Canadian Journal of Family Law
2009

Article

*223 Tragic Choices and the Division of Sorrow: Speaking about Race, Culture and Community Traumatisation in the Lives of Children

Hadley Friedland [FNa1]

What if no lost child can be replaced? [FN1]

INTRODUCTION

There is a long sad history in Canada regarding the treatment of Aboriginal children and families by actors representing non-Aboriginal society. The residential schools, in motive and abuses, are notorious, as is the "sixties scoop" that saw many Aboriginal children forcibly removed from their families and *224 communities. This history is part of a longer story of massive social upheaval caused by colonial imposition, dispossession and oppression. The trauma created by these colonial mechanisms, whether deliberately or blindly, would be difficult to underestimate. [FN2] While there is a huge diversity of Aboriginal communities, cultures and responses to colonialism across the continent, to my knowledge, no community has completely escaped the devastating impacts of this painful legacy.

Above all else, the legacy of Canadian government intervention in the lives of Aboriginal children has been one of loss. The most public of these losses have been the absolute losses: those Aboriginal children who have died while in government care. [FN3] These public and absolute losses are accompanied by many less public and less permanent losses, which are nonetheless as disruptive for community survival and individual children and families. [FN4] However, as *225 government policies shift to an increasing emphasis on keeping Aboriginal children in Aboriginal families, and as community control over children's services increases, there have been some equally public deaths of Aboriginal children in the care of Aboriginal families or Aboriginal agencies, [FN5] with accompanying losses of a less permanent and public kind. [FN6]

The fact that losses, absolute and otherwise, have flowed from both these arrangements challenges the individual versus communal interest dichotomy in child welfare issues regarding Aboriginal children. Rather than wading into the debate about the ideological premises of the best interests of the child test itself, my starting premise in this article is that the best interests of Aboriginal children *are* inseparable from the best interests of their community, [FN7] *and* that their individual *226 losses are equally inseparable from the larger community's losses. In this article, I argue that in the imperfect present, our concerns over one type of loss must not silence or subordinate our concern over another. My aspiration is painfully small. I want to discuss how we speak about the full range of factors in the current situation, and I want to demonstrate that how we, and the law, speak about this situation, with its inextricable losses, matters for the future.

Speech is thus the dominant theme of this article. In the first part of this article, I attempt to articulate, with honesty and care, some of the factors that we, as a society, must squarely face in Child Welfare decisions regarding Aboriginal children, acknowledging that this represents the tip of the iceberg of an extremely complicated reality. First, I identify judicial treatment of racial and Aboriginal heritage that illustrates a problematic and insufficient way of addressing the actual needs of Aboriginal children and communities. Next, I outline some of the positive steps taken in Aboriginal communities, and in government policy, legislation and practice, toward recognizing and strengthening Aboriginal cultural identity and autonomy. I then turn to the issue of intergenerational community traumatisation, and discuss the concrete reality of other possible harms and losses that unfortunately exist today.

In the second part of this article, I turn to the question of how law should address this situation and these losses. I draw on legal theorists to suggest the best way of describing Aboriginal child welfare decisions at this point in time is as tragic choices, where the legal decision-maker is choosing which suffering to impose or ignore. I argue that a vital part of reconciliation and healing involves legal decision-makers considering how to create a bearable meaning for the actions in individual narratives. This, while not mandating a different result, requires a different methodology, which includes explicit recognition of the impact of historical and systemic injustice.

*227 JUDICIAL CHARACTERIZATIONS OF RACE, CULTURE AND ABORIGINAL HERITAGE

In custody decisions regarding Aboriginal children, three major issues of Aboriginal heritage arise. The first is the social-historical context, where child welfare practices are linked to assimilation policies, sometimes even to the extent of being termed "cultural genocide". [FN8] The second, and closely related issue, is the loss of children into non-Aboriginal homes, with the accompanying disruption and demoralization, which is seen to threaten community survival itself. The third issue is race, or racialization, and the coping strategies a child who is visibly non-white in a racist society may need to develop for his or her own emotional well-being. [FN9]

***228** In the Supreme Court of Canada decision of *Van de Perre v. Edwards*, a decision discussing the impact of race in custody decisions, Bastarache J. seems to flatten these concerns into a single consideration of "race" by his referral to and affirmation of the reasoning in *H.(D.) v. M.(H.)*, which concerned a child with Aboriginal heritage. [FN10] Writing for a unanimous court, he found that race "can be a factor in considering the best interests of the child because it is connected to the culture, identity, and emotional well-being of the child." [FN11] The case was a custody decision between mixed race parents. Justice Bastarache affirmed that judges may take judicial notice of "some racial facts" but stressed that "it is not always possible to address these sensitive issues" through judicial notice. Rather, he found that adducing evidence of race relations in relevant communities may be "important to define the context in which the child and his parents will function." [FN12]

While discussing the importance of racial heritage as a factor, Bastarache made a distinction between cases of adoption and custody cases, as adoption cases were more likely to result in a decision where the court "must make an either/or decision" about whether or not the child is exposed to his or her heritage. However, even in adoption cases, he affirmed the approach in *H. (D.) v. M.(H.)*: while race can be considered a factor, it is not a determinative one, and its relative importance will vary greatly based on the facts of each case. [FN13] In *H.(D.) v. M. (H.)* the Supreme Court of Canada affirmed the trial court ***229** finding that even where there is clear legislative intent to specifically consider the importance of cultural identity in aboriginal children, aboriginal heritage is not determinative, but only one of the factors to be considered as part of the best interests of the child test.

[FN14] Thus, the Court seems to suggest there is no distinction made between race generally and Aboriginal heritage.

In *H.(D.) v. M.(H.)*, adoptive maternal grandparents sought custody of their grandchild, Ishmael, who was of Aboriginal and African-American descent. His biological grandfather, who was Aboriginal, also sought custody. Custody was awarded to the adoptive grandparents, with reasonable access to the biological grandfather. The court found that both heritages were "equally deserving of preservation and nurturing" [FN15] and that the blood-ties and adoptive ties of the respective grandparents "counter-balanced" each other. [FN16] On the basis of these adoptive ties, the court distinguished this case from a case "of taking an aboriginal child and placing him with a non-aboriginal family in complete disregard for his culture and heritage." [FN17]

Presumably, this was exactly what did happen to Ishmael's mother, Melissa, when she was adopted by the petitioners at four years of age (although this connection is not mentioned in the case). Annie Bunting argues we should be mindful that "histories of racism and colonialism are mapped ***230** onto individual children's narratives, even when decisions are silent on history." [FN18] In *H.(D.) v. M.(H.)*, the Court held that Melissa's biological father's belated discovery about the "loss of his children" through adoption, due to his lack of contact at a time where he was abusing alcohol and even incarcerated, had "a lasting impact" on him. [FN19] Melissa sought out, contacted and visited her birth mother and birth father, with the assistance, financial and otherwise, of her adoptive parents. [FN20] She "forcefully argued" that custody should go to her biological father because of her "disaffection with the petitioners" and her desire that Ishmael be raised so he could "realize his aboriginal heritage." [FN21] According to documents filed in court, she did not want him to grow up "as she did, with a feeling that she never belonged." [FN22] These facts suggest that the generation before Ishmael experienced a loss that maps onto history and context of many other Aboriginal children and families in Canada. Thus the trial judge in *D.(H.) v. H.(M.)* acknowledged the historical context without linking it to all the facts of the actual case.

