

POPULAR JUSTICE AND ABORIGINAL COMMUNITIES

SOME PRELIMINARY CONSIDERATIONS¹

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Introduction

It is well noted in the criminal justice literature that interpersonal violence, property crimes, family problems and other forms of social tension, friction and disorder recur in aboriginal communities at levels far greater than national or regional rates (Depew 1994; Jackson 1988). And, whether the focus is on issues of local adjudication, treatment of offenders or the needs of victims, it is increasingly being recognized that the conventional formal approach of the State is very limited in the extent to which it can successfully respond to these concerns (Auger et al. 1992; Brodeur et al. 1991; LaPrairie 1992a; LaPrairie and Diamond 1992). Furthermore, after decades of intervention by the State, aboriginal peoples continue to experience disproportionate involvement in the criminal justice system (LaPrairie 1992b) as well as considerable frustration in trying to satisfy their justice goals, needs and aspirations as historical societies. It is no surprise then that aboriginal people believe that the justice system discriminates against them, and marginalizes and trivializes the importance of their cultures and community circumstances to their justice concerns (Hamilton and Sinclair 1991; Monture-Okanee and Turpel 1992).

Maintaining and rationalizing State control under these conditions is very difficult for justice officials committed to improving the relationship between aboriginal

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peoples and the justice system. State control also constitutes a significant challenge to aboriginal peoples who wish to redefine and redirect the evolution of justice arrangements for their communities. These issues are complicated by what many commentators see as forced aboriginal dependence on dominant, adversarial and coercive, non-aboriginal justice authorities, institutions and processes. This theme is usually elaborated in terms of a sharply focused critique of the State's formal justice apparatus that questions its relevance and legitimacy for aboriginal peoples (Gosse et al. 1994). Indeed, the argument is often reinforced by appeals to the struggle of aboriginal peoples to define their own unique justice system(s) in more direct community and cultural terms and, in the process, regain a measure of control over criminal, civil and family justice matters (Royal Commission on Aboriginal Peoples 1993). Thus, the aboriginal justice agenda seeks more appropriate, meaningful, legitimate, accessible and effective approaches to administration of justice in the hope that these will also help to reconstitute aboriginal communities on the basis of autonomy, empowerment and tradition.

Perhaps more than any other expanding alternatives-to-the-State movement in Canada, 'popular justice' for aboriginal communities has been embraced by its advocates as a solution to a range of unique justice problems faced by aboriginal communities. Although the political importance of this movement is now well established, it is frequently overlooked that the results of popular justice in a non-aboriginal context are not always encouraging (e.g. Hann and Axon 1994; Merry and Milner 1993a), and that some aboriginal people themselves are often uncertain about its prospects for justice and wider community development (e.g. Clairmont 1994; LaPrairie 1991, 1992a). More importantly, little is known about informal approaches to dispute resolution and conflict management, such as mediation, reconciliation, and restitution in aboriginal communities, knowledge of which might support the claims of popular justice advocates. Indeed, the results of the limited research and evaluation conducted in an aboriginal context are ambiguous at best and require interpretation (Clairmont 1993, 1994; Crnkovich 1993; Obonsawin-Irwin 1992a, 1992b). Furthermore, theoretical claims that aboriginal cultures are uniquely situated to activate and develop popular justice structures and processes, especially when compared to Western 'Culture', require further scrutiny (e.g. Ross 1994a, 1994b). Otherwise, we are simply begging the question as to whether significantly different ways of dealing with aboriginal justice issues exist or whether more suitable approaches can be created on the basis of community, cultural or other differences and distinctions.

The purpose of the present paper is to broaden the discussion of popular justice for aboriginal communities by raising a number of key issues for commentary, research and evaluation. Drawing on case study material, various reports and analytical reference points developed in the popular justice and related literature, the paper critically examines the concept of popular justice, describes some of its

organizational features and raises some questions for further investigation. The discussion is facilitated by an appeal to sociological analysis of popular justice in both aboriginal and non-aboriginal contexts. It is concluded that, while there may be common issues to consider, regardless of cultural or racial context, it is crucial to reflect on the social, cultural, economic and political forces that uniquely shape and change aboriginal communities. This has important implications for the conceptualization and development of popular justice in an aboriginal context. By proceeding this way, the paper is intended as a contribution to more informed and realistic approaches to the design and, ultimately, implementation of justice arrangements for aboriginal peoples and their communities.

The Popular Justice Framework

This paper is concerned with a model of popular justice that has been developed within nation States over the last two decades and is sometimes referred to as the 'communitarian tradition'.² Like all traditions of popular justice, the communitarian model embraces an ideology and assumption set which promise a quality of justice and a range of related practical benefits that cannot be achieved or are difficult to achieve through the more conventional, formal justice apparatus of the State.

The distinctive quality of justice promoted by the communitarian tradition (hereinafter referred to as 'popular justice') is of a social rather than a strictly legal nature. It is primarily concerned with the complexities of disputes that arise from the social demands of community living. Thus the quality of popular justice is reflected in the way social histories and the personal and community circumstances of disputants are brought to bear on the adjudication of transgressions, and by the ability of disputants to resume harmonious social relationships or to continue harmonious interaction in the future. The principal assumption of popular justice, therefore, is that it can provide preventative and order maintenance functions within a framework of proactive and socially relevant and meaningful justice administration in relation to crime and disorder.

² From a global perspective, Merry (1993:40-49) distinguishes four traditions of popular justice: reformist, socialist, anarchic and communitarian. Unlike reformist and socialist traditions which intentionally locate popular justice within the legal and judicial framework of the State, the communitarian tradition promotes institutions and processes that are more closely associated with community-based or indigenous forms of order and control, but without mass uprisings characteristic of anarchic traditions.

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The relevance and meaning of popular justice also lie in its apparent capacity as a community dispute resolution forum to increase the availability of justice through direct participation by community members in its processes, and to enhance access, especially for those individuals who are poor, uneducated or disempowered, or are members of marginalized ethnic minorities. In order to facilitate availability and accessibility, popular justice organizations theoretically rely on relatively unprofessionalized personnel recruited on a voluntary basis from the community itself, eliminate or reduce costs by charging no or minimal fees for service, maintain flexible hours by conducting 'hearings' or sessions at times that are convenient for the disputants, and operate with rules and procedures that are based on common, lay understandings.

Prospects for the effectiveness of popular justice are based on two main assumptions. The first is psychological and involves empowering, 'improving' and 'healing' the individual. Empowering the individual means that individuals maintain ownership of, or exercise greater control over, their disputes rather than turning them over to lawyers to manage or to court judges to decide. The ideology of minimal intervention by formal institutions and players is based on the principle that disputants are responsible for resolving their own disputes. Managing one's own disputes is thought to enhance individual self-reliance and control over one's life. However, the way in which conflict is managed by the popular justice process is no less important than the fact of its management by individual disputants. By establishing psychological parameters that focus on emotions and feelings, and by emphasizing a therapeutic-like dispute resolution discourse and process, popular justice encourages disputants to reflect upon and become more responsible for their actions, especially as they affect other people in a variety of continuing social relationships. Thus popular justice seeks to maintain adequate personality adjustment (or 'health') by incorporating personal and social, rather than legal, meanings, incentives and constraints into conflict management. This is thought to be necessary since popular justice assumes disputes are generated by the failure of individuals to act as they should in their social relationships.

Problems that may in other forums be expressed as legal issues are usually transformed into problems of communication between disputants. The reason for this is that complex disputes may reflect a range of social demands and considerations that bring wider scope and depth to the problem at hand. The application of various communication techniques is thought to be the best way to resolve these kinds of problems or to prevent them from happening in the future. As a result, the means of achieving resolution - the language of personal and group 'therapy', the articulation of personal differences, and the improvement of communication - often become just as, or more important than, the ends of

resolution, i.e., a settlement or other outcome.³ Since 'therapy' and the communication process are more comprehensive than the content of a particular settlement, the broader objective is to 'heal' the individual and interpersonal relationships, and to restore 'health' to the community.⁴

The assumed psychological requirements and benefits of popular justice are closely tied to its sociological assumptions. In general, popular justice claims to build on local resources as a model *of* and a model *for* society. Through its structures and processes, popular justice claims to activate a model *of* 'natural', 'genuine' or 'human' feelings, emotions and interpersonal relationships that are believed to be the foundation of community life. This model is directed to the 'clash of individual personalities' that are thought to create, or to have the potential to create, tension and strain in the existing institutional framework, to tear individuals from their social roots and to disrupt social cohesion. As a model *for* society, popular justice promotes community values and norms that prescribe the kind of approach individuals should bring to disputes and conflicts experienced in everyday life. This is intended to give the process the stamp of credibility and legitimacy. Thus popular justice claims to articulate a model of dispute resolution and conflict management that can, on the one hand, counteract the feelings of anomie, alienation, isolation and fear that are believed to lie between disputants and to (temporarily) sever their relationship, and, on the other hand, to draw the disputants, justice administrators and concerned public into a re-emergent sense of community, a reaffirmation of individual self-worth and self-esteem, and an invigoration of the existing civic order. The end result of this overall process is expected to be a quality of justice fashioned by and for the community.

It is important to bear in mind that popular justice organizations and programs are intended to be dynamic, and designs or design features are at best temporary phenomena that constantly change in order to adapt to environmental circumstances (Clairmont 1994; Hann and Axon 1994; Merry and Milner 1993a). At the same time, the structure of most popular justice organizations is expected to conform to a number of forces that, taken together, determine a low degree of complexity, low formalization (i.e. little standardization and few formal rules) and decentralized or

³ These outcomes may be particular, compromise-oriented agreements, or more diffusely structured settlements ranging from redress, making amends and other forms of peace-making to individual reintegration into the community. Significantly, all of these outcomes rely on informal sanctions and incentives of on-going relationships, community norms and values to encourage compliance, rather than on legally-binding orders and decrees that force compliance.

