Culture, Self-Determination and Colonialism:

Issues Around the Revitalization of Indigenous Legal Traditions

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This paper works from the assumption that the power of the state to determine and regulate debate around the reinvigoration of Indigenous legal traditions must be set aside, and that the path forward must be laid out by Indigenous peoples. Working out the implications of this assumption leads to

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ruminations on the roles that identity, colonialism, culture and self-determination must play in structuring debate around the rebuilding of these legal traditions. The position that begins to emerge from these ruminations focuses attention on the need to control processes of identity formation. Given the historical and ongoing impacts of colonial policies and practices, regaining and exercising control over these processes will be challenging in its own right, but only through this sort of strategy will Indigenous nations find that their efforts hold promise of a 'post-colonial' world for subsequent generations.

I INTRODUCTION

There were some remarks made this morning that made me think of some things, and I thought I would begin by sharing those thoughts. There was some discussion about the underground stream that runs close by where we are here at the University of Toronto, and some use was made of it as a metaphor to talk about certain things. The use of it as representing Indigenous legal traditions, and thinking of it in that way flowing along under the ground and only now re-emerging to the surface, was compelling.

There was also talk of different groups of people in that metaphor, and I would like to place myself in and amongst these groups. I do not see myself as being "in the stream" if that represents being immersed in one's Indigenous legal traditions. I wish I were, but that's not where I find myself. My mother's family is from the north slope of Alaska, eastward to the western reaches of Canada's western Arctic. My mom's immediate family found themselves spending a winter in the Mackenzie River delta area in the 1940s, which accounts for my being Canadian. I am one possible outcome of a rapid transition from traditional ways of living to many and varied sorts of lives. My grandmother spoke very little English, and I do not speak Inuktitut, which made communication with her very difficult. My mother's generation was at the crux of the transition, living through several decades of tremendous upheaval. Now here I find myself, a "southerner," a law professor speaking at a conference in Toronto. The most I can be is someone helping to bring the life-giving water of Indigenous legal traditions to the surface. I hope I can be carrying up buckets of water, or facilitating the bringing up of water.

The other thing that came up this morning was the story of the residential school, the story of the boy showing up at the residential school with snare wire in his pocket, and in my mind I could see another metaphor unfolding, one that relates to what I am talking about today. A snare is a very simple though effective device, typically made out of wire. Wire is malleable material, easy to work with, and all you do is twist a little knot

that you can pass the other end of the wire through, to create a nice larger loop, with the wire slipping easily enough through the knot. The snare itself becomes a sort of a loose knot, but because it's wire it keeps its form nicely. When it's placed somewhere along an animal trail, an unsuspecting animal, say a rabbit or marten, will walk right into it, his head going unnoticed into the loop. At some point he realizes that there is something around his neck, but the natural thing to do is to want to get past this thing that is bothering him, to move ahead, so he continues on, pushing his way through. Of course what happens is the wire slips through the knot and the loop closes. The more the animal tries to get out, the tighter it gets, and at some point he is permanently stuck. That's how it works, and in a sense that captures a problem I will be talking about today.

II THE NATURE OF THE SNARE

This talk comes out of work I did last year as part of a project funded by the Indigenous Bar Association and the (now dormant) Law Commission of Canada. I played a supporting role, with a wonderful piece by John Borrows,[1] mentioned earlier today, being the essential piece in this project. In my work I initially tried to do something "acceptable" and "useful" for those working in the dominant legal and political arenas, but I had trouble working within these parameters, and I wound up going down a different path. Fortunately, the people at the Law Commission and the IBA were quite understanding, and they seemed happy enough with what I produced. Today, after saying a bit about what I found problematic about the initial direction I took in my research, I hope to present some threads from this earlier piece, threads that weave together notions of identity, culture, colonialism and self-determination.

I was originally looking at the idea of constitutional space for Indigenous legal traditions, imagining how much "space" could be opened up. But I wound up getting more concerned about what I came to consider to be deeper problems facing Aboriginal peoples in Canada, those who are trying to bring the stream to the surface. In a sense, I couldn't help thinking that there was wire around my neck, that the sort of argument I was thinking of developing—this "forward looking" argument—would be tightening this wire. I had to think about how to pull my head back out of that noose.