Emily Carasco insists the "history and context" of Aboriginal child custody issues mean that the presence of ***231** Aboriginal heritage raises different considerations than racial heritage generally. She states that "the relevance of 'race' in family law situations involving these children should not be in doubt" and is an "integral aspect" of all custody decisions involving Aboriginal children. [FN23] The trial judge did acknowledge that Ishmael's aboriginal heritage and "the ability of his biological grandfather to preserve and enhance it [were] important considerations." [FN24] However, the fact the grandfather was, though "very proud of his aboriginal heritage", not comfortable with "traditional spiritual practices" is characterised as an "admission." [FN25] Meanwhile, his "laissez faire approach to parenting" and "high regard for the independence of his offspring" is characterized as an approach that "may be seen to be enlightened" but "can, on the contrary, be viewed as parenting which is too 'hands off." [FN26] This could be an example of essentialising "culture" into certain unentrenched practices, while ignoring what is possibly an embedded cultural practice of child-rearing, common to many Aboriginal communities. [FN27] ***232** Ironically, Ishmael's biological grandfather seems to be judged for not being "Aboriginal" enough on the one hand, and (perhaps) for being too traditional on the other.

HOPEFUL SIGNS: POLICY, PRACTICE AND THE INDIGENOUS RESURGENCE

The evaluation of Ishmael's grandfather's cultural practices raises a challenge for the goal of maintaining the cultural identity of Aboriginal children. On the one hand, the historical context of oppressive, assimilationist policies makes attending to it an essential part of custody decisions. On the other hand, as Bunting puts it, "seeing cultural identity as something that is acquired through genetics and maintained through symbolic rituals

oversimplifies cultural identity" and this essentialism, in turn, "obfuscates histories of oppression and colonialism because difference is presented as biological or natural or a-historical." [FN28] Bunting argues for an approach to culture that recognizes culture as "a contested and dynamic process rather than a static or abstract concept that is assessed rather than lived." [FN29] This includes a need to recognize the continuum of experiences of Aboriginal children themselves. [FN30]

Viewing culture as a fluid process and recognizing that Aboriginal children and families do not necessarily fit neatly into a recognizable "cultural" slot is an important but challenging goal. Bunting suggests two main ways to work ***233** towards this goal. The first is that legal decision-makers "need to interrogate their own cultural attitudes and identities as well as those of the children they have the power to affect." [FN31] The second, also related to the community survival issue, is that "Aboriginal communities ought to be [fully] supported in their efforts to take over child welfare services in their communities." [FN32] These suggestions work against the conflation of race with Aboriginal heritage. The suggestions also address the difficulty of outside legal decision-makers, who are embedded in a context that has historically devalued Aboriginal peoples and culture, evaluating the cultural connections of Aboriginal children. There are some encouraging signs that Bunting's second suggestion is being operationalised.

The Royal Commission on Aboriginal People lists several changes in government policies in the 1980s and 1990s that focused on "supporting increased Aboriginal control of the development, design and delivery of child and family services." These included allocated funding from the Department of Indian and Northern Affairs to 36 agencies, which covered 212 bands. [FN33] Agencies and services were also established under a tripartite agreement with the Four Nations Confederacy in Manitoba, sponsored jointly by bands and government in Ontario, developed regionally in British Columbia and Nova Scotia, and agreed on with individual bands under a provincial mandate in Alberta and Saskatchewan. [FN34] In Alberta there are currently 18 delegated ***234** First Nations agencies. [FN35] In British Columbia, the government recently announced the inception of its first ever delegated urban Aboriginal agency. [FN36] A thorough review of Aboriginal control over child welfare services is beyond the scope of this paper, but it is clear that many communities across Canada are regaining control over delivery of services and placement of Aboriginal children. [FN37]

In addition to this increased community control over services, child welfare legislation in every province and territory of Canada includes "references to a child's cultural, religious or racial heritage" as part of the best interests of the child. [FN38] The *BC Child, Family and Community Service Act* states the importance of preserving the cultural identity of Aboriginal children in both its general principles [FN39] and in several specific provisions, including explicit mention in the ***235** best interest of the child factors. [FN40] For example, one provision states that any interim plan for a child in care must include details of steps to be taken to preserve the child's aboriginal identity; [FN41] another creates provisions for voluntary care agreements (which may include financial support) between the Director and a person who "has a cultural or traditional responsibility towards a child." [FN42] In addition, there is a provision that emphasises the priority of aboriginal placements, starting with extended family and the child's own community. [FN43]

Recent British Columbia cases involving Aboriginal children reveal social work practices that include ongoing co-parenting support programs for Aboriginal parents; [FN44] the possibility of Aboriginal parents being able to continue caring for their children, even when there are serious concerns, if there is a relative or community member willing to be a "co-parent"; [FN45] the recognition that the presence of extended family ***236** and community support in the local Aboriginal community, even in an urban centre, is an important consideration in custody issues; [FN46] and continuing access for family members if the child is subject to a continuing

custody order. [FN47]

Finally, and perhaps most importantly, we are in the midst of what some writers have described as an "Indigenous ***237** resurgence." [FN48] There are many Aboriginal and non-Aboriginal people who work tirelessly to develop creative and effective solutions for communities. A good example of this is the unprecedented creation of the "Indigenous Child at the Centre" initiative, where British Columbian First Nation Chiefs agreed to work together toward a common goal of the health and well-being of their children, and established an interim First Nations Child and Family Wellness Council. [FN49] There are also numerous healing programs emerging to deal with abuse and addiction issues that impact families. [FN50] There is both a revival of traditions and customs which "respect and strengthen the extended family, and implement teachings of sharing, kindness and respect" and in many places, as described above, increasing community control of services. These are all "hopeful signs" for the future of children and families of and in Aboriginal communities. [FN51]

*238 COLLECTIVE SURVIVAL, COMMUNITY CONTROL, AND COMMUNITY LOSS

The issue of collective survival of Indigenous communities is an urgent one. The focus on respecting cultural differences is necessary given the social and historical context of child welfare policies and their continuing impact on Aboriginal communities in Canada. Similarly, Aboriginal communities' increasing autonomy over the provision of children's services is an important part of healing and, for many communities, of the larger goal of self-governance. However, it is still important to "not underestimate the difficulties of turning ideals into reality." [FN52] We ignore uncomfortable realities at our own peril. Two major issues continue: entrenched poverty in a neo-liberal climate, and the perpetuation of traumatisation through lateral violence in many communities. I will address the first issue only briefly.