⁴ As Nader (1993: 442) puts it, in this model of justice administration "plaintiffs are patients needing treatment".

localized decision-making and judgments.⁵

These organizational features are designed to embody community power and control in the form of local political and 'judicial' institutions, and patterns of civic action that, together, constitute community ordering sanctioned by local norms and values. In this way popular justice appeals to aspirations for local governance and civic action set within a context of autonomous community authority that supports legitimate, independent, locally determined judgments in justice administration. Accordingly, the exercise of control may be located at individual or group levels and may involve those who lead popular justice organizations as administrators (e.g. mediators), who enjoy status in the community (e.g. community leaders or other respected members of the community), or who demonstrate personal charisma and/or expertise and knowledge in community affairs or popular justice issues. Community control may also be achieved by the allocation of decision-making to empowered disputants, rather than by reliance on more direct forms of supervision and direction, such as those using mediators or conciliators. Finally, control may be located in aspects of the community itself. Participants in popular justice are thought to share the same cultural values and, therefore, to be willing to accept the structure, process, leadership, etc., as legitimate, and to comply voluntarily with their requirements. This is possible when participants have strong social and cultural bonds and share a commitment to popular justice because of common socialization and values. Strong consensus and cultural homogeneity permit individuals and the community to work together in support of popular justice goals and objectives (cf. Braithwaite 1990; Skogan 1991).

Critical reflections on popular justice

Popular justice has a certain intuitive appeal. Its declared opposition to an all-powerful, expensive, bureaucratic, technical, inflexible, adversarial, adjudicatory model of justice administration, and its endorsement of a fundamentally different approach to conflict resolution built on shared social sentiments, community morality and a reallocation of power between the individual, community and State, seem to be a compelling argument for its adoption. Yet proponents of popular justice often overlook a number of crucial questions about its theoretical premises and assumptions, the community contexts within which it is expected to evolve, its

⁵ These forces include the organization's size, techniques, strategic direction and power relations, and corresponding processes of coordination, communication, conflict management and strategies of personnel commitment. For details, see Mintzberg (1991) and Robbins (1990).

actual practises and results, its limitations, and its potential to complement or supplement State justice, or to redefine justice. Some of these are discussed below.

1. *Is the model theoretically sound?*

Some advocates of popular justice claim to have rediscovered 'more human' solutions to disputes in the ideational systems and social resources of other cultures. Indeed, for many modern-day imaginations, traditional societies project an image of harmony and equilibrium, a condition reproduced through apparently voluntary, consensual and conciliatory decision-making as informal ways to address and resolve a wide range of conflicts and disputes (Jackson 1988, 1992; Monture-Okanee and Turpel 1992). This image is often reinforced by juxtaposing the formal procedures of the State against theoretical models of traditional, non-Western justice 'systems' that appear analogous to the informal regulative functions of the family, peer groups, neighbourhoods and other local institutions in contemporary communities.⁶ Transplanting traditional models to communities then seems natural and irresistible. However, such contrasts and comparisons are a doubtful methodological exercise at best, and in view of the empirical evidence can be highly misleading.

As Merry (1982) has forcefully argued, 'exemplary' models of traditional, informal approaches to social control and justice work in ways quite different from those envisioned or intended by many contemporary mediation experiments in complex, modern societies, since the traditional resources relied upon are, by contemporary standards, often neither democratic, impartial nor fair.⁷ Attention to cultural and community 'relativism' then raises the important questions as to what types of resources assume legitimacy and authority in what types of communities, how these resources are employed, and what are the results.

⁶ It is not necessary to examine 'traditional' societies to find supporting 'cross-cultural' evidence. In modern societies there are regulating devices that may serve as functional alternatives to law. Informal mechanisms of social control - the family, significant and respected others, the community at large - support the assumption that modern community institutions may perform extra-legal functions that are the analogues of law and the courts. Both are concerned with the regulation of behaviour and the reproduction of social order (Strathern 1985:113).

⁷ These resources include the potential for violence and other forms of coercion and pressure, and tolerance of social, economic and political inequalities among disputants and those charged with resolving the disputes.

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The difficulty with these questions is that comparatively little is known about the specific characteristics and relations of contemporary communities which are assumed to lie at the heart of legitimate, authoritative, appropriate and effective popular justice methods. Indeed, empirical descriptions of communities often give way to a set of nostalgic ideas⁸ about communities as bastions of truly human qualities insulated from the dehumanizing effects of legalizing, institutionalizing and formalizing the justice system. However, these ideas do not easily translate into the whole range of variation and change in Canadian communities, both aboriginal and non-aboriginal (e.g. Crook 1967; Gerber 1979; Harding 1994; LaPrairie 1988, 1991, 1992a; Murphy 1988). Furthermore, where the information is available, it is evident that diversity of concepts of social order often correspond to this diversity of cultures, of communities and of members of the same community (Clairmont 1992; LaPrairie 1991; Murphy 1988). It is not unreasonable, therefore, to expect different types of resources to be mobilized in response to different types of justice problems and needs across cultures and communities.

These observations lead to a number of important questions which are not usually raised in discussions about the design and development of popular justice in contemporary Canadian communities. For example:

- (i) What factors influence different definitions of justice problems and needs at the community level?
- (ii) How does community diversity contribute to variation in justice issues, and in what ways are these issues interrelated?
- (iii) What types of response options best fit local justice problems, needs and other conditions?
- (iv) What types of resources can be legitimately, authoritatively and

⁸ To be nostalgic is to enter the world of half remembrance and half fantasy, in which uniquely created images refer to carefully cherished and mainly mythical interpretations, but which provide a secure retreat from present realities. (Crook 1967: 283; cf. Harrington and Merry 1988)

Indulgence in nostalgia parallels a similar manipulation of the concept of 'community' - its artificial construction by some popular justice organizations (Yngvesson 1993). As Merry (1993: 11) cautions, the meaning of 'community' can be very elusive in the context of popular justice.

effectively mobilized in support of what types of intervention?

- (v) How are the legitimacy, authority and effectiveness of response options to be determined?

It is difficult to answer these questions empirically without placing them in their appropriate sociological contexts. This requires, first, that the communities under consideration be carefully described on the basis of their geographical location, and cultural, social, economic and political resources and circumstances. This entails the collection of data on the composition of community populations in terms of differences in age, gender, class, education, employment, lifestyles, institutions, power relations, and cultural traditions, including values, norms and practises. Second, these factors should be carefully examined to determine how they frame and precipitate forms of interaction that underlie justice problems, needs and responses to problems (see, for example, Depew 1994; LaPrairie 1991).

A focus on various levels of interaction also draws attention to the structurally ambiguous character of popular justice itself. Contrary to views that popular justice is separate from State justice, Merry (1992a, 1993) has convincingly argued that popular justice is a "contested space": over time, popular justice and State justice 'struggle' against one another for control and alternative visions of justice and, in the process, may mutually influence one another and transform, at least in part, the contents, structures, processes and discourse of each other (Cain 1985; Henry 1985; Fitzpatrick 1988).⁹ The emergence of informal alternatives then implies a symbiotic relationship between formal adjudication and informal mediation and negotiation. Thus, the legitimacy and authority possessed by popular justice processes is not located exclusively in the community as some commentators believe, but is directly or indirectly linked to government (Harrington 1982, 1985; Lowry 1993; Wahrhaftig 1982). Under these conditions popular justice programs are usually compelled to 'choose' disputes assigned or referred by the State, to follow funding guidelines established by government, and to process disputes in a way that is consistent with the practises of the police, courts and other government agencies (Crnkovich 1993; Clairmont 1994; Merry and Milner 1993a). This would seem to add a measure of complexity to the legitimation of popular justice, especially if legitimacy in this instance is a direct function of community, rather than State, values, norms and practises. Even if legitimacy is not problematic, the

⁹ It is important to recognize, for example, that negotiation and 'bargaining' which reflect features of informalism are also important aspects of the formal judicial process. At the same time, the permeability of popular justice shows in the quasi-legal metaphors which have penetrated descriptions of the structures and processes of mediation and dispute resolution (Merry and Milner 1993a).

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temptation to see judicial and legal reform as the integration of informal and formal procedures in a way that captures the best of what each has to offer, encounters a fundamental theoretical issue.

Although formalism and informalism are usually presented as a dichotomy of approaches to the administration of justice, their current articulation reveals a common functionalist conception of social order and control which, to some extent, facilitates the integration of their processes (Fitzpatrick 1985: 478; Strathern 1985: 122). Indeed, both share an underlying model of society and community that hypothesizes or assumes behaviour is embedded in or acts out sets of relationships that exist in social equilibrium and maintain individual and community 'health'. Crime and disorderly conduct are thought to disrupt or momentarily destabilize this equilibrium. So the function of popular justice and the formal justice system is to repair or restore it.

There are two main problems with such functional models. First, they tend to take the wider community context for granted or, what amounts to the same thing, treat it as a constant, since the principal focus of popular justice is on changing individuals or dyadic relationships. What is missed, however, is variation and change in *patterns* of crime and disorder at the community level. Recognizing and explaining these patterns is crucial for a more comprehensive and complete understanding of specific justice problems and needs, and how to respond to them. But with functional models guiding popular justice thinking, it becomes difficult to explain (or offer good policy advice with respect to) variation and change in these patterns. The second and related problem is that functional models simply presume that the nature of interpersonal or group confrontations starts and ends with the individual offender (who fails to behave as he/she/they should in social relationships) or with a dyadic relationship between the offender and the victim (individual or group). However, this view does not adequately acknowledge that conflict and disorder are frequently structurally generated in ways that implicate a wider range of justice problems and conditions than can be attributed to the characteristics and psychology of individual offenders or to the peculiar but narrow features of dyadic relationships (Fitzpatrick 1985: 478; LaPrairie 1993; Nader 1993; cf. Gordon and Meggitt 1985: 190-209).