To do so, I had to work out what to avoid. Consider the sort of argument I might have developed, in line with a kind of argument many people present

1. J. Borrows, "Justice Within: Indigenous Legal Traditions Discussion Paper" (Ottawa: Law Commission of Canada, 2006).

when they talk about Indigenous legal traditions and related matters, like Indigenous justice systems. Numerous commentators, for example, have put considerable energy into arguing that liberal society and Indigenous legal systems can peaceably coexist. Jeremy Webber, for example, presents an interlocking argument.[2] He argues first that liberalism is itself socially and historically contingent, a means by which certain pressing problems facing people living in large-scale societal settings are addressed. Second, he argues that "traditional" Indigenous legal systems may generally and superficially look quite different, but would have functioned to address similar sorts of interpersonal problems. Finally, he argues that, given that contemporary Indigenous peoples possess more centralized authority structures (that may threaten the interests of members), and that these nations are now made up of individuals who are simultaneously citizens of a larger liberal democracy, revitalized Indigenous systems will more obviously respond to the needs of community members with structures that more clearly run parallel to those adopted within liberal communities.

It is important to note that this is not an argument meant to show that liberalism is a threat; rather, it is directed towards convincing forces within dominant society that revitalized Indigenous legal traditions would fit well enough within the Canadian framework. The aim is to demonstrate that Indigenous legal traditions would be non-threatening. I see arguments like this as having a certain kind of form, an underlying assumption which is troubling. They begin with the assumption that the state (or dominant society) is there, a given, and then imagine Indigenous peoples coming to this center of power to try to argue (somehow) that they should have a place within the larger system. This approach begins with the notion that in some way the power structure in Canada is legitimate.

I think this framework also fits fairly well with the reasoning coming out of the Supreme Court over the last ten years or so. In his talk, Professor Morse did a wonderful job of going through some of the recent decisions. The Supreme Court has been busy articulating a vision of the purpose of Section 35 of the *Constitution Act, 1982*, at the heart of which is the principle of protecting "Aboriginality."[3] The strong suggestion is that the Court is signalling that projects like the reinvigoration of Indigenous legal traditions will have to take place within a larger project of cultural reinvigoration and protection. We can call this the cultural protection argument.

I suspect that when it comes time to directly deal with Indigenous legal traditions (the Supreme Court has not yet had such an opportunity), they are

2. Jeremy Webber, "Individuality, Equality and Difference: Justifications for a Parallel System of Aboriginal Justice" in Canada, *Report of the Royal Commission on Aboriginal Peoples: Aboriginal Peoples and the Justice System* (Ottawa: Supply and Services Canada, 1993), 133.
3. See, for example, *R. v. Van der Peet*, [1996] 2 S.C.R. 507.

going to treat them as rights. I find that puzzling and disturbing on a number of levels. First, how are we to imagine an entire legal system being fit with a sort of "right" or combination of "rights"? I find this notion mysterious. But while I am concerned about this obscurity, what I am more concerned about is the fact that this is the voice of one arm of dominant society—its legal system—unilaterally laying down rules for how it will determine matters in relation to other legal systems. In other words, the Supreme Court begins as well with the assumption that the dominant system is legitimately in a position to control and dominate other legal systems. We see, again, the outlines of the snare. Thinking about how Indigenous legal traditions might bubble up to the surface, we immediately come across concerns about the presence and exercise of *power* in the context of historically separate and distinct societies. Historically, power permeated the relationship between dominant society and Aboriginal nations. For many generations the colonial state has unceasingly directed power to the task of subjugating and controlling Aboriginal nations (and families and individuals). This power continues to be wielded, though now in more subtle, entrapping forms. To move to a post-colonial world this power must be tempered and controlled (to allow, for example, Indigenous legal traditions to be revitalized and integrated into a threefold pluralist world). How, though, do we conceptualize a way forward when the dominant conceptual scheme is a colonial legal system?