No doubt, there is a neo-liberal policy shift geared toward increasing devolution and privatization of child welfare services. [FN53] Increased kinship care and community control is occurring in this present context, often without concurrent resources for supporting the work of care or alleviating conditions of poverty. It is worth keeping in mind that the long battle of jurisdiction between the federal and provincial government over child welfare provision on reserves were about neither government wanting to fund them. [FN54] The funding ***239** formula for on-reserve Aboriginal children is still 22% less than for other children. [FN55] Devolution of services also does not, in itself, address the material conditions of poverty which form the context of individual choices in many Child Welfare custody matters. Kline stresses that "the current crisis in First Nations child welfare will only be effectively resolved if addressed in conjunction with the wider and intersecting social, economic, and political goals of First Nations." [FN56]

The second issue, lateral violence within communities, is a difficult to discuss because of the fear of falling into a trap of reinforcing the moral devaluation of Aboriginal peoples. On the other hand, not talking about it risks conflating the need to respect Aboriginal autonomy and cultural difference with turning a blind eye to the perpetuation of intergenerational traumatisation, paving the way for "a pattern of abandoning the oppressed to the oppressed." [FN57]

Mary Ellen Turpel-Lafond states: "The pressing reality is that we have unprecedented levels of violence experienced in Aboriginal families and communities in the current generation, ***240** likely connected to the intergenerational trauma from the residential school experience." This "lateral violence" is "clearly impacted by poverty and dislocation". [FN58] A graphic description of the seriousness of the issue in certain communities is written by Rupert Ross, in a recent memo describing the traumatisation in several remote Northern Ontario com-

munities, which he states "clearly began with the residential schools." [FN59] He talks about a "desperate situation" where two generations of children have grown up amid unparalleled levels of alcohol abuse, family violence and sexual abuse combined with increasing organic incapacities due to fetal alcohol spectrum disorder and brain damage from solvent abuse. In many communities, 60-80% of the population have been victimized by serious sexual abuse and up to 50% have been victimizers. [FN60] In addition, there are "an escalating number of young people whose exposure to violence at home and in the community has rendered them incapable of feeling either empathy for others or remorse for their own actions." [FN61] A research report commissioned by the Aboriginal Healing Foundation concludes that "all available evidence suggests the rates of violence and sexual offending in many Aboriginal ***241** communities are ... as much as five times higher than Canadian rates, perhaps higher." [FN62]

Ross links high rates of suicide and rampant substance abuse in some communities directly to the "perpetual denial of hidden pain, and perpetual fear of it ever being disclosed." [FN63] So did the Hollow Waters Healing Project in Manitoba, which was developed because a resource group who had formed in the community to attempt to address the many social ills came to the conclusion that "seventy-five percent of the community have been victims of sexual abuse and thirty-five percent are victimizers." They decided they had to find a way to confront the pervasive issue of sexual abuse and overcome the secrecy around it in order to effectively resolve the other social issues in the community. [FN64]

Ross's focus, as a Crown Prosecutor, is on the criminal justice system, but his point about the ineffectiveness of the regular system, or even dispute-resolution based solutions, in ***242** the face of such acute and complex traumatisation, is germane for child welfare as well. Lateral violence, connected to intergenerational trauma, is perpetuating and even escalating traumatisation in many communities. There is also the difficult issue of actual incapacities due to organic brain injuries and the particular needs of children requiring specialized care, as opposed to racist devaluation of traditional parenting methods. [FN65] Ultimately, I agree with Ross that, if the government is serious about "helping communities help themselves", they likely need to devote considerable resources to developing programs that deal with mass traumatisation. [FN66] There are already several innovative programs, such as Hollow Waters, devoted to addressing healing needs, [FN67] and, of course, not every Aboriginal community is dealing with the same levels of traumatisation. However, my point is that intergenerational traumatisation, attributable to colonial imposition and not generalized to every Aboriginal person or community, means that there is more than one way for communities to lose children.

***243** Communities lose children to non-Aboriginal homes *and* communities lose children to substance abuse, criminal or "gang" lifestyles and/or brain damage. Some children flee to the streets, never to return. Some children are lost to suicide or homicide. Aboriginal control of child welfare, or a priority of placing Aboriginal children with extended family or in their community when possible, does not, in itself, address the risks that massive traumatisation creates for abuse, severe neglect, or even death. Borrows and Rotman point out that:

> [C]ultural chauvinism has often overshadowed the welfare of Aboriginal children in Canada. While this has largely been evident by the way Aboriginal children have been treated by the Canadian government, unfortunately, it can also exist in Aboriginal communities. [FN68]

Abstracting a child from their culture and community has caused devastating losses, but the loss of children "can also cut the other way." [FN69]

While deaths are the most glaring and permanent losses, one need only compare the decision in *Racine v. Woods*, where Wilson J. found "the significance of cultural background and heritage as opposed to bonding

abates over time", [FN70] with the more recent decision *of Jane Doe v. Awasis Agency*, to see a subtler form of loss at play. In the Jane Doe case, a 13 year ***244** old girl whose adoption was overturned, was removed to a remote reserve against her will, after spending her entire life with her non-Aboriginal foster parents. She was not accepted and was treated like an outsider. She was also repeatedly forcibly confined and suffered numerous sexual assaults and rapes by multiple male offenders (contracting a venereal disease) before being "rescued" by a fly-in doctor. [FN71] One way of looking at the communal loss here clearly is to ask which of these two girls, Letecia (in *Racine v. Woods*), or Jane Doe, is more likely to seek a relationship with their biological family as an adult, like Melissa did in *N.(M.)*. It seems clear the loss of the latter is likely to be a much more permanent one. [FN72]

Framing the community loss this way is not meant to diminish the seriousness of the enormous individual loss and suffering in this case. Attending to both the suffering of the individual child and the community loss suggests that the success of child welfare reforms cannot be evaluated based on the sole criteria of the numbers of "First Nations children ... returned to their communities." [FN73] This does not mean there should be a return to the old ways of child welfare intervention, ***245** but that it is "absolutely crucial" issues like these are not simply added to the list of shameful silences, but rather "also be the subject of child welfare reform." [FN74] The future health and vitality of communities is inextricably bound to the health and well-being of its children.