Given the general assumption that tension and conflict are endemic in social life, it is not surprising that social or community equilibrium and 'harmony' are rarely the outcome of popular justice in practice. Disputants seeking redress, whether for themselves or on behalf of a group with which they may identify, cannot be considered independent of self-interest, since what is generally at stake is the acknowledgement of an injury to interests, many of which include a sense of legal entitlement (Clairmont 1994; Merry 1990; Nightingale 1994; Strathern 1985: 119) - although one cannot necessarily discount feelings and emotions as well. Despite

appeals to common moral attitudes and cultural values, people will side with a party or register counter-claims in so far as interests are seen to be shared, divided and legitimized by situationally-specific norms and values, or grounded in certain conceptualizations of legal or other forms of entitlement. These situations then do not necessarily reveal the "cohesive normative structure of society" or the configuration of common values often assumed by popular justice advocates. Nor do they lend a measure of empowerment to disputants beyond the fact that popular justice offers a specialized forum for people to present, test, promote, defend, consolidate and re-evaluate their interests.¹⁰

This interpretation is confirmed not only by case studies and reports (e.g. Clairmont 1994; Crnkovich 1993), but also by the fact that in modern and modernizing societies, values tend towards heterogeneity, and especially towards liberal individualism which supports increasingly complex role relationships (Crook 1967: 274-277, 284; 1970). The interests these values legitimate are diverse, sometimes incompatible or even opposing. Similarly, the distribution and use of social, economic and political resources that sustain these interests are uneven between individuals, groups, the generations and the sexes. It is often overlooked that the genesis of justice problems and responses to them are nested within these wider political, economic and social structures. Given its current psychological parameters, popular justice provides only a peripheral, at best limited arena for forms of interaction to address and resolve disputes and conflicts that arise in these broader contexts. It is for this reason then that approaches to popular justice should be conceptualized in broader structural, rather than narrower functional, terms.

At the same time, one must be careful not to subordinate popular justice to political, economic or social issues and thereby fail to address the concept of

¹⁰ What this means in a community context is that one cannot simply assemble all the normative and value statements disclosed in a mediation or dispute settlement session and then construct a model of social order that has been disrupted by conflict (Strathern 1985: 128). What goes on in these forums is not a microcosm of how community equilibrium and harmony are reproduced, but an incomplete reflection of community structural dynamics. Conventional models of popular justice, therefore, filter out a broader appreciation of community justice processes over time which might otherwise elucidate the social and cultural contexts of confrontation and disputes. If we are to understand the place of norms and values (and the conduct they guide) in approaches to popular justice, we need to know more about the moments at which certain associations are relevant, since it is the sequencing of, say, value interpretations and reinterpretations in community processes that are essential to the elucidation of meaning of popular justice for community members.

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legality and issues of legal rights, including recognition of the legal subject (Fitzpatrick 1985, 1993; Strathern 1985: 119). Raising the question of whether mediation denigrates the rights of disputants or 'litigants', enables the instrument of popular justice to be refashioned and given a strong hand in discriminating between situations where principles of legality apply and those where social and moral issues predominate. Therefore, a theoretically sound model of popular justice sees the complementarity of informalism (the social and moral) and formalism (the legal) from a much broader perspective than does a functionalist focus on more narrow therapeutic discourse and action. By shifting the theoretical frame of reference to include a structural level that describes unequal access to power, resources, and opportunities as contributing to the genesis of disputes, conflict, crime and disorder, the justice problems and needs of individuals and communities can be given a much broader interpretation.

Identification of the range of possible institutional variation under this conception of popular justice will require the careful use of comparative materials, which is another reason why knowledge of community diversity is so important. Given variable and changing community conditions, popular justice is presented with a new challenge in so far as it has the courage to raise and address the question of why some areas of community life and not others should be conceptualized as in need of governance.¹¹ In this context, popular justice may promise a wider range of options for dealing with a wider range of justice situations.

2. How does popular justice theory translate into practice?

The theoretical assumption that popular justice practises significantly reduce the complexity, formalization and centralization of justice structures, and redefine justice processes in an informal way, often turns out to go against the available data. Indeed, a number of case studies indicate that popular justice programs and organizations tend towards greater complexity and formalization not less, and increased centralization rather than decentralization. More specifically, case studies

¹¹ As LaPrairie (1993: 22) has insightfully noted,

Justice systems have not sanctioned behaviours that may deprive others of access to scarce opportunities whether these are jobs, houses or programs even though the long term effects of such deprivation may cause considerable harm. Most often, such harm takes the form of strained relationships between individuals and families, and underlies behaviours which may eventually come to the attention of the criminal justice system.

show how popular justice retains a legalistic core, promotes the professional expertise of 'healers', increasingly specializes its structures and processes through more formal and professional styles of intervention, and privileges certain class values over others (Cain 1985: 336-340; CBC 1990; Clairmont 1994; Harrington 1985; Merry 1992a: 166).

These observations not only reveal the structuring effects of the surrounding judicial culture on popular justice, but suggest that, contrary to the objective of individual and community empowerment, popular justice practises have a tendency to reinforce relations of power rather than transform them. As a result, decision-making occurs in a power-base located either within the State, dominant classes, elites or other powerful local groups (but see Clairmont 1994: 28, 1993). No less important, some studies also suggest that mediation and dispute resolution participants may be under coercive pressures or 'active recruitment' to accept popular justice services (Clairmont 1994: 13). In addition, mandatory arbitration and other forms of coercion may be used if mediation fails to achieve an agreement - a practise and pressure Harrington (1985) refers to as "institutionalized voluntarism".

There is no guarantee, therefore, that popular justice will 'naturally' take hold in a community to the point where the reciprocal constraints of the social relationships it is expected to foster will order interaction, or where popular justice will be shaped and directed by the wider interests of the community. This does not seem to have happened in many heterogeneous urban neighbourhoods, and not simply because systems of indigenous ordering and control in these geographical locations tend to be uncertain, contested and fragile (Harding 1994; Merry 1982: 40, 1992a: 169; Murphy 1988). An equally important consideration with implications for all geographical locations is that further centralization of decision-making often causes mediation and dispute resolution to become identified with the particular needs of the popular justice organization or program itself. When this occurs, it is difficult to ensure that the general needs of the community, including empowerment, will be met (Clairmont 1994; Fitzpatrick 1988, 1993: 456; Lowry 1993: 108-109; Nader 1993: 447-448; Yngvesson 1993: 398).

Under these circumstances, 'community' often assumes an ambiguous definition. There is the 'community' of the organization or program which tends to its own needs, including the investment of program resources that favour the development of the organization (e.g. more and better training) and the promotion of its services as 'commodities' of an evolving 'industry'. This raises the issue of whether popular justice may come to be seen, and to function in fact, as an experiment in

employment generation¹² or expertise development, thereby drastically redefining the strategic direction of popular justice as well as the basis for its credibility, legitimacy and authority as an instrument of community-based justice. Indeed, there is also the 'community' of clients which can be increasingly manoeuvred or manipulated and directed by the organization in ways that eclipse or are resistant to the knowledge, concerns and meaningful participation of disputants and communities in justice processes (Fitzpatrick 1993: 457; Yngvesson 1993: 390-394). Similarly, popular justice organizations have the potential to create a 'community' of clients by redefining crime and disorder in such a way that this 'community' simply sustains the new industry. These distinctions draw attention to an important difference between applying a popular justice program to a community, and cultivating one in terms of a community's specific and perhaps unique characteristics, relations and resources.

The research literature also clearly indicates that when popular justice assumes the strategic direction and proportions of an industry, there is a corresponding increase in its complexity and formalization (Clairmont 1994; Merry and Milner 1993a). This raises the related issue of whether diverse communities with different resources, capacities and abilities are equally positioned to sustain more complex and formal popular justice programs, or whether in fact these are appropriate in specific cases. It also raises the key issue of whether community dependence on the formal justice system is simply being replaced by dependency on popular justice programs and, in particular, on the activities of specialists and professionals. Neither form of dependency may be satisfactory or acceptable since both tend to marginalize the role of communities in popular justice practises.¹³

3. *What are the results of popular justice?*

¹² This may especially be the case in areas of chronically high unemployment (e.g. LaPrairie 1994b: 15-16).

¹³ Yngvesson emphasizes this point when she asks us to

consider the implications for local autonomy of a practice that reproduces dependence and which requires the intervention of specialists to hold [the] community together. (Yngvesson 1993: 399)

In other words, the community itself, rather than professional specialization, should provide the context and resource for connectedness among community members, provided certain conditions and requirements of community development are met.

It is important to note at the outset that one of the most significant findings to have emerged from case studies and other research is that disputants in both modern and developing societies with differentiated or plural legal cultures increasingly conceptualize their confrontations and conflicts in primarily legal terms (e.g. LiPuma 1994; Merry 1990; Nightingale 1994). This suggests that people in all communities operate within a legal discourse that focuses on rights and evidence, although they may also view their problems in terms of moral discourse about how people should act in relation to one another, or, less frequently, within a therapeutic discourse about treatment and 'healing' (McDonnell 1992a; Merry 1990: 12; Ross 1994a, 1994b).

A good example of this mix of languages and the tendency of people in modern societies to favour legal remedies to justice problems, is Merry's (1990) ethnographic study of a sample of white, working class individuals (mainly women) from neighbourhoods in Salem and Cambridge, Massachusetts. This study revealed that, despite their apparent social and moral nature, neighbourhood problems are interpreted in terms of property ownership, marital problems become questions of contract, problems between the sexes are seen as issues of protection against violence, and parent-child difficulties, especially those involving youth, are regarded as problems for the State to resolve (Merry 1990: 179).