The way forward would seem to be to pull back, to be certain not to slip further into conceptual schemes and arguments developed by, or designed to fit within, dominant systems. I am trying to explore ways of approaching this problem of the reinvigoration of Indigenous legal systems that do not begin from these sorts of first premises or assumptions. I am concerned that the debates over the reinvigoration of Indigenous legal traditions will be limited by the simple fact of having the debate take place within the world *built around* the dominant system and its conceptual worldview. The paradigmatic assumption is that power lies in, and is exercised through, the Canadian state. If one does not step back from this picture of "reality," the danger is that thinking about reinvigorating Indigenous legal traditions will begin by imagining that the fundamental problem is in constructing arguments that might convince the state to adjust the reality it controls and constructs. It is in just this way, however, that "created" or "constructed" reality becomes "reality."

The obvious move is to put to one side the power of the state. I hope to place this power to one side, to begin analysis from a position centred on Indigenous peoples themselves. I should note that I am somewhat leery of doing this myself, because as I said earlier, I am not well placed to speak directly about the substance of Indigenous legal traditions. I am too deeply

infected by my presence in the non-Aboriginal world. Nevertheless, I want to explore this approach, to see where it might go. For the rest of this talk I will lead you through a discussion around things like identity, colonialism, culture and self-determination, trying to weave these notions together into something that hopefully makes a little bit of sense. You can be the judge of that. It makes a little bit of sense in my mind.

Ultimately, I want to stress, Indigenous peoples are faced with key *choices*, many of which are contingent on regaining control over certain aspects of their collective existences. The central claim in my argument is that control over processes of identity formation is the core mechanism through which neo-colonial practices and structures maintain themselves within our current "reality," a fact that demands that we acknowledge this power dynamic, and that we thereby approach projects like the reinvigoration of Indigenous legal traditions by placing to one side the power of dominant society to frame debates around these projects.

This examination reveals, I believe, the depth of the challenges facing advocates of the reinvigoration of Indigenous legal traditions, and the enormity of the difficulties inherent in the project of attempting to circle around so as to find a way out of a world built around colonial and neo-colonial structures. My argument, however, is that we must live up to these challenges, as overwhelming as they may appear to be. Only with appreciation of the challenges facing us can strategies be developed that can move us to a "post-colonial" existence. Indigenous peoples in Canada find themselves living in a difficult time of transition, with identities partly constituted through generations of living within Canadian society and partly constituted by their ties to "traditional" Indigenous worlds. Reinvigorating legal traditions can play a profound role in laying out future paths that Indigenous nations might tread. It presents the enormous promise of reweaving threads connecting Indigenous communities to their traditional cultural fabric. Taking the wrong first step on this sort of path would be disastrous.

III ARGUMENTS AROUND INDIGENOUS LEGAL TRADITIONS—DIFFERENT WEIGHT/DIFFERENT UNDERSTANDINGS

As I mentioned earlier, the Supreme Court has adopted a particular kind of argument to deal with Aboriginal claims in general, an argument I think they are going to use when they turn to Indigenous legal traditions—the cultural protection argument. The other argument out there is the self-determination argument. There may be others as well, but I will focus on just this one alternative. The justificatory force of this sort of argument emerges from recognition that Aboriginal peoples were "here first," living in organized

societies. The power of this argument is not dependent on this "here first" component, as Aboriginal nations can point simply to their being "peoples," political collectives vested with powers of self-determination. Indigenous claims can receive their justificatory power from the historical and political status of Indigenous nations (the collective self-determination argument).

There are interesting and telling observations to be made about the existence of these two approaches to justifying the reinvigoration of Indigenous legal traditions. These observations arise when one notes that not only are these two approaches distinct in what they might say about how Indigenous legal traditions should be reinvigorated (and to what extent), but that these two approaches are differently weighted between Indigenous and non-Indigenous societies, and that they are often differently understood between these societies.

Consider the cultural argument: One might suppose that it would be treated with some suspicion by Indigenous peoples, given the sorts of concerns raised earlier about the pervasiveness of power and its non-legitimate exercise in this context. One might suppose that both Indigenous societies and Indigenous scholars would demand that attention be shifted to the self-determination argument. The cultural argument, however, is accepted and employed by both Indigenous and non-Indigenous peoples (and their authorities).