TRAGIC CHOICES AND THE DIVISION OF SORROW: MEANING AND METHODOLOGY

So how do we respond to this? And does it matter how law goes about deciding, and how it speaks about deciding? At the point any child is not being taken care of, is endangered, or is being hurt by the people in his or her home, any decision is going to create other risks and cause suffering. Goldstein and Freud have pointed out that generally in custody determinations, "since there is no infallible method of selecting the best caregiver or caregivers, one is really seeking to choose the least damaging options available." [FN75] Even the least damaging option is a matter of speculation. This is exacerbated in the case of Aboriginal children by the five complicating factors identified above: (1) the historical and social context, (2) racism, (3) community survival, (4) poverty and (5) community traumatisation. All of these factors must inform the best interests of the child *and* the community, because they all have profound effects on both of those inter-related interests.

Typically, when a legal decision is made, the decision-makers "just decide -- they usually do not also experience the event of deciding itself in the form of a problem that is worthy ***246** of thought." [FN76] In this paper, I argue it is important to focus on the event of deciding. Courts have a legal obligation to give reasons. [FN77] Lon Fuller tells us that judicial law has a "burden of rationality". [FN78] Yet, at certain points, the only way to *feel* rational about a choice is to engage in magical thinking or wilful blindness. If we wish away one or more of the complicating factors -- say the importance of culture or race for example -- the choice for child custody becomes much easier to decide. [FN79] Unfortunately, this does not make it easier for the participants to live with, or for communities to bear.

Louis Wolcher argues that "it is suffering, not violence, which is the origin of law." [FN80] The division of suffering and justification of pain is the "paradox of the political" enacted by and through law, which "consists in the fact that it both remedies and causes human suffering." [FN81] Thus, in every case, what "law doers" really do is:

> ... divide people's suffering into two parts: suffering that is regarded as socially acceptable, ***247** and suffering that is not .... Only those that suffer in a manner that is acceptable to the law-doers' alienated

> law-thing enjoy the "right" to have their suffering taken seriously. All others -- those without rights -- the doers of law ignore, thereby exacerbating their misery. [FN82]

Such a view of law has "disrupting implications" for the primary story about law in our society, which imagines it as a stable ground of legal rules and principles, where suffering caused by law or mistakes in the legal process are unfortunate but a lesser evil in the overall cost-benefit analysis. Because we are "disinclined or unwilling to bear witness to so much anguish" we tend to develop techniques to "anaesthetise law-doers to the suffering they personally ignore or inflict on others, including such mantras as "[t]hese people don't deserve anything" and "[t]hey got what they deserve." [FN83] In Child Welfare, we can add one more to these: "It was in the best interests of the child." When all the complicating factors are considered, the best interests of the child should be a less effective mantra to shield decision-makers from the fact they are dividing, not alleviating, suffering. And in so doing, they are effectively telling Aboriginal children, families, and communities, which aspect of their suffering is socially acceptable and which is not.

The most honest way of describing this situation is that legal decision-making around Aboriginal Child Welfare situations is often going to be a tragic choice, where every option is likely to impose suffering on many people. It is a choice that almost no one wants to make, [FN84] yet somebody has ***248** to. Alan Dershowitz, argues that the shortfall of rational decision-making theory is that it "does not teach us how to choose among unreasonable alternatives, each so horrible our mind rebels at the notion of thinking about the evil options." [FN85] He gives the humorous example about arguing in his Orthodox Jewish neighbourhood about the "tragic choice" of which would be preferable, having to tell your parents you contracted syphilis or trichinosis (a disease only contracted through eating pork). [FN86] While 1 do not necessarily agree with Dershowitz that a tragic choice truly exists in his particular topic, that of torture and a "ticking bomb" terrorist, I do think his concept of a tragic choice is apt to describe the choices legal decision-makers must make where Aboriginal children face trauma and violence at home.

So we return to the question: How should legal decision-makers, where tragic choices have to be made, approach child welfare decision regarding Aboriginal children? First, it is vital to contextualise these decisions in the broader framework of reconciliation. Reconciliation is constitutionalised, and is the official government policy response to the Residential Schools. Georges Erasmus, President of the Aboriginal Healing Foundation, explains that reconciliation includes "actions which demonstrate a sustained commitment to right relations" and "provision of support for healing." [FN87] As discussed above, we know courts do not have a ***249** legal obligation to make Aboriginal heritage or race a determinative factor in custody decisions. Given the present situation regarding losses attributable to lateral violence and intergenerational traumatisation, making it a determinative factor in all cases would not necessarily accomplish communal goals, including healing. However, we also know that poverty, lateral violence and intergenerational traumatisation have their roots in colonial practices of displacement, moral devaluation and forced assimilation. In light of how deeply implicated the Canadian government is in the causes of many Child Welfare cases, simply considering Aboriginal heritage as the equivalent to any other ethnic background in the best interests of the child considerations seems inappropriate. This leads us to the need for a different methodology for deciding in the first place.

Legal theorists who grapple with the paradoxes of law itself can assist us in understanding how to approach such decisions. Wolcher suggests that "conformity to the spirit of law's task requires law-doers to acknowledge, more or less constantly, that they are tragic participants in the making of a world that is never more than a mixed blessing for those who must live in it." [FN88] Ben Berger has pushed this insight further in his discussion of the precariousness of modern criminal law. He discusses the peculiar difficulty in criminal law's task of ascribing meaning to suffering in a modern world where it is increasingly recognized that perpetrators of crime are

"produced on the anvil of both public equanimity in the face of private injustices and society's construction of or acquiescence to poverty, exclusion, and inequality." [FN89] Thus, "the ultimate precariousness" of the criminal law is that, as it finds the ***250** reasons it must in order to avoid injustice, it begins, "itself, to look unjust." [FN90]

This precariousness in criminal law is exacerbated in the case of Aboriginal offenders. One way of addressing this has been through the interpretation of s. 718.2 of the criminal code as remedial [FN91] and as requiring a different *methodology* for sentencing Aboriginal offenders. This different methodology does not prescribe a different outcome. [FN92] Allan Manson explains this involves judges taking judicial notice of "systemic or background factors" and the historical factors at play, and inquiring into "the unique circumstances of the offender", including evidence of available community initiatives. [FN93]

While the *BCFC Act* has even more legislatively prescribed instructions to consider the unique situation of Aboriginal children, there has not been a similar interpretation of these as requiring a different methodology for decision-making. It is beyond the scope of this paper to discuss the differences and similarities between criminal and child welfare law; so, while acknowledging contrast of the two, [FN94] I simply ***251** suggest that such an interpretation of Child Welfare statutes is not unreasonable, and more compatible with the goal of reconciliation than the current conflation of Aboriginal heritage with other racial backgrounds. Even if the Supreme Court of Canada is cautious about using judicial notice about race relations in particular communities, there seems to be no reason why judicial notice could not be taken about what is essentially the same systemic, background, and historical factors, of which they may take judicial notice of in sentencing cases.

