48. Alexis Nakota Sioux Nation, *Escabi* 31–32 (see n. 37).
49. Buckley, *Wooden Ploughs*, 31 (see n. 42).
50. Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories including The Negotiations on Which They Were Based*, (1880; repr., Saskatoon: Fifth House: 1991), 279.
51. Alberta Justice and Attorney General, "Aboriginal Justice Programs and Initiatives," (October 2006), 4–5, Alberta Justice, http://www.justice.gov.ab.ca/aboriginal. (accessed May 24, 2007)
52. Ibid., 14–18.
53. Ibid., 13.
54. Alberta Justice, *Alexis Evaluation*, viii (see note 21).
55. John Borrows, "Creating an Indigenous Legal Community," *McGill Law Journal* 50, no. 1 (2005): 160.
56. Lon L. Fuller, "Human Interaction and the Law," *Am. Journal of Jurisprudence* 14 (1969): 2. Since many indigenous peoples were decentralized, but nonetheless had legal orders and law, Fuller's theory of law being generated by social interaction over time is very useful.

57. Gerald Postema, "Implicit Law," 361 (see n. 25).
58. Ibid.
59. Ibid., 363.
60. Borrows, "Indigenous Legal Community," 168 (see n. 55).
61. Ibid., 177.
62. Ibid., 71.
63. Ibid., 176.
64. Postema, "Implicit Law," 365 (see n. 25).
65. Ibid. 367. This is because centralized systems of law can only operate if there are decentralized, interactive customary laws around them. Central systems of law require peoples' cooperation in order to function. If people do not cooperate with and uphold central systems of law, they fail. See Fuller, "Human Interaction," 23 (see n. 56).
66. Postema, ibid., 368.
67. Ibid., 373–74.
68. Ibid., 375.
69. Ibid., 375–76.
70. Julie Cruikshank, "*The Social Life of Stories: Narrative and Knowledge in the Yukon Territory* (Vancouver: UBC Press, 1998), 66–67.
71. Ibid., 68.
72. Ibid., 64.
73. Postema, "Implicit Law," 377 (see n. 25).
74. Ibid.
75. Rose Stremlau, "'To Domesticate and Civilize Wild Indians': Allotment and the Campaign to Reform Indian Families, 1875–1887," *Journal of Family History* 30 (July 2005): 266.
76. Ella Cara Deloria, *Waterlily* (Lincoln: University of Nebraska Press, 1988), x, quoted in Stremlau, ibid., 266.
77. Stremlau, "Wild Indians," 266 (see note 75). Also see Val Napoleon, "Raven's Garden: A Discussion about Aboriginal Sexual Orientation and Transgender Issues," *Canadian Journal of Law and Society* 17 (2002): 149–71 for commentary on other Aboriginal legal orders where gender norms also proved flexible.
78. Daniel Jutras asserts that law manifests itself in small but important ways, such as greetings, in everyday life: "Brief encounters are evidence of the existence of true legal systems on a very small scale: micro-normative systems display characteristics that are fundamental to any form of legal ordering." ("The Legal Dimensions of Everyday Life," *Canadian Journal of Law and Society* 16 (2001): 46.)
79. Alberta Justice, *Alexis Evaluation,* (see n. 21).
80. Ibid., 26.
81. Ibid*.,* xii.
82. Ibid., 26.
83. Statistics were not available. However one justice employee noted that almost all of the files have a domestic violence component.
84. Val Napoleon, "Indigenous Discourse: Gender, Identity, and Community" in *Indigenous Peoples and the Law: Comparative and Critical Perspectives*, eds. Kent McNeil and Benjamin J. Richardson, (N.p.: Osgoode-Hart, forthcoming in 2007)
85. In this chapter, we use the term "intimate violence" to denote physical, sexual, emotional, financial, psychological, or spiritual abuse by adult males of adult female partners in intimate relationships. We follow Anne McGillivray and Brenda Comasky, Canadian feminist legal scholars, in using this term in lieu of wife battering, battered woman syndrome, wife abuse, spousal assault, family violence, domestic abuse, domestic assault, and domestic violence. Intimate violence is used instead because it speaks to the close, personal relationship between abuser and survivor and the "deep trust presumed to exist among family members, between intimate partners." Anne McGillivray and Brenda Comasky, *Black Eyes All of the Time: Intimate* V*iolence, Aboriginal Women, and the Justice System* (Toronto: University of Toronto Press, 1999), xiv.