Some might argue that this reveals the pervasiveness and subtlety of colonial and neo-colonial forces. Perhaps, one might suggest, those Indigenous peoples and authorities employing the language of cultural revitalization are unaware of the possibility that this functions well to advance the interests of the colonial state. Perhaps, one might suggest, the cultural argument is meant to ensnare Indigenous peoples.

This, however, ignores the possibility that by and large Indigenous and non-Indigenous authorities might understand the argument itself quite differently. The state, for example, speaks of cultural revitalization from a very particular point of view, one grounded in principle on liberal democratic principles underlying the life of Canadian society, and in practice on the fact that such a project deflects energies away from challenges to state hegemony. Indigenous nations, on the other hand, see cultural revitalization as connected to a larger package of goals, as intermixed, for example, with the larger project of achieving self-determination.

Similarly, the self-determination argument must be seen as being differently understood by Indigenous and non-Indigenous authorities. Even when similar language is employed, it has to be appreciated that the two political communities often attach quite different assumptions, connotations, and implications to the words used. On the state side there is avoidance of this sort of grounding for the revitalization of Indigenous traditions. When

pressed to acknowledge the moral or political power of arguments for self-determination, the Crown makes attempts to tame it, to keep its perceived threats to the state under control through replacement with such notions as "self-government." The attempt is made to tame self-determination, transforming it into something incapable of threatening "territoriality" and Crown sovereignty. On the Indigenous side, on the other hand, "self-determination" points to the immense efforts that must be made to work against the effects of colonialism, to regain collective control over matters that are essential to the continuation of ways of life tied to people's ancestors. For Indigenous peoples it would seem that the self-determination argument is inextricably linked to the cultural argument, the two being seen as going hand in hand in the larger project of decolonizing Indigenous nations.

The cultural argument cannot, then, be simply jettisoned, since it forms a central part of the Indigenous sense around why Indigenous legal traditions must be reinvigorated. At this point my methodological approach to this general issue reasserts itself—given the bracketing of state power over debates in this arena, the primary concern must be in making sense of how to ground the project in *Indigenous notions* of Indigenous self-determination and cultural revitalization, appropriate to the aspirations of Indigenous peoples.

IV THE CULTURAL AND SELF-DETERMINATION ARGUMENTS AGAINST THE BACKDROP OF COLONIALISM

When the question is framed this way, however, fundamental questions arise around colonialism and its impact on issues of identity. The passage of generations living within the heavy atmosphere of colonial policy has complicated how to understand such notions as "traditional" and "Indigenous." Just as there are complex questions plaguing the notion of "traditions" many generations after contact with Europeans, it is a vexing problem to work out how to identify Indigenous peoples and nations, given that these generations are marked by the effects of innumerable social, economic, political and legal forces, ranging across such matters as policies driven by the Crown's ceaseless attempts at colonization, to intermarriage, to increased mobility.

While it might be conceptually simple to address questions of Indigenous identity by way of descent, this is generally recognized today by most parties to be inappropriate. The two determinants that contemporary commentators argue should be brought into discussions around issues of Indigenous identity are, once again, culture and self-determination.

The first thing to note is that these arguments function differently between Indigenous and non-Indigenous societies and authorities, just as we noted in the context of the project of reinvigorating Indigenous legal traditions. For example, while generally cultural theories around identity link certain cultural markers to the debate, many Indigenous peoples find particular resonance with the retention of language, as they see in their languages repositories of, and vehicles for, knowledge and wisdom. Similarly, while Canadian authorities are reluctant to acknowledge the continued existence of Indigenous political units, for some Indigenous peoples identity is tied to self-determination precisely because Indigenous polities have maintained unique identities crafted and re-crafted over time. These political identities reflect peoples' resistance and adaptation to the difficult events they have faced over the last few hundred years, identities that constantly and consistently reflect and express the collective wills of different peoples.