The reasons for this seem to hinge on the use of law as an instrument of power and the influence of interaction in relation to power on conceptualizations of justice. Merry's study involves an analysis of individuals who are aware that their social and economic positions in the community leave them relatively powerless to pursue 'justice' effectively, particularly in a context of 'popular justice'. What Merry's study demonstrates are basic conflicts of values and interests in contemporary communities and the attempts of relatively powerless people to resolve them through formal legal processes. By emphasizing the personal and structural conditions that *contextualize* 'disputes' at the community level, she also reveals the *complexity* of individual and group justice problems, needs and priorities, especially as these relate to access to justice and the quality of justice received. Furthermore, she questions the capacity of popular justice to accommodate these complex, multidimensional issues, especially where communities are characterized by social, economic and power inequalities and imbalances among its members. At the same time, she draws attention to the difficulties inherent in the State's response to what it considers to be mainly social rather than strictly legal issues.¹⁴

¹⁴ Disputants frequently appeal to the court in interpersonal disputes but use it as a sanction rather than as a forum for settling disputes...It is predominately those less capable of using violence, such as women and the elderly, who threaten or actually go to

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The results of popular justice generally reflect this dilemma of a choice between formal and informal justice, neither of which may be satisfactory to, or at least meet the minimal requirements of, a large number of people caught up in networks of power relations. Although the evidence is sometimes ambiguous and conflicting, disputing parties in general seem no more willing to participate in mediation and dispute resolution than in formal processing. Indeed, it is striking that popular justice caseloads are invariably small, regardless of the type of community concerned, and that there is some evidence that popular justice methods are generating meaningless and ineffective settlements (Clairmont 1994; Crnkovich 1993; Hann and Axon 1994; Harrington 1985; Merry and Milner 1993a; cf. Umbreit and Coates 1993). This suggests that popular justice may not be very compelling to certain sectors of the population for whom it was initially designed. This includes people who, because of social, economic or political disadvantages, might otherwise be expected to use less expensive and cumbersome, but more meaningful and effective popular justice services.¹⁵ But a low level of use or effectiveness of popular justice services could also be the result of other factors such as a lack of public education about alternatives to formal adjudication (LaPrairie 1992a), ambivalence about mediation and alternative dispute resolution on the part of the legal community (Lowry 1993), or the status of case management procedures.¹⁶ There is also a 'corridor explanation', working its way through Canadian government circles in particular, that popular justice programs, organizations or pilot projects are 'young' and exploratory, and therefore need time to 'grow'. But this explanation is difficult to sustain in the light of the history of American experience with various forms of 'mature' popular justice experiments (Merry and Milner 1993a). Indeed, such explanations seem more like apologies by those who are reluctant to confront the complexities of popular justice issues in either aboriginal or non-aboriginal contexts.

court not because they expect to win an effective judgment (cases are often dismissed) but in order to equalize the balance. (Merry 1982: 38)

¹⁵ The available evidence on this matter seems ambiguous. Lowry cautions that

... we do not know from the conventional way in which demographic data are reported to what degree community mediation represents the dispute-resolution forum of choice for the poor, the uneducated and ethnic minorities. (Lowry (1993: 111)

¹⁶ Significantly, Hann and Axon report: "[I]t has been found in Australia that when case management procedures were improved, litigants preferred the efficiency of the trial track over arbitration" (Hann and Axon (1994: vi).

What appears to be the least controversial of research findings is that the *type of case* and the *characteristics of disputants* strongly influence the use and effectiveness of popular justice interventions. Specifically, mediation and dispute resolution processes seem particularly appropriate for more narrowly defined, concrete disputes that can be settled simply and in a timely fashion, while more complex, multi-dimensional, emotion-laden confrontations caught up in a tangled web of conflicting values and interests seem more resistant to these informal approaches (Hann and Axon 1994; Merry 1982). On the other hand, the personal characteristics of disputants, including age, the level of education attained and the seriousness and repetitiveness of offending (Roeger 1994; Wooldredge et al. 1994) also appear to be closely related to the success, failure or indeterminacy of popular justice methods.

Other factors influence the results of popular justice and serve to stimulate rethinking of the development of popular justice in modern societies. Processes of social change, urbanization, the evolution of more complex role networks, and the communication revolution all tend to break down the 'traditional' cohesion of families, neighbourhoods and other community groups. The tendency is for aggregates of individuals to replace or undermine the mutual dependence of community members which is so important for effective popular justice interventions. This is occurring partly as a result of social and geographic mobility and new settlement patterns, and partly as a result of increasingly complex role networks that are underpinned by an influx of new and diverse values and value orientations among the sexes, generations, classes, sub-cultures and various other groups.¹⁷

A concern with cross-community and cross-cultural distinctions in modern societies, therefore, raises some of the most important research and evaluation issues in the area of popular justice. Lowry (1993: 118-120) is quite correct when he concludes that we need to know more about the "nuances, settings, complexities, contexts and idiosyncracies" of various programs and models if we are to draw firm comparative conclusions.

¹⁷ There are some notable exceptions to these effects of modernization. Amish, Hutterite and Mennonite communities of North America are in many ways unique. These settlements are usually small-scale, relatively unstratified, sedentary and stable. These features are enhanced by strong ties of kinship and friendship, and common (religious) values. In addition, common community goals and values serve to contextualize a sense of collective responsibility for the actions of community members. Although there are other issues to consider (see Cohen 1985), communities of this type would seem especially promising for popular justice developments (Lederach and Kraybill 1993).

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These considerations have two important implications for research and evaluation. First, better, more detailed information is required especially in the following general areas:

- broader community contexts, constraints and opportunities;
- community justice problems, needs and priorities, as these are framed by the values, interests, beliefs, resources, and opportunities of classes, the sexes, the generations, special groups, sub-cultures and so on;
- characteristics of offenders/disputants, and case characteristics including issues of legal rights, other social, economic, political and cultural dimensions of justice, and related principles; and
- variations in the structures and processes of popular justice organizations and programs.

The analytical challenge is to determine how interactions among these factors influence popular justice inputs and shape their outputs, and what types of arrangements produce better results for all parties. The second implication of these considerations for research and evaluation is that we are compelled to broaden our conceptualization of justice or popular justice itself.

4. In what ways does popular justice promote and contribute to community organization, development and change?

It is not clear how popular justice as presently designed and practised contributes, if at all, to an increased sense of community and autonomous community action in the area of justice administration. This is bluntly confirmed by Lowry's (1993) survey of the field which reveals no studies of empowerment and a curious silence among popular justice practitioners over this central issue. Lowry concludes that it "...is not clear whether the current lack of emphasis on building the community represents an abandonment of the objective of empowerment" among popular justice organizations and enthusiasts (Lowry 1993: 117).

The available data do indeed suggest that, at least in non-aboriginal society, there is little interest in building popular justice structures and processes on the basis of existing community characteristics and relations. This objective is often supplanted by the recurrent practise of creating 'communities' as a by-product of popular justice industries or as an adjunct to, or 'legitimation' of, popular justice organizations and programs.

Perhaps the closest thing to community development at present is the nurturing of community leaders or other influential community members skilled in the techniques of mediation and conflict management. But this raises the crucial question of whether this is a necessary or sufficient condition for *community* change, empowerment and development. An exclusive focus on honing therapeutic and 'healing' skills seems far too narrow to capture the range and depth of structural dynamics that are so central to community organization, development and change, and their implications for the scope of popular justice developments. Fitzpatrick's suggestion that "...[the] management and regulation [of conflict] may lie in the systematic nature of the conflict and in some other institutional site than law" (Fitzpatrick 1985: 478), neatly alludes to the sense in which dispute resolution is part of broader and ongoing social, economic and political processes. This view is shared by Harrington (1993) and LaPrairie (1992a) who see the use of dispute resolution, crime prevention and justice development as aspects of broader community development. This perspective raises the important question as to the types of institutional arrangements which can facilitate the development of popular justice. How, for example, might variations in the definition and design of popular justice structures and processes manage and reconcile individual and group interests and, in the process, activate various economic, political, family, educational, neighbourhood and peer-focused institutions, or other community-based agencies such as health and social services? What other justice-related initiatives might also be required to assist in this organizational process? Until these and similar types of questions are addressed by research and, more importantly, by communities themselves, the relationship between popular justice and community development is likely to remain obscure.

5. What are the limits of popular justice?

There are at least four general areas in which the limits of popular justice may be fruitfully explored. First, what types of disputes can popular justice successfully process, and why? Second, what types of disputes does it fail to process successfully, and why? Third, what other constraints limit the applicability and functioning of popular justice? And fourth, what are the implications of holding alternative visions and concepts of popular justice?

There seems to be little disagreement in the literature that, under certain circumstances, popular justice may be particularly suited to the resolution of disputes that are of a civil, family¹⁸ or minor criminal nature. These circumstances

¹⁸ A possible exception, or otherwise a need for a more contextualized interpretation, seems to be in the area of marriage and divorce. As Merry

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include a community context where conflicts in one relationship have important repercussions for other relationships which have not yet been drawn into, or complicated by, the dispute in question. In other words, this is a context where the conflict itself does not provide the only source of interconnection. The stability of settlements and agreements also appears to be greater when consensual resolution emerges from shared or commensurate values, as well as from common social and community experiences, and from interconnections among the parties that are historically grounded and focused (Lederach and Kraybill 1993; Skogan 1991). Mediation also seems to work best when disputants are of equal bargaining strength and sophistication. This factor would seem to provide some measure of control over divergent views of reconciliation that otherwise might lead to different interpretations of what constitutes successful or unsuccessful reconciliation (Gordon and Meggitt 1985). In cases where there is a significant imbalance, say, in social, economic or political statuses and resources, effective mediation requires that carefully selected mediators possess sufficient power, authority and credibility to equalize the balance between disputants (Lederach and Kraybill 1993).

In some situations, especially where the connectedness of the parties is minimal, it is essential to preserve neutrality in the mediation process. Therefore, care must be taken in the selection of impartial mediators to ensure that they do not influence agreements to the point of bias which may contribute to the instability of outcomes. The possibility of bias raises the important issue of public accountability of popular justice methods as a check against possible abuses of disputants' legal rights which might otherwise go unnoticed (Hann and Axon 1994). However, as Lederach and Kraybill (1993) suggest, some other situations in which proximity, familiarity and connectedness characterize all parties, mediator 'bias' may be crucial for maximum effectiveness of the mediation process and its outcome. Paradoxically, these situations require partiality as an expression of connectedness and trust between the

comments,

...a domestic conflict in which both parties wish to preserve the [marriage] relationship demands different treatment from one in which they are trying to establish the terms of their separation. (Merry 1982: 35)

Significantly, in their study of alternative dispute resolution, Hann and Axon found

[s]ome improvement in the compliance rates for agreements reached via mediation in the criminal and family context... although initial compliance with divorce agreements is frequently found to be short-lived. (Hann and Axon 1994: iii-iv)

mediator and the disputants. These factors in turn serve to recognize and acknowledge the legitimacy and authority of the mediator and the outcome of mediation. Thus, '[c]oncern for the appearance of impartiality and neutrality is replaced with concern for the ability to know, get to, and get into the world of the other" (Lederach and Kraybill 1993: 365).