Some may argue this is a pointless exercise, adding unnecessarily to the tasks of already over-burdened provincial judges. In a recent British Columbia case, Meiklem J. overturned an appeal by an Aboriginal father who argued the trial judge erred by failing to explicitly mention his child's Aboriginal identity in the reasons for judgement. After finding there was no evidence that the trial judge failed to consider the importance of the child's cultural identity, [FN95] the appeals judge states emphatically: "The law is not advanced by requiring unnecessary and potentially self-serving incantations from trial judges who are presumed to know and apply the law." [FN96] On the facts of this case, where the band social worker supported the continuing custody order, and where the father struggled with crack cocaine and alcohol addiction, lived in a house with 11 other adults and had failed to take any recommended steps in the two years between the appeal and the original hearing, it is unlikely explicit mention would have changed the outcome. [FN97] ***252** What is the point of explicitly recognizing and inquiring into the social historical context, if it does not advance the law, or mandate different outcomes?

This brings us back to the two aspects of reconciliation Erasmus speaks of: supporting healing and committing to right relations. Law plays a role in this. James Boyd White insists human beings are meaning-seeking creatures. As we imagine the world "even in the face of the deep uncertainties and injustices life necessarily presents", we "work against two deep fears: that the story we shall then be able to tell will have a meaning that is intolerable to us -- or no meaning at all." [FN98] Interestingly, story-telling is also an important therapeutic technique for treating traumatized children. [FN99] Part of story-telling in law is related to the fact we all want "a workable way of thinking about human action and responsibility, about judgement, about justice." [FN100]

The losses and injustice imposed by colonialism are immense. The healing is underway, but, as Erasmus points out, it is a long-term goal. [FN101] In the interim, both Aboriginal and non-Aboriginal decision-makers will face tragic choices -- the task of dividing suffering, and of how to tell the story of that suffering. There is a

teaching in many Aboriginal cultures, that ***253** "today's decisions have to include the needs of the seventh generation of their children." [FN102] Do current judgements, in telling the story of a child welfare case, create a workable way of thinking about human action and responsibility in light of massive, intergenerational traumatisation? Would a child, grown and returning to his or her own case, see a tolerable meaning in his or her own individual narrative? Will he or she be able to ascertain the reasons for that suffering? Will the generation after them?

Kline points out that the "ideology of motherhood" and corresponding "mother blaming" in the child welfare system "obscures the wider context of racism, poverty, ill health and violence within which many First Nations women ... are struggling to survive." [FN103] Part of the reason for this is that the provinces' framework of child protection legislation is "designed to identify and design treatment for problematic behaviours of individual caregivers", [FN104] and is embedded in a liberal framework of 'choice' that ignores the presence of constraints in women's lives that make some options difficult and others impossible. [FN105] Law often tells a story about Aboriginal (and other) families involved with the child welfare system where individual parents (overwhelmingly women), fail to provide a safe environment for their children because of "life ***254** style choices" such as drug and alcohol abuse or even domestic violence. [FN106] Even homelessness has been described by courts as a "transient" or "nomadic" *lifestyle*. [FN107] One Yukon case described a mother who was battered, unemployed and unable to find adequate housing as "at bottom, 'preoccupied with her own needs"'. [FN108]

These cases reveal a way of understanding human responsibility and action where the power to choose freely is ascribed to mothers regardless of circumstances (she got what she deserved), and the responsibility for the consequences of those choices rest with her (she does not deserve anything). While it may be effective in anaesthetising legal decision-makers from the suffering they impose or ignore, it is difficult to imagine a tolerable meaning this could have for a child looking back on the case that determined his or her life. The story is an intolerable one, which, if it has any meaning at all, is one of failure, shame and personal rejection.

In the small sample of recent British Columbia cases, there was often an expression by the judge of the difficulty of the choice before them. Most judges commented about the difficulty of the parent's lives before them. [FN109] Some judges ***255** acknowledged the impact of poverty. [FN110] Acknowledging the impact of generational abuses and poverty starts to make sense of the circumstances of the individual child, but the reasons do not stretch beyond the individual circumstances and choices of the parent's family of origin. Only one judge explicitly acknowledged the impact on the family of the social discrimination against Aboriginal women and the traumatizing effects of residential schools. [FN111] In that simple sentence, one of the major reasons behind the current suffering becomes accessible to all participants. If justice is indeed about making sense of suffering, here its demands seem to coincide with those of reconciliation and healing.

CONCLUSION

This paper is admittedly following an intuition through legal theorists and case law, rather than a thorough or empirical analysis of the present situation. That intuition is that no matter how uncomfortable speaking is, blindness to or silences about the losses of children cannot be the answer either. Learning to speak openly of the difficult realities is an important part of restoring right relations. It is in this spirit I attempt to do so here. Blindness to the losses of children and communities created a great deal of pain and disruption in the past and ***256** continues into the present. Silence is not healing -- in fact, it is devastating some communities.

Children need healthy families and communities, and they need refuge when they no longer can rely on their own. Undeniably, families and communities need their children. All too often children find themselves out of the frying pan into the fire once they are in government care. And children who remain with family or extended family can suffer terribly as well. This is today's complicated reality.

Healing is happening, but it is a long term process and, as Wolcher points out, a better reality will inevitably always fall short of a "glorious transcendence from an unhealthy past." [FN112] In the interim, and to a certain extent, always, Aboriginal and non-Aboriginal people will be faced with tragic choices. Our failure to identify them as such should signal to all decision-makers we are sacrificing both the participants and communities' need for a bearable meaning to avoid bearing witness to the suffering we inflict or ignore. The navigation out of the oppressive practices of the past, through the pain of the children in the present, illustrates some of the hardest yet most vital work of reconciliation. How we think and speak about this in the immediate, non-ideal world does matter.

[FNa1]. The initial version of this article was written as a final paper in Advanced Family Law with Prof. Gillian Calder at the University of Victoria. Hadley Friedland recently completed her LLM at the University of Alberta, working under Prof. Val Napoleon. Her thesis looks at the revitalization of Indigenous legal orders. Particularly, it explores the potential for using normative principles and processes that historically preserved community safety to respond to contemporary lateral violence concerns. The author would like to thank her seminar classmates and Prof. Calder for their support and insightful feedback, as well as the two anonymous reviewers for their helpful comments on this piece.

[FN1]. Emil Fackenheim, *The Jewish Bible After the Holocaust; A Re-reading* (Bloomington: Indiana UP, 1990) at 92-93. Fackenheim discusses the Book of Job, and the death of his first seven children.

[FN2]. Ipperwash Inquiry, *Crown and Aboriginal Occupations of Land: A History and Comparison*, by John Borrows (Ontario: Ministry of the Attorney General, 2005) at 57-76, online: Ministry of the Attorney General <http:// www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/policy_ part/research/pdf/History_of_Occupations_Borrows.pdf>.

[FN3]. See e.g. the deaths of children in care cited in Marlee Kline, Child Welfare Law, "'Best Interests of the Child' Ideology, and First Nations" (1992) 30 Osgoode Hall L.J. 375 at n. 7 [Kline, Best Interests Ideology].

