

# POSITIONING THE LEGAL SUBJECT AND THE ANTHROPOLOGIST: THE CHALLENGE OF *DELGAMUUKW* TO ANTHROPOLOGICAL THEORY<sup>1</sup>

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## Introduction

On December 17 1997 the Supreme Court of Canada, in presenting its judgment in the famous aboriginal<sup>2</sup> rights case, *Delgamuukw v. Regina*, addressed a critical issue of evidentiary rules, namely the acceptance of oral histories as proof of land occupancy and as normative statements respecting aboriginal law and systems of governance.<sup>3</sup> In overturning the decision of the trial judge, Justice McEachern of the

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<sup>2</sup> The term 'aboriginal' is used throughout for the First Peoples dwelling within the nation-state of Canada as this is the concept used in the *Canadian Charter of Rights and Freedoms*, which provides for their rights. First Nations is also used to indicate those peoples known formerly as 'Indians' and whose identity and rights (and lack thereof) are defined in federal legislation, *The Indian Act*.

<sup>3</sup> In 1987 the Gitksan and Witsuwit'en Nations began a court action that continued through three years of testimony respecting aboriginal title. In 1991 Justice McEachern not only ruled against them, but wrote a lengthy judgment dismissive of their culture, precontact social organization, and the veracity of their oral history. *Delgamuukw v. British Columbia* (1991), 79 D.L.R. (4th) British Columbia

British Columbia Supreme Court argued that "the factual findings made at trial could not stand because the trial judge's treatment of the various kinds of oral histories did not satisfy the principles laid down in *R. v. Van der Peet*" and concluded: "Had the oral histories been correctly assessed, the conclusions on these issues of fact might have been very different (6)."<sup>4</sup>

In defining aboriginal rights, and setting out their origins, the court ruled that "section 35(1) [of the Constitution Act]...must recognize and affirm...the prior social organization and distinctive cultures of aboriginal peoples on that land" (9) and went on to assert that "occupancy is part of aboriginal culture in a broad sense and is, therefore, absorbed in the notion of distinctiveness". Their position affirmed the arguments of Justice Lambert who, in dissenting from the majority of the British Columbia Court of Appeal, had stated that "all rights arise from the practices, customs and traditions which form an integral part of the distinctive culture of the aboriginal people, and were part of the social fabric of aboriginal society at the time of the arrival of the first Europeans" and went further to assert that these rights came "under the doctrine of continuity, from the practices, customs and traditions of aboriginal people" (46-47). This ruling suggests that the balance of legal discourse is shifting the subjugated discourses of aboriginal customary law closer to the centre of dominant legal discourses. Protection of traditional law within common law will surely disrupt the boundaries of established legal discourses. Common law will now provide a foundation for either or both of parallel but equally powerful legal discourses or (more plausibly) a new hybrid legal discourse that absorbs and accommodates customary law encoded in normative cultural narratives, sacred songs and the like.

The court's emphasis on cultural difference and the validity of oral histories and traditional law, thereby understood as truth-based normative discourses, marked a moral and political victory for Aboriginal Nations of Canada, and indirectly vindicated the anthropologists whose expert testimony had been denigrated by McEachern in his reasons for judgement.<sup>5</sup> In its recognition of cultural difference as

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Supreme Court; 104 D.L.R. (4th) 470 British Columbia Court of Appeal (1993).

<sup>4</sup> *R. v Van der Peet* [1996] 2 S.C.R. 507 (Supreme Court of Canada Appeal). Chief Justice Lamer held that the common law rules of evidence should be adapted to take into account the *sui generis* nature of aboriginal rights.

<sup>5</sup> McEachern criticized the plaintiff's expert witnesses for their professional code of ethics, their methods, and their apparent lack of objectivity. Antonia Mills responded to his treatment of her in the publication of her expert testimony (Mills 1994) and Dara Culhane provides a detailed analysis of the judgment including the

the origins of aboriginal title the court not only affirmed treaty rights protected by section 35(1) of the Charter of Rights and Freedoms; it also affirmed the value of the anthropological project of ethnographic representation, which has been embraced by aboriginal plaintiffs for over a century as a normative source of knowledge sufficiently accurate to form the basis of expert testimony. One possible reading arising from the Supreme Court's decision is that the recognition and affirmation of cultural distinction (the basis upon which arguments for alternative and parallel justice systems rest) implicitly recognizes and affirms distinctive epistemologies and the power of Aboriginal plaintiffs to construct counter-domains of knowledge. This is a significant political victory, for "the power to define reality is an economic and political power" (Moore 1994: 5).