86. See for example, Angela Cameron, "Sentencing Circles and Intimate Violence: A Canadian Feminist Perspective," *Canadian Journal of Women and the Law* 18 (2006) (in press); Barbara Hudson, "Restorative Justice: The Challenge of Sexual and Racial Violence," *Journal of Law and Society* 25, no. 22 (1998): 237–

56; and Joan Pennell and Gale Burford, “Feminist Praxis: Making Family Group Conferencing Work,” in *Restorative Justice and Family Violence,* eds. John Braithwaite and Heather Strang, 108–27 (Cambridge: Cambridge University Press, 2002).
87. We choose to use the word “survivor” rather than “victim.” “Victim” erases the complex ways that women resist, recuperate from, return to, and eliminate violence from their own lives. “Survivor” more easily captures the emotional, financial, political, employment, and parenting strategies that women who live with violence deploy from day to day. It is partly in supporting and augmenting these strategies of agency, survival, and resistance that the solutions to intimate violence lay.
88. See generally, Joanne C. Minaker, “Evaluating Criminal Justice Responses to Intimate Abuse through the Lens of Women’s Needs,” *Canadian Journal of Women and the Law* 13 (2001): 74–106.
89. Jeremy Webber, “Naturalism and Agency in the Living Law” (2007): 2 (working paper, on file with author at University of Victoria).
90. For a very interesting critique of how harmony is used to stifle internal conflict and challenges to the status quo, see Laura Nader, *Harmony Ideology: Justice and Control in a Zapotec Mountain Village* (Stanford: Stanford University Press, 1990).
91. Kay Pranis, Barry Stuart, and Mark Wedge, *Peacemaking Circles* (St. Paul, MN: Living Justice, 2003), 47. Other publications focus on restorative justice *principles*. See for example, Howard Zehr, *Changing Lenses*, 3rd ed. (Scottsdale, PA.; Herald, 2005); and Howard Zehr, *The Little Book of Restorative Justice* (Intercourse, PA.: Good Books, 2002). Zehr is often described as the grandfather of restorative justice.
92. Pranis, ibid., 46.
93. Ibid., 47.
94. Barb Toews, *The Little Book of Restorative Justice for People in Prison: Rebuilding the Web of Relationships* (Intercourse, PA.: Good Books, 2006) at 23.
95. Ibid.
96. Law Commission of Canada, *Transforming Relationships Through Participatory Justice* (Ottawa: Minister of Public Works and Government Services, 2003), xvi. The Commission also provides a list of “consensus-based justice values” at xviii. The Law Commission of Canada closed its offices in 2007 after the federal government terminated funding.
97. Daniel Van Ness, “An Overview of Restorative Justice Around the World” (paper, Eleventh United Nations Congress on Crime Prevention and Criminal Justice, Bangkok, April 22, 2005), International Centre for Criminal Law Reform, www.icclr.law.ubc.ca/Publications/Reports, 5.(accessed May 23, 2007)
98. Ibid.
99. Alberta Justice, *Alexis Evaluation*, xi, 18. (see n. 21).
100. Jennifer Haslett, Restorative Opportunities Program (Alberta), Correctional Services of Canada, in discussion with Val Napoleon, March 17, 2007. Jennifer has worked extensively with victims and offenders in restorative justice processes since 1996.
101. Webber, “Naturalism,” 2 (see n. 89).
102. *Ibid.* at 1.
103. But see the work of academics like Thomas Flanagan and others who advance racist notions of a single evolution of civilizations. See for example, Thomas Flanagan, *First Nations? Second Thoughts* (Montreal: McGill-Queen's University Press, 2000).
104. For a very interesting argument for political pluralism, see Tim Schouls, *Shifting Boundaries: Aboriginal Identity, Pluralist Theory, and the Politics of Self-Government* (Vancouver: UBC Press, 2003).
105. For an excellent discussion about legal pluralism, see Jeremy Webber, “Legal Pluralism and Human Agency,” *Osgoode Hall Law Journal* 44, no. 1 (2006): 167–98.
106. John Ralston Saul argues that some distance creates a level of personal disinterest that is necessary in order for people to effectively maintain and protect the larger public good. See, *The Unconscious Civilization* (Concord, ON: Anansi, 1995), 167.
107. Alexis already has various working arrangements with other communities.