[FN4]. See e.g. the extremely high correlation between being in care and incarceration rates of Aboriginal offenders. A.C. Hamilton and CM. Sinclair, Commissioners, *The Justice System and Aboriginal People-Report of the Aboriginal Justice Inquiry of Manitoba* (Winnipeg: Queens Printer, 1991) at 509 [Manitoba Justice Inquiry]. See also Patricia Monture, "A Vicious Circle: Child Welfare and First Nations" (1989) 3 C.J.W.L. 1, at 1 [Monture, Vicious Circle], discussing the case of Cameron Kerley and at 3, pointing out "removal of a child weakens the entire community".

[FN5]. See e.g. the death of Lester Deslarjais, while under the care of Dakota Ojibway Child and Family Services, "The Giesbrecht Report", as cited in John Borrows & Leonard I. Rotman, *Aboriginal Legal Issues: Cases, Materials and Commentary*, 2d ed. (Ontario: LexisNexis Canada, 2003) at 871 [Borrows & Rotman]; See also the *Report of the Gove Inquiry into Child Protection in British Columbia* by Thomas J. Gove, Commissioner (Vancouver: British Columbia Queen's Printer, 1995), online: British Columbia Government <http://

www.qp.gov.bc.ca/gove/>; Office for Children and Youth, *Report to the Attorney General of British Columbia under Section 6 of the Office for Children and Youth Act on the Director's Case Review Relating to the Nuu-chah-nuilth Child Who Died in Port Alberni on September 4, 2002* (Victoria: BC, 2006), online: Representative for Children and Youth <http://www.rcybc.ca// Groups/Investigation%20Reports/reporttoAG_nuu-chah-nulth.pdf>.

[FN6]. See e.g. the case of 13 year old Jane Doe, *Jane Doe (Public Trustee of) v. Awasis Agency of Northern Manitoba*, [1990] 4 CNLR 10, 72 D.L.R. (4th) 738 (Man. C.A.) [Jane Doe].

[FN7]. Kline, Best Interests Ideology, *supra* note 3 at 425 and Annie Bunting, "Complicating Culture in Child Placement Decisions" (2004) 16 C.J.W.L. 137 at 144 [Bunting].

[FN8]. See e.g. Monture, Vicious Circle, *supra* note 4 at 3. Monture actually just says genocide. I prefer Associate Chief Justice Murray Sinclair's take on this. Sinclair explains that genocide can be defined as the "killing of a people" and cultural genocide connotes killing of a culture. He distinguishes these two terms with the term "ethnocide." While genocidal policies focus on destroying something, ethnocidal policies "believes that the target group can or must be saved" by destroying a culture the ethnocidal practitioner genuinely believes is inferior, or a "terrible condition." See also Murray Sinclair, "A Presentation to the Western Workshop of the Western Judicial Education Centre" (May 14, 1990), in Jennie Abell & Elizabeth Sheehy, *Criminal Law and Procedure: Proof, Defences, and Beyond*, 3d ed. (Ontario: Captus Press, 2004) at 83.

[FN9]. Several theorists link the consideration of racialisation, racial heritage, or visibility of race to the individual child's sense of positive identity, self esteem and confidence. See e.g. Emily F. Carasco, "Race and Child Custody in Canada" (1999) 16 Can. J. Fam. L. 11 [Carasco], at 29, 34, 39, 40, 41, 47; Gayle Pollack, "The Role of Race in Child Custody Decisions between Natural Parents over Biracial Children" (1997) 23 N.Y.U. Rev. L. & Soc. Change 603, at 605, 609, 619-622.

[FN10]. *Van de Perre v. Edwards*, 2001 SCC 60, [2001] 2 S.C.R. 1014 [*Van de Perre v. Edwards*].

[FN11]. *Ibid*. at para. 40.

[FN12]. *Ibid*. at para. 38.

[FN13]. *Ibid*. at para. 39.

[FN14]. *D.H v. H.M.*, [1998] S.C.C.A. No. 13.

[FN15]. *D.H v. H.M.,* [1997] B.C.J. No. 2144, (trial decision) at paras. 45 and 47.

[FN16]. *Ibid*. at para. 47.

[FN17]. *Ibid*. at para. 46.

[FN18]. Bunting, *supra* note 7 at 138.

[FN19]. *D.H. v. H.M., supra* note 15 at paras. 29-30.

[FN20]. *Ibid*. at para. 15. She also lived with her biological father for a short time.

[FN21]. *Ibid*. at para. 41. While Melissa's wishes were a factor to consider, they also were not determinative (at para. 58).

[FN22]. Janice Tibetts, "Adoptive Family Wins Custody of Native Boy Supreme Court Will Not Deliver Written Reasons" *National Post* (18 February 1999).

[FN23]. Carasco, Race and Child Custody in Canada, *supra* note 9 at 17-18.

[FN24]. *D.H. v. KM., supra* note 15 at para. 46.

[FN25]. *Ibid*. at para. 32. "By his own admission ..."

[FN26]. *Ibid*. at para. 36. She would also disappear for two to three weeks at a time when Ishmael was an infant, leaving him in the care of her adoptive parents (at para. 14).

[FN27]. See e.g. the description of children as "gifts from the spirit world" who need to be treated gently, in *Report of the Royal Commission on Aboriginal Peoples, Gathering Strength*, vol. 3 (Ottawa: Ministry of Supply and Services, 1996) at 23 [RCAP: Gathering Strength], or the description of "the ethic of non-interference" in parenting as described by Dr. Brant, a Mohawk psychiatrist, in Rupert Ross, *Dancing with a Ghost* (Ontario: Octopus Publishing Group, 1992) at 17-19.

[FN28]. Bunting, *supra* note 7 at 142.

[FN29]. *Ibid*. at 146.

[FN30]. Chan Durrant Limited, "A Review of the Office of the Children's Advocate" (Calgary, Alberta: Minister of Children's Services, 2000) at 2-3, as cited in Bunting, *supra* note 7 at 144.

[FN31]. Bunting, *ibid*. at 148.

[FN32]. *Ibid*. at 163.

[FN33]. RCAP: Gathering Strength, *supra* note 27 at 29.

[FN34]. *Ibid*. at 30.

[FN35]. Listed on the Alberta Child and Youth Advocate's website, accessed April 20. 2008, online: Child and Youth Advocate <http:// advocate.gov.ab.ca/main_links_list.html>.

[FN36]. British Columbia Ministry of Children and Family Development, "B.C. Marks Milestone Agreement on Aboriginal Services", online: <http:// www2.news.gov.bc.ca/news_releases_2005-2009/2008CFD0010-000447.htm>.