The court's vindication of ethnographic representation, however, is not without constraint and irony given the shifting context in which academic knowledge is now created (Harris Jones 1996). In the decade following the opening of *Delgamuukw* in 1987 new voices - variously categorized as postmodern, poststructural, and/or 'new ethnography' - have arisen in anthropological theory. These approaches purport to enhance our appreciation of and access to 'subjugated knowledges' and 'subaltern voices' on the one hand and to reject the anthropological passion for difference as constituted in established practices of normative ethnographic accounts on the other. In the words of Stanley Barrett, who views the postmodern position primarily as a spurning of science in favour of hermeneutics, "[p]ostmodernists argue that it is meaningless and even immoral, to search for generalizations, laws, evidence, verification, all of which in their view dehumanizes people by objectifying them" (Barrett 1996: 32).

Anthropologists working with First Nations of Canada have recognized the dilemma posed by the *Delgamuukw* decision. Pryce views this concern as twofold. The legal process in her view "forces native peoples to demonstrate unequivocally that they have objective ethnic distinctiveness and exclusive historical claim to territory." She sees this as dragging anthropologists into an advocacy function that positions them in the role of proving longevity and authenticity of culture (Pryce 1999: 143). Rather than addressing theoretical conundrums, however, Pryce sees the solution to lie in professional practice. She argues:

We [anthropologists] do not serve best as professional advocates,  
but rather as independent scholars..., our best contribution can  
only come from cultivated disinterest....Ultimately, the *dmod*

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double standards McEachern applied to the defendants' and plaintiff's expert witnesses (Culhane 1998).

motivation, 'contribution to knowledge', may be the foundation of clearest integrity (Pryce 1999: 146).

Any call for contributions to knowledge however, must address theoretical developments and the challenges they pose to dispassionate scholarship and to the power relations inherent in the construction of scholarly knowledge which situates itself in opposition to the integrity of alternative knowledge. In *The Social Life of Stories* Julie Cruikshank suggests that changing theoretical questions have led anthropologists to view positivism as "our adversary" at the same time as indigenous organizations have begun to "recognize the strategic value of using such concepts as 'tradition' and 'boundedness' as a framework to present their claims to collective rights and distinctive identity." Our growing preference for deconstruction, she worries, "may now be viewed as offensive or even as harmful to indigenous peoples' struggles", and she asks: "where are the possible intersections of indigenous paradigms with scholarly theory at the end of the twentieth century?" (Cruikshank 1998: 162)

In this paper I consider how these 'new' theoretical insights and moral objections pose new challenges to the work of applied legal anthropologists who are called upon as expert witnesses to document traditional legal orders. At the heart of this challenge lies the postmodern position that "texts constituted by difference can no longer provide reliable knowledge because meaning itself is self-divided and undecidable" (Ebert: 1995: 346). Positing that politics are a textual practice leads to rejection of the socially normative categories upon which politics has conventionally been grounded - race, ethnicity, class, gender, and the state - in favour of the formulation of discursive manoeuvres as comprising a subversive action that prevents easy circulation of meaning. In fact, this 'subversive action' of deconstructing meaning through rejection of these categories is as likely to subvert aboriginal purpose as it is to overthrow legitimating narratives of ethnography.

This 'new' ethnographic genre locates itself in opposition to established ethnographic practices and genres on five significant grounds: the comparative study of difference, the premise of cohesive, self-consciously bounded cultural communities, the practice of observational/descriptive 'normative' ethnographies, the categorization of knowledge and practice as traditional, and the displacement of the unified subject of law and nation with the multiple or fractured subject of the postmodern era. In confronting these challenges I wish to revisit the socio-critical dimension of anthropology, which will surely be called upon to address the possibilities of legal pluralism alluded to by our Supreme Court. In doing so, I do not purport to advance new critiques of the postmodern/ poststructural position, or to place myself in opposition to the postmodern concern for representation, for its insights into the relations between author, text and culture, are invaluable. Rather,

my intent is to apply theoretical insights of others to the particular ramifications facing aboriginal communities who turn to anthropology for scholarly verification of their legal discourses and oral history and for the documentation of cultural difference demanded by the court in an effort to substantiate the aboriginal rights and titles that inhere in traditional laws, customs and practices.