One of the most consistent findings in the literature is that popular justice tends to deal with a limited number of cases that involve relatively little violence. There may be several reasons for this. Cases of serious interpersonal offenses are usually regarded by the State as truly legal issues and, therefore, are not referred to popular justice for 'negotiation'. Similarly, victims of such offenses may conceptualize them in legal terms and regard the State, rather than the 'disputants', as responsible for responding to and resolving these problems. Significantly, plaintiffs rarely take these types of problems to popular justice organizations or programs on their own initiative (e.g. Dubow and Currie 1993; cf. LaPrairie 1992a: 129-130). At the same time, cases involving less serious violence are often referred to those community-mediation programs that are closely tied to the courts, especially when the courts become congested or when the constraints of geographical location favour the use of such programs (cf. Hann and Axon 1994).

'Failures' to process or successfully process a wider and deeper range of interpersonal conflicts and violence may be traced to the marginalization of popular justice by agents of the criminal justice system (Merry and Milner 1993b: 22). However, the broader social, economic, political and cultural contexts of these problems are themselves marginalized or simply ignored by an emphasis on narrowly conceived dispute resolution processes and 'microprevention'. As a result, popular justice, as conventionally conceived and practiced, is often not equipped, prepared, nor willing to deal effectively with very important categories of domestic disputes, interpersonal and family violence, property offenses, public disturbances and so on, since these may be structurally generated and require a focus on 'macroprevention' (LaPrairie 1993: 21; Nader 1993: 435, 442, 448), and on the institutions and concepts of order that underwrite it.

The status of community infrastructures and other resources may also place significant limits on the design, implementation and further development of popular justice. The available social, political and economic resources in a community may or may not be adequate to support certain types of popular justice structures and processes. Or, there may be difficulties encountered in organizing around existing resources, regardless of their adequacy or appropriateness (LaPrairie 1992b; Niezen 1993) - an issue that speaks to more general problems of social disorganization.

However, perhaps one of the greatest limitations on current approaches to popular

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justice is also the least tangible and least questioned: its vision and conception of 'justice' and social change. The issue here is how popular justice can be constructed to deal more realistically and effectively with a wider range of justice issues, including interpersonal and property crimes as well as social disorder, that stem from structurally based community inequalities, tensions, conflicts and needs (LaPrairie 1993: 5).

6. *What is the potential for popular justice?*

The foregoing suggests that popular justice must develop its potential for justice administration *and* community development along two interrelated fronts. It must develop (i) a more limited and realistic concern with 'treatment' and microprevention; and (ii) a more far-reaching and challenging strategy of community development, social change and macroprevention.

As a form of treatment and microprevention, popular justice may be an effective instrument for mediation and dispute resolution if its capacities are better understood and its use more appropriately focused and contextualized. This means that greater comparative attention must be given to the specifics of case and offender characteristics, and how they relate to various response options in determining their appropriateness and likelihood of success. Beyond these considerations, the non-violent resolution of conflicts promoted by popular justice has potential for matters ranging from the decriminalization of certain categories of offenses to the application of alternative intervention styles. The former has currency where disputes are regarded by the parties and community concerned as social rather than strictly legal problems. The latter may be especially relevant in areas such as domestic disputes and assaults, where current formal approaches, such as police intervention, may prove somewhat problematic. More generally, popular justice has a potential for effective intervention in and re-orientation of 'disrupted' social relationships if it is limited to disputes between relatively equal parties and if it is used primarily in disputes where future interaction is inevitable or desired. Thus, it seems promising where the parties have an incentive to settle because of their geographical and social proximity, or because of other social and cultural constraints requiring continuous interaction and ongoing social relationships. Some of the most important institutions that may be activated in this context, and which are also an important focus of community development, include kinship and the family, friends and closely connected neighbours, mutually respected others, and other community institutions.¹⁹

¹⁹ It is especially in this context that Braithwaite's (1990) notion of shaming as a mechanism of social reintegration in situations of conflict, crime and disorder

Popular justice, as a form of treatment and microprevention, also offers hope for resolving disputes that genuinely arise from faulty communication, misunderstandings, or from situations where the disputants conceptualize their concerns in social or moral terms, or wish to circumvent formal court procedures and sanctions for social, moral, economic, political or other cultural reasons. Finally, popular justice has a potential to sustain functional relations between people if the settlements and agreements it negotiates involve specific exchanges and commitments, sanctioned and monitored by credible and legitimate authorities, rather than vague promises of, or untested assumptions about, improved behaviour in the future (Lowry 1993).

There is also broader scope for popular justice as an approach to macroprevention and community development where communities and the State have the political will to re-evaluate the definition of justice and provide a framework for its practical reconstruction in more direct and broader community terms. This means that mediation and dispute resolution processes have tremendous potential if they can build on or further develop community structures and processes that meet certain requirements and conditions of a broader definition of justice, rather than simply reflect a growing 'industry' or be appended to the justice system. One of the most important requirements here is that of community self-assessment. This involves raising questions about the effects of structural and value differentiation and change on community life and institutions, and their implications for the nature and extent of disputes, crime and disorder, and alternative responses to them. This needs to go hand in hand with the establishment or activation of institutional mechanisms that can provide for community consultations, deliberations and decisions over definitions of local justice problems, needs and priorities, and responses to them. As an approach to macroprevention, popular justice would also speak to a broader process of legitimation that is so desperately required in many communities in order to move thinking about justice from the conventional, narrow and exclusive perspectives of the current popular justice movement towards a much broader and inclusive conceptualization of justice administration as including a concern with structural disparities at the community level.

Popular Justice in the Aboriginal Context

Although various aboriginal justice inquiries, initiatives and reports (e.g. Clairmont 1993, 1994; Crnkovich 1993; Gosse et al. 1994; Hamilton and Sinclair 1991; Obonsawin-Irwin 1992a, 1992b; Royal Commission on Aboriginal Peoples 1993),

may have some currency.

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and some students of aboriginal affairs (e.g. Ross 1994a, 1994b), have chronicled and in some cases endorsed a move towards popular justice in aboriginal communities, there is still relatively little information on its contribution to the administration of justice, its relation to the State and formal justice, and its meaning for aboriginal communities.

The first half of the present paper outlines some of the key issues at the root of popular justice. In this section, an attempt is made to apply the framework to the complex currents and countercurrents of the aboriginal context in which popular justice may be developed. It begins with a summary of the geographic, demographic, social, cultural, economic and political diversity of aboriginal peoples and their communities, and draws attention to its relevance for some of the most important issues. There follows a further discussion of some forms of popular justice currently practised in some aboriginal communities, and an assessment of their results. The paper concludes with some reflections on possibly unique directions for aboriginal communities in the area of popular justice.

Aboriginal Diversity and Popular Justice Issues

Consideration of the geography and demography of aboriginal peoples draws attention to the diversity of their communities. There are majority or exclusively aboriginal communities, usually located in rural and remote areas, as well as heterogeneous, urban communities where aboriginal peoples are usually, but not always, in a minority. These distinctions frame, at the most general level, interpersonal, intergroup and other forms of interaction. Thus, members of rural or remote, homogeneous communities live in close proximity, are usually closely connected in terms of kinship, marriage, friendship and familiarity, and expect to continue living together under these conditions. In contrast, aboriginal peoples who live in heterogeneous, urban locations where 'community' membership and boundaries are more fluid and sometimes fleeting are often strangers to one another and to other non-aboriginal members of their 'community', and do not always live in close proximity or expect to do so in the future.

These variations strongly influence the extent to which justice problems may be targeted by aboriginal communities for more informal responses - usually in rural and remote communities - or be handled by the formal justice system, especially in urban areas and larger cities (LaPrairie 1992c, 1994a). Therefore, they provide a general guide concerning the limits and potential of popular justice approaches under different geographic and demographic circumstances. However, this general diversity is complicated by a number of other interrelated structural factors that introduce further complexity between and within both types of communities. These factors in turn are closely associated with distinctive patterns of aboriginal crime

and disorder and certain dilemmas in responding to them.

Overcrowded housing, low education levels and limited skills, uneven or minimal employment, meagre or irregular incomes and welfare dependency, and idleness affect many aboriginal people and contribute to tensions in kinship relationships and social interaction that may in turn be linked to interpersonal disputes, violence and victimization. In this context, offenders vary by age (but are usually youth), gender (mostly males), family group and class (Depew 1994; LaPrairie 1991, 1994a). Significantly, these attributes speak to some of the most important comparative aspects of community justice problems and provide a much needed focus for the development of possible response options. At the same time, it is important to note that not all aboriginal people are at risk in the justice system since aboriginal people are not uniformly disadvantaged in terms of a number of crucial social, economic and political factors. For some aboriginal people, adequate housing, satisfactory jobs, wealth, property, information and power are available and accessible, while for others they are not. Inequality of this sort may be expressed at individual, family and group levels and can foster different forms of interaction that are linked to distinctive patterns of crime and disorder (Auger et al. 1992; Depew 1994; Gerber 1979; LaPrairie 1988, 1991, 1994a).

Patterns of interpersonal violence²⁰ and its kinship/affinal character suggest the misuse and abuse of family relationships and, more generally, that certain families are in conflict and crisis. No less important, the kinship nature of offender-victim relationships and the context of incidents suggest problems of social disorder rather than crime per se (Clairmont 1992: 161; LaPrairie 1992a: 107, 1994a). Indeed, when incidents occur they are usually spontaneous or 'explosive', or situational rather than premeditated, and they are usually alcohol-related and repetitive (Clairmont 1992: 31-50; LaPrairie 1991; Moyer 1992: 392). As indicated above, problems of social disorder may be linked to such structural disparities as unemployment, income deficiencies, low education levels, poor housing and health conditions, geographic and social immobility, and other demographic factors that put certain sectors of the aboriginal population in both rural/remote and urban locations at risk in the criminal justice system. The risk of youth becoming involved in the criminal justice system is increased by the fact that they are especially prone to alienative, disorderly responses to the rapidity of social change and modernization (Clairmont 1993, 1994; Crook 1970). These case and offender

²⁰ 'Unofficial' statistics (including police daily reports) and community interviews show a preponderance of violent interpersonal offenses among kin and affines, although official records often give the false impression that property or other *Criminal Code* or provincial/territorial statute violations are more common in some aboriginal communities (Depew 1994; LaPrairie 1991).