[FN37]. For an extensive list of other jurisdiction's legislation enlarging the role of Aboriginal peoples in child welfare, see Sonia Harris-Short, "The Road Back From Hell? Self Government and the Decolonisation of Aboriginal Child Welfare in Canada" (2003), in Borrows and Rotman, *supra* note 5 at 868-869.

[FN38]. Bunting, *supra* note 7 at 151.

[FN39]. *BC Child. Family and Community Service Act*, R.S.B.C. 1996, c. 46, s. 2(e) and (f); s.70 (1)(j) [CFCS ACT].

[FN40]. *Ibid*. s. 4(2).

[FN41]. *Ibid*. s.35(l)(b).

[FN42]. *Ibid*. s. 8(1)(a) and s. 8(2).

[FN43]. *Ibid*. s.71(3)(a),(b) and (c).

[FN44]. See e.g. *British Columbia (Director of Child, Family & Community Service) v. S.(C.)*, 2007 BCPC 19, [2007] B.C.W.L.D. 6119, [2007] W.D.F.L. 4511 at 21, 44 and 89 for discussion of co-parenting support. In this case, the proposed co-parenting program did not work out. It would be worthwhile to explore the existing barriers to such innovative programs [*B.C. v. S.C.*].

[FN45]. See e.g. *British Columbia (Director of Child, Family & Community Services) v. W.(R)*, 2003 BCPC 55 at 16, where parents of a toddler diagnosed with shaken baby syndrome were encouraged to find a "responsible person" willing to provide primary care to co-parent with them [*B.C. v. W.R.*].

[FN46]. See e.g. *British Columbia (Director of Family & Child Services) v. B.(M.)*, 2003 BCPC 429 at 52, where the judge stressed he only believed the child's safety and well-being could be met if the mother continued to have the support of the local Aboriginal community [*B.C. v. B.M.*] and *British Columbia (Director of Family & Child Services) v. N.(T.)*, 2003 BCPC 309 at 42, where the mother's family was "not in a position to help her, but fortunately aboriginal community agencies are available to her." In this case, it was not enough for her to access a six month last chance order under s. 49 (7)(b) of the *CFCS Act*.

[FN47]. See e.g. *B.C. v. S.C., supra* note 44, at 144, where the judge orders the parents and paternal grandparents are to have ongoing access to the children, and the children are not to be adopted, but remain in foster care until 19; *British Columbia (Director of Family & Child Services) v. W. (M.A.J.)*, 2006 BCSC 1666, [2007] B.C.W.L.D. 1595 at 14, affirming an ongoing access order for the Aboriginal father *[B.C. v. W.M.A.J.]* and *British Columbia (Director of Child, Family & Community Service) v. G.(C.M.)*, 2006 BCPC 364, [2007] W.D.F.L. 1394, affirming ongoing access for the father and paternal grandmother. See also *British Columbia (Director of Family & Child Services) v. W.(M.)*, 2003 BCPC 396 at 54 for a discussion of the importance of maintaining emotional bonds with Aboriginal family members for Aboriginal children [*B.C. v. W.M.*].

[FN48]. Ken S. Coates, *A Global History of Indigenous Peoples: Struggle and Survival* (New York: Parlgrave MacMillan, 2004) at 265-266 ["Coates"]. Jim Tully also uses this term (lecture).

[FN49]. "BC First Nations Put Aside Differences for the Sake of the Children: Call on Governments to Do the Same" from "Child at the Centre" Interim First Nations Child and Family Wellness Council, online: Child at the Centre
<http://www.informationbc.ca/child2/Forum%20Two/IFNCFWC_final%20Opinion%C20piece%Öct08.pdf>.

[FN50]. To date, the Aboriginal Healing Foundation [AHF] has made 1345 grants toward healing projects in Canada. For a complete list, see Aboriginal Healing Foundation Funded Projects, online: Aboriginal Healing Foundation < http://www.ahf.ca/funded-projects>.

[FN51]. Borrows and Rotman, *supra* note 5 at 886.

[FN52]. RCAP: Gathering Strength, *supra* note 27 at 27.

[FN53]. Hester Lessard, "The Empire of the Lone Mother: Parental Rights, Child Welfare Law, and State Restructuring" (2001) 39 Osgoode Hall L.J. 717 at 758 [Lessard].

[FN54]. Though this lack of services is often mentioned, the impact of it, except during "life and death situations" (See Tae Mee Park, "In the Best Interests of the Aboriginal Child" (2003) 16 W.R.L.S.I. 43 at 44) is rarely discussed directly. But, see brief mention of this in Lessard, *ibid*. at 741, where she points out "Aboriginal communities were subjected to the harshest impacts of the residual model without any of the moderating effects of the preventive, support, and advocacy services available more generally to non-Aboriginal Canadians."

[FN55]. "BC First Nations Put Aside Differences for the Sake of the Children: Call on Governments to Do the Same", *supra* note 49.

[FN56]. Kline, Best Interests Ideology, *supra* note 3 at 425.

[FN57]. Emma LaRocque, "Re-examining Culturally Appropriate Models of Criminal Justice" in Michael Asch, ed., *Aboriginal and Treaty Rights in Canada* (Vancouver: UBC Press, 1997) at 86.

[FN58]. Mary Ellen Turpel-Lafond, "Some Thoughts on Inclusion and Innovation in the Saskatchewan Justice System" (2005) 68 Sask. L. Rev. 293 at 295.

[FN59]. Rupert Ross, "Traumatization in Remote First Nations: An Expression of Concern" (2006) [unpublished memo, on file with author].

[FN60]. *Ibid*. at 3.

[FN61]. *Ibid*. at 4.

[FN62]. Dr. John H. Hylton, *Aboriginal Sexual Offending in Canada* (Ontario, Aboriginal Healing Foundation, 2006), online: Aboriginal Healing Foundation < http://www.ahf.ca/publications/research-series> at 69 [Hylton].

[FN63]. *Ibid*. at 4. He gives the example of a chief and council suddenly withdrawing funding to send 16 young men to a treatment centre rather than jail when they learned the focus would be on the sexual abuse they had all suffered as children.

[FN64]. "Hollow Waters First Nation's Community Holistic Circle Healing Project" from Canada, Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (Ottawa: Ministry Of Supply and Services, 1996) in Jennie Abell & Elizabeth Sheehy, *Criminal Law and Procedure: Proof, Defences, and Beyond*, 3d ed., (Ontario: Captus Press, 2004) at 185.

[FN65]. This was a predominant issue in three recent British Columbia cases. See *B.C. v. B.M., supra* note 46 at 20, referring to the special needs of one daughter and the mother's diagnosis of FAE; *B.C. v. N.T., supra* note 46 at 13, referring to the mother's "very significant cognitive and intellectual difficulties." And *B.C. v. S.C., supra* note 44 at 40, discussing the difficulty of parenting four children, given the mother's cognitive deficits.

[FN66]. Ross, *supra* note 56 at 12.