To do so, I call for a *resistant sensibility* which directs us to a reconsideration of the normative within the context of supramodernity<sup>6</sup> and the emergent nationalism of aboriginal peoples. Supramodernity calls for an alternative discourse to the postmodern theorizing of incoherence and instability, namely a discourse of negotiation which will at various levels require normative texts of identity formation and national coherence. As Moore (1994: 5) expresses it, "the search for identity and authenticity...is part of a project of modernity, that is a project for the future and it is in this sense that the aspirations of this work are global." Supramodernity thus requires a discourse of the postcolonial legal subject.

Resistant sensibility does not, however, seek to replicate the stable subject that inheres in the rational and utilitarian man, but rather to re-constitute the particular subject of aboriginal legal discourse. That is, it seeks to position the legal subject within aboriginal narration of oral history understood as legal discourses grounded in ontology as distinct from the epistemological basis of dominant legal discourses. In so doing, it recognizes that each culture, through narratives that constitute statements of normativity, sets itself the task of defining subjectivity and determining the legal subject, whether this be through a rights-endowed individual or through an obligation-bearing member of a collective bound by reciprocity. Resistant sensibility moves beyond disclaiming the normativity of tradition and boundedness to create a space for multiple claims to identity; in doing so it shifts our attention to the ways in which individuals constitute themselves as social beings in their struggles to overcome their subjugated position.<sup>7</sup>

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<sup>6</sup> I use supramodernity to express what Ong (1996) has termed multiple modernities; in contemporary conditions discourses of modernity arise in multiple sites that sometimes but not always are formed in resistance to Western modernity. I further use the term to suggest that theorizing the emergent nationalism with attendant quests for innovative justice praxis requires us to reconsider the discursive formation of stable subjects within normative, nationalist discourses.

<sup>7</sup> Margaret Lock and Patricia Kaufert take up a parallel position with respect to the constitution and positioning of the medical subject, arguing that in order to be pragmatic, women self-consciously select from a range of subject positions those that will benefit their struggles (Lock and Kaufert 1998).

The argument for resistant sensibility follows the leads of two feminist scholars, Teresa Ebert and Emma LaRocque, who argue in different ways for a position of resistance within postmodern readings of representation and politics. Ebert proposes a "resistance postmodernism" grounded in transformative politics in contradistinction to a "ludic postmodernism" that limits its analysis to a crisis of signification (Ebert 1995). For Ebert a resistant reading does not fold back into the ludic, but rather grounds all reading in an understanding of the economic base of postcolonial relations and representations. LaRocque (1996), an aboriginal scholar, takes a complementary stance; although she foregrounds issues of representation she refuses to subordinate the lived economic/political experience that underlies aboriginal women's ways of knowing. In writing of women's struggle for social justice within aboriginal communities, LaRocque urges aboriginal feminists and their intellectual supporters to initiate a "textual resistance" that draws upon postmodern understandings of textuality and "difference within" to reconstitute traditional law in ways that will ensure recognition and protection of aboriginal women's equity and rights within contemporary pluralistic legal fora. Thus she, like Cruikshank, accepts the need to problematize the telling of oral history as an aspect of seeking meaning in response to externally imposed categories of truth and validity. But she does so with the understanding that a resistant reading of tradition will illuminate particular aboriginal ways of positioning the ontological legal subject.

### Difference and the (In)coherent Community

Postmodernism problematizes politics of difference as a crisis of representation that mark distinctions between seemingly apparent and stable self-contained collectivities and identities. Drawing on literary theory grounded in continental philosophies, the new ethnographies of the postmodernists reject conventional descriptive representations of cultural difference by linking these allegedly dehumanizing and objectifying accounts to the usurpation of authority by the ethnographer who validates her/his monologue by reference to fieldwork experience. Interleaved with this perception of ethnographic discourses as discriminatory is the practice of deconstruction through which 'authoritative' ethnography is revealed as fiction and artifice (Visweswaren 1994).

Postmodern opposition to established ethnographic conventions of objectivity and validation has given rise to an 'experimental' ethnography in which language and representation have taken on new dimensions that purport to arise from multiple-authored and often fractious or contrary representations of 'differences within'. Postmodern focus on differences within disclaims representation of coherent communities as a creation of ethnographic writing, that is, as literary artifice.