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characteristics point to complex problems in the areas of civil, family and criminal law, but also raise important considerations of context for the possible application of either formal or informal response options.

How and when to choose between these options poses a dilemma for State responses to aboriginal justice problems, and for policies for the development of popular justice in aboriginal communities. On the one hand, the State is handicapped in so far as its mandate is more legally than socially or morally oriented. Indeed, the State's principal instrument of justice administration, written law, is designed to regulate relations between aggregates of individuals, groups and strangers in the context of criminal activity. Thus, it has only a minimal or narrow understanding, capacity and ability to respond in appropriate, relevant and legitimate ways to socially-based justice problems and needs of people who are closely interrelated and connected by long-term relationships and interaction. On the other hand, customary law, the traditional 'instrument' of justice administration for aboriginal peoples who have historically lived in societies without written law, finds its mandate seriously challenged in contemporary aboriginal communities.

Traditionally, customary law is understood to be an expression of cultural, social and moral forms of interaction (Depew 1994: 20-22; McDonnell 1992a, 1992b). In this sense it *is* the culturally defined role relationships, responsibilities, obligations and duties between kin, spouses, friends and neighbours. This interpretation of customary law highlights not only the functions of kinship, marriage, age and gender differences in maintaining order in specific cultural and community contexts, but also the locus of interaction between community members that influences traditional concepts of 'justice'.

However, change and modernization have resulted in far more complex role relationships and interaction between the generations, between the sexes and between family groups than is generally acknowledged and these have, to some extent, adversely affected informal community control mechanisms embedded in customary law and traditional practises (e.g. McDonnell 1992a). Indeed, the effects of capitalist production, modernization, urbanization and the technological/communication revolution have often affected aboriginal communities no less than they have affected non-aboriginal communities in creating hierarchies, stratification, exploitation and other systematic inequalities. As a result, interaction among community members in relation to these new sources of power influences new and sometimes contested concepts of order, control and justice.

This issue is compounded by the fact that there exist different understandings and representations of 'customary law' within aboriginal communities and between aboriginal and non-aboriginal communities. Past colonial practises, for example,

have often disfigured and deformed 'customary law' to the point where its meaning and relevance may have more to say about the political objectives of the colonizers than about the traditional ways of adjudication among the colonized (Moore 1992).²¹ Indeed, the principles of aboriginal interaction that underlie customary law²² are not reducible in any straightforward way to the practises of colonial courts or, for that matter, to those of contemporary courts. Nevertheless, this has not prevented the fallacious representation of customary law as an analogical extension of common law,²³ nor has it tempered concepts of customary

²¹ Fitzpatrick poses the issue in these terms:

The colonist created reserves and other enforced settlement; restricted mobility beyond the 'tribal' area; required a continuing attachment to that area in indenture, vagrancy and pass laws; confined people to the amount of land deemed adequate for 'subsistence' and appropriated so-called waste and vacant land; prohibited or restricted wide-ranging political activity and food gathering; and in varying forms, erected systems of so-called indirect rule... With colonialism, existing social relations were taken, reconstituted in terms of its imperatives and then, as it were, given back to the people as their own. In this history was denied and tradition created instead. (Fitzpatrick 1985: 479)

However, this may be overstating the case, at least in the Canadian situation. Paraphrasing Lee (1992: 38), aboriginal peoples have struggled to constitute themselves as subjects rather than objects of history, and as the makers of their own history. Emphasizing the active role of the colonial system to the point where the history of aboriginal peoples becomes passive or entirely reactive is to commit a fallacy that is the opposite of assuming that historical aboriginal societies, or certain aspects of them relevant to justice administration, have been retained in culturally unique or rigid forms. While the latter view requires critical scrutiny, it can also be argued that conceding to statements about the 'homogenization' of aboriginal peoples and the effacement of their historically-situated cultural differences, indicates a fascination with colonialism (and modernization) that in many ways is no less romantic and uncritical than fascination with 'unique' aboriginal cultures and traditions (cf. Crook 1967; Sahlins 1993; Trigger 1991).

²² These principles include reciprocity and moral obligations and responsibilities that flow from different kinship statuses and role definitions. For detailed discussion, see Gell (1992: 150-152) and McDonnell (1992a).

²³ The point is illustrated by the legal fictions that are sometimes created by those involved in disputes over aboriginal land 'rights'. Here Western, liberal

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law that have relevance primarily to elite members of aboriginal and non-aboriginal communities interested in its recovery.²⁴

These considerations indicate that one of the main challenges for popular justice in the aboriginal context lies in the extent to which these kinds of differences can be accommodated, or differences in power can be minimized; i.e. how realistically and widely 'justice' can be conceptualized and defined.

Not surprisingly, the practises of aboriginal justice authorities (e.g. police, justices of the peace and other justice agents), and of other community members, are often influenced by complex, ambiguous, conflicting and often contradictory demands for services, both formal and informal, that appear to flow from different concepts of order, control and justice, and the different circumstances in which community members find themselves. This is often manifested in attempts by aboriginal justice agents and community members themselves, in especially rural and remote areas, to minimize formal justice processing while exercising informal but frequently ineffective and questionable intervention strategies (Depew 1994; LaPrairie 1991, 1992a). At other times informal options may translate into no responses at all or 'doing nothing', except, perhaps, blaming the State for this unsatisfactory situation (LaPrairie 1991; LaPrairie and Diamond 1992). These facts suggest that in many aboriginal communities justice problems and needs may be broadly conceptualized, significantly differentiated and dynamic, but are narrowly and inadequately addressed by both formal and informal responses. They also raise the important issue of what types of social, moral, cultural and legal resources and precepts might be considered by aboriginal communities to be relevant, legitimate and credible in responding to justice problems, how they might be (re)constructed as aspects of community development, and how they might be incorporated, if at all, into customary law.

notions of rights in property may be compared, by both aboriginals and non-aboriginals, to aboriginal concepts in terms of analogical extensions of common law, although on the basis of the ethnographic evidence such notions and analogies are neither applicable nor appropriate to the aboriginal people concerned (see *Benoanie v Canada* (1992); cf. McDonnell, 1992b: 314, note 2). In situations like this one gets a sense of the extent to which the term 'culture' now embraces political symbology as well as unreflective local knowledge.

²⁴ For example, sentencing circles recently established by the judiciary in the Canadian arctic and sub-arctic as an expression of popular justice have, conceptually, little in common with the historical and ethnological record of the ways in which aboriginal peoples of these jurisdictions handled disputes. This discrepancy suggests that, while such initiatives may fulfil a need for graspable concepts that can give judges and policymakers a standpoint on aboriginal justice issues, they may also compromise descriptions and characterizations of aboriginal cultures and justice practises.

Interestingly, studies of these issues have frequently stressed the apparent resiliency of different aboriginal styles of thought, life ways and institutions, despite the loss of or profound change in other, related 'systems'.²⁵ Indeed, the theme that aboriginal cultures are unique by virtue of their distinctive languages and related styles of thought has captured the imagination of a number of observers interested in the development of alternative justice systems for aboriginal peoples and their communities (e.g. Cawsey 1991; Dumont 1993; Hamilton and Sinclair 1991; Little Bear 1994; Ross 1992, 1994a, 1994b). The general line of argument suggests that aboriginal languages, linked worldviews and ritual hold the key to understanding fundamental differences between aboriginal and non-aboriginal Canadians, and that these differences in turn point to different prerequisites for the development of justice models, programs and arrangements for aboriginal peoples and their communities. In particular, the argument highlights traditional aboriginal approaches to justice administration that include customary practises of mediation, reconciliation, restitution and healing, and suggests that their articulating, regulating and harmonizing functions can exercise a positive influence on the lives of those aboriginal people whose views these practises are purported to represent, provided aboriginal communities are in a position to administer justice independently from the State (Hamilton and Sinclair 1991; Jackson 1988, 1992; Monture-Okanee and Turpel 1992; Ross 1994a, 1994b; Royal Commission on Aboriginal Peoples 1993).

This would seem to have very important implications for the development of popular justice in the aboriginal context. But the argument is based largely on extrapolations from questionable cultural and linguistic models. It is critical, therefore, to move beyond these initial calls for customary law and traditional practises that see their implementation taking place in relatively straightforward ways. What is required is community-focused research that reveals the contexts in which cultural elements assume meaning, relevance, legitimacy, authority and effectiveness in responding to patterns of crime and disorder.

Ross' (1992, 1994a, 1994b) argument illustrates this research gap as well as the problems encountered when analysts rely on a narrow range of selected sources to explain the significance of aboriginal culture for approaches to justice administration (cf. Depew 1994:23-36). At the most general level of cross-cultural

²⁵ Ethnographic studies have described aboriginal communities with kinship systems, ritual practises and linguistic attributes that sometimes function in historically distinctive ways. However, these and other institutions integral to traditional political organization and dispute resolution may have significantly changed or may be in an advanced state of disintegration (Depew 1994: 19-36; Kobrinsky 1977; Lanoue 1991; McDonnell 1992a, 1992b).

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comparison, Ross tends to rely on misleading essentialist ideas and dichotomies in linguistic structure and use, culture and science, religion and philosophy, and society and worldview, that pit a monolithic Western 'Culture' in opposition to aboriginal cultures. However, this approach ignores the diversity on a global scale of the roots of Western culture (Wax 1993), and overlooks the implications of local, regional and global historical processes for the contingent nature of worldviews and language use, a principle of cross-cultural comparison which is at odds with Ross' position on cultural and linguistic determinism (e.g. Kobrinsky 1977; Lanoue 1991; Wolf 1982). More importantly, what Ross and similar commentators see as contributing to aboriginal worldviews falls short of contemporary realities. These realities reflect different values and lifestyles, and even factionalism, dissent and protest, that within many aboriginal communities serve to define and enhance individuality, cultural identity, meaning, self-interest, human rights and so on, against ideological pressures to conform (Barth 1993; Cohen 1985; LaPrairie 1993; Nahanee 1993; Nightingale 1994).²⁶ Indeed, to argue otherwise raises the intractable problem of trying to explain why customary law and traditional practises as expressions of worldview do not function as well as might be expected when aboriginal communities actively exclude or prohibit formal criminal justice interventions and attempt to apply informal responses. These considerations place the development of popular justice, including its ideology, in a far more complex environment than is acknowledged by those who advocate a more straightforward approach to aboriginal worldview and language as the foundation for aboriginal justice developments.