[FN67]. For an AHF commissioned study of five select healing programs across Canada, see: James B. Waldram, ed., *Aboriginal Healing in Canada: Studies in Therapeutic Meaning and Practice* (Ottawa: Aboriginal Healing Foundation, 2008), online: Aboriginal Healing Foundation <http://www.ahf.ca/publications/research-series>.

Borrows and Rotman, *supra* note 5 at 886.

[FN68]. *Ibid*.

[FN69]. *Ibid*.

[FN70]. She goes on to say: "The closer the bond that develops with the prospective adoptive parents the less important the racial element becomes." *Racine v. Woods*, [1983] 2 S.C.R. 173, 1 D.L.R. (4th) 193 [*Racine v. Woods*].

[FN71]. *Jane Doe (Public Trustee of) v. Awasis Agency of Northern Manitoba*, [1990] 4 C.N.L.R. 10, 72 D.L.R. (4th) 738 (Man. C.A.).

[FN72]. Compare with *B.C. v. B.M., supra* note 46 at 45 where the judge followed the child's wishes to stay with her non-Aboriginal foster parent with continuing access at her discretion, stating the relationship between her and her mother might heal in time, or *B.C. v. W.M. supra* note 47 at 19, where the judge pointed out that despite continuing custody orders, the child's older brothers had always 'voted with their feet' to return to their mother's care.

[FN73]. This was suggested as a mark of success of measure of Alberta legislative measures which included removing the best interests of the child test. Kline, Ideology of Best Interests, *supra* note 3 at 421 and 423.

[FN74]. Borrows and Rotman, *supra* note 5 at 871.

[FN75]. J. Goldstein, A. Freud & A.J. Solnit, *Before the Best Interests of the Child* (New York: Free Press, 1979) at 6, as cited at n. 17 in Carasco, Race and Child Custody in Canada, *supra* note 16.

[FN76]. Louis E. Wolcher, "Universal Suffering and the Ultimate Task of Law" (2006) 24 Windsor Y.B. Access Just. 361 at 367 [Wolcher].

[FN77]. *R v. Sheppard*, 2002 SCC 26, 1 S.C.R. 869 at paras. 5 and 15.

[FN78]. Lon Fuller, "The Forms and Limits of Adjudication" (1978) 92 Harv. L. Rev. 353 at 366.

[FN79]. See e.g. *Racine v. Woods, supra* note 70, where the Court based its final decision on an assertion that race and culture become less important the longer a child remained with her adoptive family.

[FN80]. Wolcher, *supra* note 76 at 388-89.

[FN81]. *Ibid*. at 367.

[FN82]. *Ibid*. at 381.

[FN83]. *Ibid*.

[FN84]. *Ibid*. at 136.

[FN85]. Alan M. Dershowitz, "Chapter 4: Should a Ticking Time Bomb Terrorist be Tortured? A Case Study in How Democracy Should Make Tragic Choices" in *Why Terrorism Works: Understanding the Treat Responding to the Challenge* (New Haven: Yale University Press, 2002) at 133 [Dershowitz].

[FN86]. *Ibid*. at 132.

[FN87]. Georges Erasmus, "Reparations: Theory, Practice and Education" (2003) 22 Windsor Y.B. Access Just. 189 at 199 [Erasmus].

[FN88]. Wolcher, *supra* note 76 at 385.

[FN89]. Benjamin Berger "On the Book of Job, Justice, and the Precariousness of the Criminal Law" (2008) 4 Law, Culture and the Humanities 31 at 48 [Berger].

[FN90]. *Ibid*. at 50.

[FN91]. *R. v. Gladue*, [1999] 1 S.C.R. 688, 171 D.L.R. (4th) 385 at 717-722.

[FN92]. *R. v. Wells*. [2000] 1 S.C.R. 207, 182 D.L.R. (4th) 257 at 229-230. This is in regard to conditional sentencing. Consequently, the first steps are determining if the offence would fit into the prescribed range, and assessing the harm done and responsibility of the offender.

[FN93]. Allan Manson, *The Law of Sentencing* (Ontario: Irwin Law, 2001) at 274-275.

[FN94]. But see Monture, Vicious Circle, *supra* note 4 at 5, who deliberately connects these two systems and argues there are many similarities in function and effect. See also The Manitoba Justice Inquiry, *supra* note 4 at 510, which argues for the "breaking down of artificial barriers between the criminal justice and child welfare system."

[FN95]. *B.C. v. W.M.A.J., supra* note 47 at 14.

[FN96]. *Ibid*. at 17.

[FN97]. *Ibid*. at 6-8 and 15.

[FN98]. James Boyd White, *Living Speech: Resisting the Empire of Force* (New Jersey: Princeton University Press, 2006) at 195 [White, Living Speech].

[FN99]. Beverly James, *Treating Traumatized Children: New Insights and Creative Interventions* (New York: The Free Press, 1996) at 14 and 212-213.

[FN100]. White, *supra* note 103 at 113.

[FN101]. Erasmus, *supra* note 91 at 199.

[FN102]. Borrows and Rotman, *supra* note 5 at 829.

[FN103]. Marlee Kline, "Complicating the Ideology of Motherhood: Child Welfare Law and First Nation Wo-

men" (1993) 18 Queen's L.J. 309 at 321. See 319-330 for a broader discussion of how the law focuses on individual characteristics and obfuscate the material conditions within which choices are made [Kline, Complicating].

[FN104]. *Ibid*. at 320.

[FN105]. *Ibid*. at 329.

[FN106]. *Ibid*. at 320-322.

[FN107]. *Ibid*. at 324-329.

[FN108]. *Ibid*. at 322, citing *Re J.H. and N.H*. (1988), 3 YR 282 (Yuk. Terr. Ct.) at 287.

[FN109]. See e.g. *B.C. v. B.M., supra* note 46, where the judge described the mother's "rustic" upbringing by a dad who was known to be violent and feared by everyone on the reserve, and the hardship of becoming pregnant at 14 years of age; and *B.C. v. N.T., supra* note 46, where the judge states: "Given Ms. N.'s dysfunctional family background and her significant cognitive deficits, it is understandable that she has difficulty properly caring for her son." (at para. 16). See also *B.C. v. W.M., supra* note 47 at paras. 9-11, summarizing at 11 by saying: "It is fair to say, in my view, that M.W. came into her adult life, and into the obligations of parenthood, without an opportunity to acquire the insight or skills necessary to navigate effectively as a parent within the large urban setting of Vancouver."

[FN110]. See e.g. *B.C. v. B.M., supra* note 46 at para. 39 and *B.C. v. W.M., supra* note 47 at para. 9

[FN111]. *B.C. v. W.M., ibid*. at 9.

[FN112]. Wolcher, *supra* note 76 at 373.
25 Can. J. Fam. L. 223

END OF DOCUMENT