Polyvocal, conflicted communities marked by a myriad of differences are now represented as more valid while the normative construction of a coherent community that arises with emergent nationalism is disdained as an invented culture (or self) that, since the mid-eighties, we no longer find fashionable.<sup>8</sup> We must ask, however: How has this come to be? If coherence is an artifice of trope and rhetoric why is the opposite any less so? Why must communities be ‘constructed’ as either fully fragmented or seamlessly whole? A more nuanced view than that of pure theoretical postulating at the expense of accurate empirical renditions is called for if we are to avoid representation of the ‘other’ as an imaginary of ourselves swept into the vortex of postindustrial urban lifestyle.

In rejecting ethnographic fieldwork as primarily political re-enactment of colonial relations, the so-called new ethnographers have not repudiated difference. Rather they claim to provide more innovative representations of difference which, they say, champion self-representation of knowledges lying beneath the surface. They further proclaim these innovations as a subversive act that cannot be undertaken by the outsider who, acting with authorial authority, seeks to provide a descriptive narrative of facts and social order. In contradistinction to conventional ethnography, postmodern ethnographers rely on the deployment of metaphors and images to invoke a shifting reality of incoherence and polyvocality.

Borrowing from esoteric literary theories the new ethnographers seek, through ludic deployment of the ironic, aleatory and self-reflexive (although some would say self-indulgent), exposure of the artifice/simulation of ethnographic authority and the consequent creation of cultures as an always partial always interested, evolving narrative. These ‘new’ ethnographies, of which Michael Taussig (1986) remains among the most popular examples, are in turn criticized for their pretensions that the author is no longer a hero of the text but is rather merely one voice of many within the text (Moore 1994: 122).

The postmodern/poststructural discourses<sup>9</sup> that have emerged in this genre are criticized for their inaccessible, often contorted, and unnecessarily abstract languages that prevent direct dissemination of their ideas beyond a few within the

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<sup>8</sup> Clifford and Marcus (1986) led this shift to the deconstruction of ethnography as a literary artifice and thus contributed to conceptions of culture and traditions as ‘invented’ (Hobsbawm and Ranger 1983).

<sup>9</sup> I combine postmodern and poststructural in this fashion because of the varied and often conflated uses of the two labels and the instability of their meanings across disciplines and national boundaries.

academy and intelligentsia. Specific critiques vary. Most significant for this discussion is the concern that esoteric discourses of postmodernism/poststructuralism exclude holders of 'subjugated knowledges' (whom the authors frequently seek to speak for as well as with) from intellectual arenas. Purveyors of such discourses are perceived to disdain, or at the very least, to disregard or misunderstand as intellectually insufficient, theorizing from the so-called 'borders' (Harris Jones 1996; Karim 1996). And, in spite of their presumed rejection of meta-narratives and essentialism, which claims to mark postmodern discourses as more morally accountable than modernist discourses of social progress or radical democracy, the new ethnographers are disposed to reconstruct the 'other' in the image/discourse of themselves as they transform the anthropologist-hero(ine) from the objective scientist to the self-reflexive hero(ine) consumed with understanding the European self. Moore insightfully suggests that representation of incoherence and instability are yet another imposition of Western self-recognition upon the ethnographic subjects, who "become in the end an extension of the male self, its other looking back at it, reflecting it at 'twice its normal size'" (1994: 124).

Postmodernist dilemmas of late capitalism, consumerism, and even the anxiety of masculine identity in post-Vietnam America, Moore goes on to argue, are carried onto the subject, who is now universally (essentially?) represented through the lenses of Western self-reflection as unstable and fractured. Literary manoeuvres (based on Freudian and Lacanian psychologies and Derridian unravellings) construct a subject who is now vulnerable before the law insofar as this fractured subject is unable to claim stability and hence credibility as a legal subject (Wicke 1994). When this subject stands before the law (and the ethnographer?) she/he is likely to be perceived as a confessional subject, which prompts me to question: How can the fractured subject, understood as a member of an incoherent coherent community, justify the political call for a stable and just parallel legal order? How does the legal subject simultaneously position her/himself to claim both inherent rights to self-governance and to prove needs as a consequence of traumatic fracturing?<sup>10</sup>

These are no simple rhetorical questions; the dilemmas raised by them cannot be resolved by a outright rejection of the fractured subject with a return to prior notions of stability and singularity. Subjects are constituted through the negotiation of social

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<sup>10</sup> I have in mind here the construction of the unstable subject as a victim of 'residential school syndrome', whose credibility is dismissed by the courts consequent to inspection of medical and counselling records, or whose confessional stance, vis-à-vis very real horrors of colonial education with its cultural, psychological, and sexual abuses, is re-presented as self-interested, opportunistic claims to monetary compensation.