All of this discussion is empty, however, if attention is not paid to the overarching effects of colonialism in this context. Cultural markers are contested within Indigenous communities, while arguments around self-determination too quickly pass over fundamental problems in identifying the core of a community that may express itself through ongoing action and discourse. Just as different groups within any particular Indigenous community will likely have different ideas about how "traditions" should be understood, identified and re-created, different groups within many communities will also have different ideas about the nature of the community, about where it has come from, about how it should be understood as presently constituted, and about how it should make decisions about how it will move into the future. Ideas about the meanings of "tradition" and "Indigenous" in contemporary life are contestable and contested *within* Indigenous communities, as a result of a long and continuing history of colonial state practice. To varying degrees in Indigenous communities across Canada, there is a lack of consensus on fundamental matters, a dissolution of social cohesion directly tied to generations of state policy and action.

While this overlays a tremendous degree of complexity onto the situation we are examining, it also points to the direction along which further discussion must proceed. When one appreciates the impacts of colonial policy on Indigenous communities and individuals, a particular complementary intermixing of the self-determination and cultural arguments emerges as the only appropriate way of proceeding around the need to revitalize Indigenous legal traditions, just as this complementary intermixing emerges as the appropriate way of making progress around the question of who (individually and collectively) might be "Indigenous."

The self-determination argument begins from the position that Indigenous societies are natural sources of answers to questions about identity. The advantage is tempered, however, by concerns over the exercise of self-determination by colonized peoples in an essentially colonized state. It is not a simple matter of determining how Indigenous peoples understand themselves and their identities in the modern world, for their collective (and individual) senses of identity have suffered under generations of constant (and at times brutal) attack from outside forces. It is not a simple matter of finding the proper locus for the determination of questions of identification (of identity or legal traditions) within Indigenous collectivities, as these very loci have suffered under the heavy weight of colonial policy and action. To varying degrees amongst the many peoples across Canada, Indigenous political communities are fractured, dispersed, and mired in conflict. Acknowledgment of the heavy weight of colonialism *requires the marriage of cultural and self-determination arguments*, as Indigenous nations rightfully take up the daunting task of defining themselves (and their legal traditions), but within a larger package of goals, centred on the project of respecting their ancestors while attempting to find a path out of the situation wrought by generations of oppression.

The nature and depth of the challenge this generates for Indigenous peoples must be appreciated. What lies behind all the difficulties we now face in this regard is the spectre (and continuation) of colonialism. We now find ourselves in contemporary times with Indigenous peoples and nations trapped in existences marked partially by their connections to "traditional" lives and times, and partially by their immersion in modern society, an existence that leaves them simultaneously "un-tethered" to varying degrees. This un-tethered existence is *not* simply the result of a transitional move from one cultural base to another. The un-tethered existence experienced by Indigenous peoples in Canada is fundamentally the result of the *involuntary* nature of the move forced upon them.

V THEORIES OF SELF AND IDENTITY: THE WAY BACK AND THEN FORWARD

I do not want to paint a picture of a hopeless situation. On the contrary, we are now in a time when continued renewed resistance might be met with an appropriate response from dominant society. Nevertheless, this resistance must be maintained, a fact that requires that Indigenous peoples in Canada be able to fully appreciate both the history leading up to this current situation, and the forces still at play in the colonial realm. Fortunately, tools are available to assist in the struggle to work our way back out of the colonial snare, should we be able to see how far down into it we have

become trapped. The primary tool is that of identity itself—or more precisely the tool lies in theories of identity that fairly accurately capture Indigenous senses of their individual and collective selves, and yet point to the development of future senses that may lead the way out of the colonial snare.

One's "identity" is now generally recognized as fluid and dynamic, as individuals and communities are seen as constantly forming and reforming their senses of who they are, and of how they relate to the world around them.[4] Identity is also seen as unavoidably being a complex matter in our complex world, for individuals (and even communities) exist within overlapping realities. The self is posited as essentially fluid and constructed. Much of the "situated-ness" of any individual is seen as given, and as reflective of this person's place in time and space. That is, a person finds herself confronted by her existence within certain social settings, by certain histories to these settings, by access to certain cultural spheres, and so forth. These general background factors have both expansive and limiting effects on efforts of this individual to craft and re-craft identity. Access to a multitude of social and cultural spheres, for example, will provide the individual a certain amount of space within which she can form and re-form her sense of self. This space is not infinite, however, for an individual will be constrained by and large within boundaries established by the overlapping spheres of that person's various social and cultural heritages.