Ross' discussion of linguistics presents further problems. Drawing upon his own interpretation of the linguistic paradigm of Benjamin Lee Whorf (cf. Bloch 1977, 1991; Hill and Mannheim 1992; Lucy 1992; Ridington 1987; Sherzer 1987), Ross claims that the structure of aboriginal languages, which he briefly contrasts with the structure of English, implies a distinct worldview that emphasizes relationships and interconnections rather than things in themselves, change rather than stasis as the principle of life, and so on. However, recent developments in linguistics, psychology, cognitive science and anthropology challenge Ross' use of the

²⁶ 'Worldviews' may, of course, be unique cultural inventions or works of art of specific individuals (Barth 1987) or they may develop as 'by-products' of Western and indigenous interaction (Beek 1991; Kuper 1994; Tooker 1994). In general, however, it is ethnographically misleading to speak of any culture's 'worldview' or cosmology as all-embracing, internally coherent and consistent within a given speech community. The global ethnographic record indicates that 'worldviews' are far more like ideologies which, by their nature, are "contestable, socially positioned and laden with political interest" (Hill and Mannheim 1992: 382).

Whorfian paradigm.²⁷

Ross elaborates his argument by contrasting 'verby' aboriginal language with 'nouny' English. Notwithstanding the theoretical and methodological issues this questionable distinction raises, the implications of translation and interpretation for the comparison of thought in aboriginal and non-aboriginal speech communities are ignored in his analysis. The importance of this issue is nicely illustrated by Campbell's study of South American Indians:

... on the subject of shamanism for example, a statement such as 'The Wayapi have shamans' is misleading and I suggest that we should try in this case to loosen up our categories of noun, adjective and adverb and learn to place more emphasis on the verb. In other words, there is no such *thing* as a shaman. People shamanize. They use a quality. (Campbell 1989: 3)

Campbell's emphasis on how language is *used* draws attention to both the relevance of socio-linguistics and linguistic anthropology for the comparative study of thought and "...a growing appreciation of how interpretive differences can be rooted as much in the systematic uses of language as in its structure" (Gumperz and Levinson 1991: 614). As Campbell's illustration makes clear, linguistic *practice*, not a predetermined linguistic structure or framework, sets the context for processes of concept formation - which in this case, arrive at the notion of 'shamanizing'.

The analogy with aboriginal concepts of order, control and justice is also clear. Consistent with Merry's (1990) study of the relationship between interaction, power and concepts of justice, the variable contexts of aboriginal interaction and practice can be expected to influence variable conceptualizations of justice at the community level. In some cases this may lead to the confirmation of the existence of unique justice concepts and practices. Such uniqueness may derive, in part, from

²⁷ Extreme versions of linguistic determinism hold that a specific language constrains thinking and perception in particular directions, which add up to a culture-specific world view. This no longer seems tenable for a number of reasons: first, there is evidence of many kinds for significant universals in language, perception and cognitive development; secondly, the argument, experiment and analysis in favour of it no longer seem convincing; thirdly, there are many indications that there are multiple modes of thinking, some of which are independent of language. (Gumperz and Levinson 1991: 615; see also D'Andrade 1995)

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the way some aboriginal people personalize the actions and interactions of individuals and groups, and the use of distinctive cultural symbols that give these practises meaning (e.g. Brodeur 1991: 81; Depew 1994: 22-23; Smith 1975: 61; Van Dyke and Jamont 1980). It may also be related to variation and change in the structural conditions of contemporary community life, including kinship, customary law, community scale, settlement and mobility patterns, opportunity structures, access to power, and other aspects of social structure and interaction.

Thus, rather than perpetuating tired ideas about aboriginal language, thought and worldview, or a romantic vision of aboriginal cultures compared uncritically and misleadingly with Western 'Culture', or advancing a uniform history of interaction between Western and aboriginal societies (cf. Beek 1991; Beidelman 1992: 510, 511; Chanock 1985; Fitzpatrick 1985; Kuper 1994; Lee 1992; McDonnell 1992b; Merry 1992b; Tooker 1994), research and evaluation should focus on the circumstances and processes of cultural and social practises and interaction at the community level, how these are related to patterns of crime and disorder, and their implications for appropriate responses, including the development of customary law. These considerations have profound implications for the conceptualizing of aboriginal justice from both micro and macro perspectives.

Developments in Aboriginal Approaches to Popular Justice

Recent trends in aboriginal justice evidence a growing emphasis on community oriented approaches to local justice needs. The overriding purpose of these developments is to improve community involvement in the administration of justice and to make it more responsive to specific community needs and priorities.

These objectives seem reasonable. Geographically remote aboriginal communities, for example, often experience difficulties in accessing mainstream justice institutions and processes, especially when they have no presence near the community (e.g. Stenning 1992: 2-3). In addition, the circumstances that influence aboriginal definitions of order, control and justice, place limits on certain types of formal intervention, such as police and social and family services. At the same time, scope for alternative, informal institutions and intervention styles may become quite narrow if there is little agreement within the community on their legitimacy, authority and relevance to its problems, or if essential resources required to sustain them are not available (LaPrairie 1992a). These and similar constraints on formal and informal approaches can create a void at the community level with the result that justice problems end up being dealt with by no one. More generally then, there is a need for access to a form of justice that is consistent with the community's organization and attentive to the nature and scope of community conditions, circumstances, justice problems and needs. A collective approach to or

involvement in justice administration in an aboriginal context is also frequently taken to mean that in appropriate circumstances, the community, rather than the State, may be in the best position to help an offender or a victim. By acting, the community, rather than the State, can claim ownership of justice problems and can administer justice independently from the State (LaPrairie and Diamond 1992).

At a practical level this has entailed a focus on ways to limit the use of incarceration and to increase the use of sentencing alternatives, as well as on ways to prevent crime and maintain social order. The former issue has stimulated the development of institutions and processes such as community justice panels, the engagement of elders as adjudicators and advisors to the (formal) court, diversion, and sentencing circles (Clairmont 1994; Crnkovich 1993). The latter issue has been addressed most notably by healing circles and programs, related spiritual support initiatives, and bush camps and other retreats that incorporate respect for aboriginal values, rituals and 'traditional' ways of life (Ross 1994a, 1994b). All of these developments are intended to give justice administration a 'more human face' by taking into fuller consideration the personal circumstances of the offender and victim, their need for wider community support, and especially offenders' obligations and responsibilities to the community, victim, and themselves.

Despite significant differences in their objectives, these initiatives have increasingly been influenced by a common ideology and language that promote the notion of 'healing'. Although it is sometimes represented as traditionally aboriginal in character, the emerging healing paradigm bears a striking resemblance to some non-aboriginal approaches to popular justice that emphasize a narrow, functionalist and psychological model of therapy for disputants/offenders/victims, neighbourhoods and communities (e.g. Ross 1994a, 1994b). Consistently, some aboriginal popular justice organizations that emphasize healing have taken on the trappings of a self-perpetuating industry: they have become more formalized and professionalised as they increasingly extend their services to a broader range of client 'communities' that cross geographic and cultural boundaries.²⁸ Operating in terms of a functionalist conception of social order and control, the current practice of healing not only shares the limitations, erroneous assumptions and theoretical pitfalls of all functional approaches, but also trivializes and marginalizes the broader contexts which define the social and cultural dynamics of aboriginal communities and their relationship to legitimate and authoritative response options, including customary law (e.g. McDonnell 1992a: xii, 28-46; 1992b: 311). In other words, it underemphasizes or ignores significant differences in community

²⁸ The involvement of Edmonton's Nechi Institute (Alberta) in seeking solutions to the problems of substance abuse in Davis Inlet (Labrador), as well as its marketing strategies (see, for example, its 1994-95 sales catalogue), are a case in point.

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contexts, the complexities of social relations and interaction, and the diverse justice needs they generate.

This 'new', judicially-inspired approach to popular justice in the aboriginal context overlooks the sociological implications of adopting narrow, psychologically focused or pre-packaged remedies for the purposes of microprevention while ignoring or marginalizing the community contexts in which they are applied and the locus of macroprevention. More specifically, it fails to recognize that the complex, often conflicting and contradictory nature of community relations does not lend itself to a hasty and superficial advancement of solutions to community justice issues or to assumptions about the roles various community members can play in the administration of (popular) justice (e.g. Crnkovich 1993).

Thus the ideology and language of 'healing' have a tendency to mask the diversity of individual, group and community justice problems by considering them as similar 'illnesses', and to homogenize, and therefore trivialize, the corresponding needs by applying a therapeutic response that is supposed to lead to 'health'. This approach loses the crucial distinctions between cases of a legal nature, including those concerning rights of the individual, of the property owner, etc., and cases of a moral or social nature. Furthermore, in packaging and using aboriginal culture-as-healing, there is a real danger of failing to acknowledge the seriousness of some offenses, the legal rights they invoke, and the contexts in which they occur, and of silencing those who would otherwise protest that such distinctions must be made. This has the consequence of creating conditions for the oppression of aboriginal people under the guise of 'justice'.