categories such as race, class, gender and nation. First Nations' discourses of self-governance and autonomous justice emerge as manifestations of supramodernity and are in danger of being implicated by constitutional assimilation into the liberal state in which they are encapsulated. State constitutions, Spivak argues, "can operate only when the person has been coded into rational abstractions manipulable according to the principle of reason" (Spivak 1995: 157). Her specific argument that American women's "involvement with the Constitution is thus not an unquestioned teleological good but a negotiation with enabling violence" (Spivak 1995: 168) is equally true for Canadian aboriginal peoples, and in particular for aboriginal women. This is demonstrated by their marginalization in Canadian masculinist political and judicial processes that privilege rational man and the implicit fraternity of liberalism (McIvor 1995; Fiske 1996; Nahanee 1993; LaRocque 1997). 'Protection' of customary law by the dominant legal order, moreover, threatens to privilege the rights-bearing subject over the obligation-bound subject of aboriginal law as courts absorb customary laws into their own legal discourses (Fiske 1995).

Resistant sensibility offers a possible solution to this polarity by locating the constitution of the subject within the 'subjugated knowledge' that provides epistemological and ontological foundations for customary law as the normative narrative underlying an alternative justice order. A new reading of tradition from a perspective of resistant sensibility offers an alternative to the unified subject abstracted under a principle of reason without resorting to the dubious construction of the fractured subject and the incoherent community. As Emma LaRocque argues, we need to locate the legal subject in the knowledge of experience to recognize that "knowledge is dynamic, and there is nothing preventing the incorporation of new female and aboriginal ways of knowing" (LaRocque 1997: 95, citing Joyce Green 1995).

### Traditional Knowledge

Bound to the postmodern rejection of stable communities and the unitary subject is a critique of ethnographic representation of traditional knowledge and practice. Within the postmodern understanding of signification, tradition is always signified relationally in terms of political inequalities of power and forms of domination. In consequence, ethnographic representation of difference is perceived as replicating social hierarchies. Underscored by implicit and explicit assumptions of evolution and imperialism, ethnographic representation is seen to exaggerate difference and to freeze the others in a past that is deemed inferior to ourselves, past and present. This uneasiness with cultural distinction has also been applied to legal reasoning respecting aboriginal rights as grounded in 'traditional' practices of the past (Bell and Asch 1997; McNeil 1997). Legal reasoning that situates rights within practices

and customs of a pre-sovereign era is seen to reify the colonizer/colonized polarity with its implicit assumptions of the relative sophistication of societies and knowledge systems as arising from a universal scale of social organization. (Bell and Asch 1997: 58). Appeals to liberal legal pluralism have not provided an alternative to these stereotypical constructions according to LaRocque. She alludes to the implications of reified culture in her critique of alternative justice orders to show that there are times when aboriginal women need to show dissonance in order to be politically astute. Thus she argues that constructs of aboriginal 'healing' as a foundation for alternative justice systems are grounded in misconceived notions of traditions that are more closely tied to Western doctrines of forgiveness than to aboriginal percepts of punishment and wrongdoing, with the consequence that

much that has unquestionably been thought to be tradition is actually syncretized fragments of Native and Western traditions which have become highly politicized because they have been created from the context of colonization (LaRocque 1997: 76).

Postmodernists/poststructuralists have encouraged ethnographers to deconstruct 'tradition' as a trope that carries excess meanings of moribund unsophisticated knowledge and practices, which are reified by ethnographic writing in the cause of difference. And while this argument provides useful insights into ethnographic representations of distinction, it is far from providing a sufficient understanding of aboriginal representations of tradition as a theorized position from which to project socio-legal causes within the realm of the contemporary world. Political allusions to tradition are not so simple and do not necessarily carry either an unreflexive idealization of a past lived reality or a self-interested discourse of political persuasions. Rather, indigenous and ethnographic representations of traditional praxis and knowledge provide symbolic realization of the possibility of the future, a blueprint as it were for constitutional norms from which to launch the re-creation of nationhood and its jurisprudential foundation. Since the aboriginal political struggle is to reaffirm and regain community and national wholeness in the face of colonial domination that has fragmented them and then sought to re-assimilate them as individuated rights-bearing subjects distantly tied to an apolitical cultural identity, an aboriginal modernist political agenda of progress and justice is more relevant than the postmodernist appeal to endless multiplicities and internal contestations. The call for nationhood constitutes a call for boundaries to demarcate a united identity as the foundation of political claims - which is not to say that it calls for a moribund conception of a past way of life.