Indigenous peoples are especially good examples of the complexities that envelop identity in the modern world, for an individual Indigenous person can exist simultaneously, for example, as a member of an Indigenous family, a clan or family group, an Indigenous band, and an Indigenous nation, and as a resident of a predominantly non-Indigenous community, a citizen of Canada, a citizen of a larger global community of Indigenous peoples from around the world, and indeed as a citizen of the world community. This person would almost certainly have a mixture of cultural backgrounds, with parents, grandparents and great-grandparents coming from various Indigenous and non-Indigenous communities, and while they may be strongly tied to their Indigenous community, they will undoubtedly have spent much of their educational and employment careers in non-Indigenous settings, learning how to live as a non-Indigenous person in a "globalized" world.

Existing in overlapping spheres is not, however, the whole of the story. Current Indigenous identities, both on the level of the collective and the

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4. For general analysis of the historical development of the modern sense of self, see C. Taylor, *Sources of the Self: The Making of the Modern Identity* (Cambridge, Mass.: Harvard University Press, 1989).

individual, are the product of both free adaptation and powerfully functioning oppressive mechanisms. Just as all peoples engage with surrounding peoples and cultures, over time adopting attributes, beliefs, values and practices that seem to meet certain collective needs and interests, Indigenous peoples across Canada have engaged with "the West," adopting ways of thinking and acting that have their roots in European culture. To the extent these ways of thinking and acting impact on the formation of senses of collective and individual identity, Indigenous peoples have freely absorbed into their senses of who they are aspects of non-Indigenous cultures.

Unfortunately, however, running parallel to this ongoing process of free adaptation has been a multi-generational dynamic of oppressive activity, aimed at undercutting or destroying Indigenous mechanisms for producing, reproducing and transmitting senses of identity.[5] The fluidity and dynamism inherent within senses of identity allows for—indeed coexists with—manipulation. That is, the very shape and content of the self is capable of manipulation, both from within and without. The colonial state understood well how to attack the cultural ties that bound together Indigenous nations. They applied relentless pressure in a generations-long war to remove the "Indian" from the Indian. That external forces can shape one's individual and communal identity is made clear by this long and tragic aspect of Canada's colonial history. What Indigenous peoples across Canada must understand is that the state *continues* to understand quite well how to exert forces to shape individual and collective identity.

Ironically, however, while the fluid and dynamic nature of identity raises the spectre of continued colonial pressure (more subtle and insidious than the physically, emotionally, spiritually and intellectually repressive residential schools, but no less effective in destroying Indigenous aspirations), it also makes possible the dream of decolonization. Fluid and dynamic senses of individual and collective identity can be both extremely dangerous and tremendously promising.

Let me reiterate the danger: Many Indigenous people find their senses of "who they are" confused and chaotic *as a result of* living at the end of

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5. Residential or boarding schools were considered as early as 1844 (from Canada, *Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back*, vol. 1 (Ottawa: Minister of Supply and Services, 1996) at part 2, c. 9 [hereinafter *RCAP 1996*]):

> To combat settler encroachments and trespassing, the Bagot Commission [reporting in 1844] recommended that reserves be properly surveyed and illegal timber cutting eliminated by a timber licensing system. Indians were to be encouraged to take up farming and other trades and were to be given the training and tools required for this purpose in lieu of treaty gifts and payments. Education was considered key to the entire enterprise; thus boarding schools were recommended as a way of countering the effects on young Indians of exposure to the more traditional Indian values of their parents. Christianity was to be fostered.

generations of colonial government policy directed at their families and communities, and now we find non-Indigenous sources of authority placed so as to dictate the parameters within which the future identities of Indigenous peoples and communities are constructed, all so that these peoples may be able to exercise what would then seem destined to be anemic versions of their "legal traditions." The institutions and authorities of the dominant legal and political system are ready to force upon Indigenous peoples and communities certain ways of thinking of themselves—the snare is around the neck, already fairly snug, and ready to tighten to the point of suffocation. What, then, to do? The promise is laid out along a difficult path.