As an illustration of the point, consider the situation of many aboriginal women in aboriginal communities. Issues concerned the serious victimization of aboriginal women and the development of appropriate responses to it stem, from a sociological point of view, from the complexity of gender role relationships and the underlying heterogeneity of individual and group interests. Victimization of aboriginal women is not a result of the failure of aboriginal women and men to act as they should in their social relationships (a view that simply rationalizes 'blaming the victim/offender' approaches) but a result of historical and on-going changes in the structure of their role relationships, including recent redefinitions of the social and legal status and roles of aboriginal women in aboriginal communities and in modern Canadian society (e.g. Depew 1986: 109; LaPrairie 1987; Nightingale 1994). These redefinitions and the wider field of heterogeneous values where they are played out can fundamentally challenge or, in some cases, undermine 'traditional' definitions of the role and status of aboriginal men, and of justice itself. Accordingly, they may also radically change conceptualizations of the nature of traditional institutions, such as marriage, a fact that raises important social and legal distinctions for marriages 'in trouble' and how to respond to such

trouble.²⁹

Where these changes pose a serious threat to the conventional power base of aboriginal men, the response has been to limit the resources available to aboriginal women, denying them access to opportunities that would apprise them of their legal rights and (political) options in responding to disputes and serious offenses (Nightingale 1994).³⁰ This has generally limited the roles of aboriginal women in the administration of justice and minimized representation of their social and legal interests. At the same time, it has encouraged aboriginal women and women's groups to mobilize around alternative and new concepts of justice in aboriginal communities.

This illustration can be extended beyond gender relations to a more general consideration of the complexity of social and legal issues in other spheres of community life. These demonstrate the structural links between community contexts, social interaction and other facts of aboriginal justice problems and needs (LaPrairie 1993: 20-21). As indicated previously, concerns over inequity in access to scarce resources (e.g. housing, property, information, power) and opportunities (e.g. education, employment, political participation) of aboriginal women, youth, the elderly, certain families and individuals, translate into a range of justice needs that are not being and cannot be appropriately, legitimately, credibly or effectively addressed by the narrow practice of 'healing' or attempting to 'heal' individuals or, more vaguely, communities themselves.

This conclusion is supported by the results of some pilot project evaluations. Obonsawin-Irwin (1992a, 1992b) and Clairmont (1994), for example, found that victims (often females) were generally less satisfied with sentencing alternatives than the offenders (usually males). This may be traced to a variety of factors, including a predominately offender-focused approach to justice administration that can overlook the needs of the victim (Clairmont 1994; Nightingale 1994), the unequal position of women-as-victims in local power structures (Depew 1994;

²⁹ Where kinship and the social collectivity once provided a moral framework for the relationship between spouses, an introduced sense of legal entitlement may redefine marriage, in whole or in part, as a legal contract. This means that domestic disputes, for example, may require a much closer analysis in order to disentangle an appropriate social response intended to change an abusive husband's behaviour, from a necessary legal response where a wife has been sexually assaulted and wishes to press charges.

³⁰ The response has also involved violence and abuse towards aboriginal women by aboriginal men, a problem that in many aboriginal communities has reached the proportions of a crisis.

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LaPrairie 1992a), and the perceived leniency of some sentences which may reflect certain powerful interests in the sentencing process, the manipulation of 'traditional culture' as a defense of offender behaviour, or other rationalizations that obviate the issue of responsibility for one's actions (e.g. Nahanee 1993; Nightingale 1994).

These observations suggest that, in some cases, the politics of popular justice in the aboriginal context may become a significant constraint on its fairness and openness. This may be especially the case where an offender and victim, or the groups with which they are identified, are unequal. Under these circumstances, the exercise of power-as-justice can effectively silence a victim or complainant since the pressure not to speak out against the powerful may be overwhelming (Crnkovich 1993; LaPrairie 1992a). This kind of response may be erroneously interpreted as conforming to community standards and customs where an undivided community shares a common purpose in resolving problems. There are other pitfalls in interpretation that should also be considered. For example, where some might see a drop in crime or recidivism rates as a result of a pilot project's effectiveness (e.g. Arnot 1994), others might question similar statistics on the grounds that they are indicative of the unwillingness of victims to register their complaints in either a popular justice or formal justice forum (e.g. Brodeur et al. 1991; Nightingale 1994: 23; cf. Clairmont 1993). The implication is that more thought needs to be directed to the design of popular justice projects and programs, especially in relation to the influences of complex community environments within which they are to be implemented.

Other issues may seem a little more straightforward. As in the non-aboriginal context, certain forms of aboriginal popular justice may not be appropriate for all conflicts or crimes, or for all offenders and victims. Clairmont (1993, 1994), for example, reports significant variation in the response of informants and respondents to such issues in relation to the Shubenacadie Band's diversion project. This observation has been repeated by some other project evaluations and analyses in other aboriginal communities (e.g. Clairmont 1994; LaPrairie 1991, 1992a; Obonsawin-Irwin 1992a, 1992b). Other commentary suggests that the roles of certain community members, including elders, while often taken for granted as an indispensable feature of most, if not all, forms of aboriginal popular justice (e.g. Monture-Okanee and Turpel 1992), may be problematic, especially where there are intergenerational differences giving rise to value conflicts with a growing youth population, or gender and other kinds of discrimination directed towards women, particularly in sentencing processes (LaPrairie 1991, 1992a; Nahanee 1993; Niezen 1993; Nightingale 1994). In other situations the issue may be one of personal unsuitability because of conflicts of interest, personal histories of misconduct or bias, or status and role incongruencies associated with judgmental positions that some community members may be obliged to assume (Crnkovich 1993; Nightingale 1994; Ross 1994a).

What can reasonably be generalized then from a research and policy perspective about popular justice developments in the aboriginal context? Perhaps the most important and firmly established generalization is that, while there seems to be a surplus of assumptions and claims about the need for and effectiveness of popular justice, there is a noticeable deficit of comprehensive, independent and objective evaluations to substantiate these assumptions or force us to rethink them. There is little that can confidently be claimed about the results of popular justice projects in aboriginal communities, and it is still unclear what their limitations and potential may be, and how, if at all, they contribute to community-building. In the absence of broad-based community opinion, widespread community consultations, and adequate monitoring, evaluation and data collection in the development of aboriginal popular justice, the potential for progress in this important area of justice administration is likely to diminish.

Conclusions: Future Directions for Aboriginal Popular Justice

This paper has described the popular justice movement in aboriginal and non-aboriginal communities and has outlined some of the underlying ideological, theoretical and practical issues in this development. The domain of aboriginal justice in particular has seen a series of changes over the last few decades, and new approaches require assessment. Popular justice is especially relevant to the situation of aboriginal communities in Canada, given their diversity and often unique characteristics. But an appreciation of its relevance requires serious questioning of simplistic and ideological commitments to its political mystique, and a move towards a more sophisticated and critical understanding of the place of popular justice in contemporary aboriginal communities. In this context, a sociologically informed investigation may contribute to a field of study and practice that has been largely dominated by the assumptions and techniques of psychology. Viewed as complementary rather than competing perspectives, the approaches of both sociology and psychology may hold out promise for aboriginal popular justice in so far as they address individual needs and the justice implications of interpersonal and inter-group relations in aboriginal communities.

Canadians today live in a modern, highly differentiated and impersonal society of immense scale and systematic inequalities. An integral part of this society is the justice system, which is designed mainly to control and regulate relationships between 'strangers' rather than mediate relationships between people who know and interact with one another on a daily, face-to-face basis. Despite seemingly overwhelming pressures to integrate and assimilate with the wider society, many aboriginal communities have chosen to live their lives in culturally and socially distinctive ways. What these communities often have in common is an ability to

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reproduce themselves as 'communities of relatives and friends' rather than 'communities of strangers'. This difference has highly significant implications for the development of aboriginal popular justice.

One major conclusion that emerges from the analysis is that aboriginal justice needs have special features, primarily because they involve the intersection of interpersonal and inter-group relations with the effects of modernization, most noticeably increasing role complexity, structural differentiation, and the accumulation and concentration of wealth and power. The approach to aboriginal popular justice, therefore, should be determined in a multi-dimensional way. Some students of aboriginal affairs would doubtless wish more rigidly defined aboriginal cultural configurations such as language, worldview and ritual to lead the way in these developments, but the evidence in support of this approach is weak. Far more relevant are the sociological attributes of communities which set the contexts of aboriginal disputes, crime and disorder, as well as those psychological processes aimed at their microprevention. But the nature of social relations and social interaction that are at the center of justice problems, needs and responses to them are more complex than the current 'healing' paradigm suggests.

This complexity is nested within power and opportunity structures that rarely imply uniform interests, values or equality of access. Yet disputes, crime and disorder disturb all sectors of the aboriginal population. The major issue now facing communities is the limited potential of 'healing' and microprevention, and the virtually unexplored potential of macroprevention to resolve these problems. Indeed, it is difficult to imagine future arrangements for popular justice in the aboriginal context being legitimized and sustained by the wider community without some reconfiguration of these structures and resources (cf. Clairmont 1993).

With this important objective in mind, LaPrairie (1993) brings her discussion to bear on the possibilities of negotiating structural disparities in terms of broader notions of 'justice' and 'popular justice'. LaPrairie's central insight is that much unexplored ground lies between the apparent intransigence of value and power differences and their much needed compromise. That is to say, there may be alternatives to the apparently insoluble differences between individual and group interests, values and resources which involve the social engineering of structural and value change at the community level (LaPrairie 1993: 23; McDonnell 1992a, 1993).

This idea is challenging in the search for prevention strategies that are neither seduced by 'politically correct' notions of cultures-as-commodities nor give uncritical priority to other narrowly conceived popular justice structures and processes. However, it may also prove somewhat problematic since there may be as many objections to this kind of aim as to the narrower and more rigidly

conceived aims of popular justice structures and processes. To extend the apparent field of legal/judicial intervention into major structural readjustment may seem as objectionable as pursuing a narrow conceptualization of legality that appears to ignore important group interests, values and resources. Ultimately, which path to follow must be a political choice as to the kind of society aboriginal communities envisage for themselves.³¹

This kind of political choice opens up for consideration the place of customary law in prevention strategies in particular, and in the development of aboriginal communities in general. The idea of promoting multi-institutional approaches that "influence and construct social relations" outside the confines of formal legal institutions (LaPrairie 1993: 23) is consistent with the (re)construction, activation and recognition of customary law as a complex of morally sanctioned social relations that may serve as a charter for social, economic and political changes. In this context, power can be viewed as the harnessing of social, economic and political forces through innovative strategies to reconstruct or further develop communities, rather than as the manipulation of resources and cultural conventions by differentiated social hierarchies. Should the former approach prevail, customary law could be a practicable model for, or an integral part of, popular justice in the future and could provide much needed inspiration for those who believe in the possibility of a more just and equitable society.

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