First, each Indigenous person, and each Indigenous nation, must examine the sources of confusion and complexity lying at the heart of their senses of who they are and of how they think of themselves. The "post-colonial" enterprise rests on just such activities, the examination of hard, essentially *internal*, issues on a personal and collective level. Second, then, Indigenous peoples must embrace the vision of the fluid and dynamic self (on both individual and collective levels), so as to interweave around this a position centred on collective self-determination, with this force of self-determination pointed towards certain projects of cultural revitalization.

The central lesson then revolves around recognition of the power that relates to all matters that connect to identity and its formation in contemporary settings. The reinvigoration of Indigenous legal traditions holds out the promise of being an integral component in a modern project of *regaining control* over processes that not only lead into the instantiation of certain structures and institutions (the legal and political structures of Indigenous societies), but, more importantly, that would play a role in the potential regeneration of Indigenous *(i.e.*, "traditional" cultural) identities.

Here I am considering as "culture" that set of collectively determined processes that produce, reproduce and transmit senses of identity. Collective notions of identity are formed and transmitted through social and cultural mechanisms, and on the basis of immersion in such communities, formed around and through such senses of identity, individuals come to have certain parameters established around them within which they come to form senses of who they are, and what they might become. Essentially, then, it all comes down to one matter, centred on questions of identity and identity-formation: Indigenous peoples need to be able to see the reinvigoration of their legal traditions as part of an ongoing process of regaining total control over the general mechanisms that produce, reproduce and transmit cultural identity.

The project of reinvigorating Indigenous legal traditions would be part of a larger collective movement towards regaining control of matters of identity-formation, on *individual and collective* levels. This would not be a directionless endeavour, but one with a very particular and definite goal, a

project that envisions the creation, recreation and maintenance of very particular senses of identity. Indigenous collectives (peoples living, thinking and feeling together, bonded by language, history, family, beliefs and values) traditionally lived within worlds built around institutional structures tied to notions of collective identity, institutions that functioned to produce and reproduce parameters within which could develop senses of individual identity. Collective institutional structures maintained the ongoing transmission of ways of thinking of oneself in the world, the mechanisms that continually led to generations of community members who saw the world through such imperatives as the need to work towards having "good thoughts," who had, at the core of their beings, senses of responsibility that acted to regulate and measure their day-to-day lives.

If the aim is the reinvigoration of *Indigenous* legal traditions, where these are part of a larger project of reinvigorating the "life-blood" of Indigenous nations (their ability to control who they are, and how they move and act in the world), *these* are the sorts of structures we have to imagine being revitalized in contemporary settings. This presents us with two fundamental challenges: on the one hand, we must imagine this sort of reinvigoration in light of the position of contemporary Indigenous communities within the larger liberal democratic state and, on the other hand, we must consider how a process of reinvigoration along the lines now articulated could come to pass given complex issues around identity facing contemporary Indigenous communities, especially those centred on appreciation of the fact that Indigenous identity has been the target of generations of relentless colonial attack.

We are now in an appropriate position from which to more directly consider problems with which most non-Indigenous commentators begin their analyses. We are imagining initiatives driven from within Indigenous nations, not the product of discussions with the Canadian state about how Indigenous legal traditions could be fit within the parameters around debate that various aspects of "reality" purportedly generate. We are envisioning these initiatives having the sort of broad contours appropriate to their connections to the fundamental project facing Indigenous nations—that of reasserting control over all matters that impact on the creation, recreation and maintenance of identity. We have also now run up into the barriers with which such movements would have to contend.

We can now meaningfully begin to wonder about the ability of the state (and Canadian society) to accommodate itself to the emergence of Indigenous legal traditions (and not the ability of emerging Indigenous legal traditions to accommodate themselves to the "reality" of Crown sovereignty, liberal doctrine, and the power wielded by such state institutions as the domestic legal system). It might be suggested that the fundamental question is about the ability of the Canadian state (and Canadian society) to

accommodate itself to the community-driven emergence of projects aimed at reasserting Indigenous control over processes of collective and individual identity-formation and transmission.

In keeping with the theme of these remarks, however, I would like to examine a different sort of challenge, one faced by many Indigenous nations with "fractured" societies, brought about by ceaseless attacks on their ways of thinking and living by the Canadian state, and the dominant society it fundamentally represents. How can these communities, marked by dissension and conflict, pulled between governance systems imposed by the state and forces within that yearn for the re-emergence of Indigenous legal and political systems, reach that state of equilibrium and solidarity required for the sorts of undertakings envisioned? For these communities, it is tempting to imagine that the thing that is sought is something that has to be in possession before the journey can begin.

I do not think this is an insurmountable problem for most communities. While it may be a very difficult matter for some communities, I cannot see how the enormity of the task could preclude the good work progressing. This is especially so when we acknowledge the "starting position" of contemporary Indigenous communities in Canada. Indigenous peoples in the contemporary world, on both collective and individual levels, do identify to some degree with various elements of identity emergent from their existence within a liberal society. In the sorts of projects being imagined these communities have people within who see themselves as gathering together in projects built around a common interest. In other words, they see themselves as groups formed around commonly arrived at sets of goals and ideals. And so, while the larger Indigenous communities within which these groups function may well include elements opposed to the projects envisioned, and the larger surrounding society may be reluctant to support these projects, these groups will be able to build up communities necessary to push forward, around—and, if necessary, to the exclusion of—these other forces. We are not imagining this to be a smooth and uneventful movement. We are imagining, for example, immense internal struggles within certain communities, communities split along lines determined by the very sort of project we are discussing in this work. The concern that such difficulties *preclude* getting such projects underway, however, is not valid.

The fact that Indigenous people, on both individual and collective levels, enjoy a hybrid existence, identities currently made up of elements drawn from both Indigenous and non-Indigenous sources, is not then a barrier to the sort of reinvigoration of Indigenous legal traditions under discussion in this work. Rather, this hybrid existence can be brought to bear on some of the seemingly more challenging hurdles facing such projects of revitalization. We are imagining the reassertion of control over all essential

aspects of identity formation, with the goal being the reinvigoration of certain *collective visions* of how individuals should be "constructed." We are imagining, in essence, Indigenous nations having the ability to sculpt their members, to work on all aspects of their upbringing so as to generate collectives formed around common attributes of identity (centred around, for example, a vision of community wherein all individuals see themselves and the world through notions of responsibility, of living and acting with a focus on having good thoughts with good intentions).

A difficulty that looms over this scenario concerns external ideological challenge, as dominant society comes to be faced with communities gaining momentum, when these endeavours begin to generate communities built around collective senses of identity (manifest in the establishment of parameters around the establishment of individual identity). Is it inevitable that no matter how these projects progress they will always have to accommodate themselves to the fact of an existence embedded within a liberal democratic state?

VI CONCLUSION

Final thoughts on this point have to take the form of impressions from two perspectives. From the perspective of liberal doctrine it may be considered, in the final analysis, unacceptable to allow the sort of development of Indigenous legal traditions argued for in this work. For example, as Indigenous nations reassert control over processes of identity formation and transmission, they may very well *choose* to leave behind the protections their members enjoy, as individuals, as citizens of a liberal democracy. With these sorts of concerns in mind, the liberal state—within which would continue to exist the Indigenous nations—may simply not be able to cut and hack out a square hole within which to place the square peg of Indigenous legal systems. From the perspective of Indigenous communities, however, it may simply be unavoidable that they begin to assert themselves in the ways imagined in this work. Contemporary events have unfolded in ways that make it clear to many Indigenous people that radical movement is necessary, and that whatever reactionary move the state may make, the risk must be taken.

Ultimately, the challenges have to be acknowledged as being truly daunting. The contemporary events alluded to above—the powerful push towards assimilation, the strengthening amongst wide swathes of Indigenous peoples of elements of identity that tie them ever more strongly to Western ways of thinking and acting—make the sorts of necessary projects of decolonization seem practically unattainable. How will fractured communities, increasingly peopled with families far removed from the

stories of their ancestors, beaten into economic submission after generations of oppression and deprivation, bombarded by endless images of how they "should" think of themselves (as consumers and capitalists, as individuals with rights and interests), be able to initiate the sorts of processes of reclamation necessary to begin the long, slow journey to post-colonial times?