Within this political context, indigenous representations of tradition speak to an envisioned past - through tropes and organic metaphors of holistic, complementary, or reciprocal relations of justice and harmonious moment - that provides a

foundation for contemporary actions in a supramodern world, that is a world of progression towards a desired nation of distinct governance and justice. Within the struggle for distinct justice systems, therefore, we should not be surprised to find indigenous theorizing and representation that allude to, draw from, or even in some instances replicate representations of earlier ethnographic texts that speak to the cosmos (we might reasonably assume that our intellectual ancestors got something right) founded in observation and concern to detail the nomos of existing or historically reconstructed communities.

This was made evident in the legal testimony presented in *Delgamuukw*. In this case, the expert testimonies of anthropologists Antonia Mills and Richard Daly constructed a view of stable subjects whose Gitksan and Witsuwit'en identity derives from customary law and tradition. Furthermore, they implicitly presented the narratives that give meaning to these laws and the construct of legal subjects as being the foundation of an objective truth that could be analysed and understood within the logic guiding Canadian jurisprudence (Mills 1994). This view was reinforced in Sterrit et al. (1998), a work by Gitksan chiefs and legal counsel. This text, which reads like a legal factum, stands as a formal validation of Gitksan entitlement to lands that the Nisga'a Nation have also claimed as traditional territory. The Gitksan ground their truth claims in the words of their ancestors which are passed through their chiefs who are responsible "for ensuring the full transmission to the next generation" (Sterrit et al. 1998: 12). The emphasis they place on social roles as binding and unchanging is reminiscent of functional theories embraced by anthropologists who wrote earlier in the 20th century ( e.g., Drucker 1955; Jenness 1943).

Legal historian Sidney Harring argues that, as a consequence of *Delgamuukw*, it is most likely that other First Nations will bring claims before the Canadian courts and in so doing bring

their law into the process.... And as long as this law shapes the way the First Nations see themselves in relationship to Canada and is brought to the courts, in case after case, it exists as Canadian law, whether the courts recognize it or not (Harring 1998: 280) .

For Harring

[t]he lived legal histories of aboriginal peoples are a part of common law [which] itself bestows substantial land rights, a good measure of sovereignty, and a broad range of other rights... Indians, as legal actors, not only make legal history, but, in effect, make law too (Harring 1998: 12).

Their disputes with Canada testify to the fact that "First Nations nationalism and identity have found effective expression in First Nations and Canadian law" (Harring 1998: 277).

What is constituted as tradition before the courts, however, is neither ageless nor fixed, but rather open and fluid. Recall and reconstitution of traditions moreover not only emerge from a complex political context but give rise to new political contestations. For LaRocque, the consequence has been "a growing complex of reinvented 'traditions' which have become extremely popular even while lacking historical or anthropological contextualization" (LaRocque 1997: 76). She posits that the answer to a deracinated reconstruction of tradition lies in a resistant scholarship that is fully conscious of the political underpinnings of discourses of tradition and ever vigilant as to their consequences, in particular for women.

Resistant sensibility, therefore, does not deny past or contrary constructs of subjectivity but seeks to invest these with aboriginal insights that "provide new directions and fresh methodologies" from which aboriginal scholars "pose new questions to old and tired traditions" (LaRocque 1996: 12). Thus for LaRocque a resistant scholarship eschews "male-gendered theoretical and epistemological development that is presented as authentic reflection of the human condition" in favour of "new female and Aboriginal ways of knowing" (Green 1993 cited by LaRocque 1996: 15). Incorporation of new Aboriginal ways of knowing implies a new reading of extant texts of subjectivity and normativity.

Working from a position of resistant sensibility, we should be neither surprised by or dismissive of the multivocal justificatory allusions to tradition that are present at moments of political tensions. Contestations and applications of tradition speak to the vigour of communities as clearly as they speak to divisive self-interested or mendacious political manoeuvres of the relatively powerful. Traditional ideals that offer foundations for justice and dispute resolution are most needed in moments of conflict and dissension, and will offer a framework for resolution only if they are debated. Internal contestation, I submit, keeps tradition alive as well as - perhaps better than - blind obedience to a stultified ideal that does not and cannot provide normative principles appropriate to contemporary conflicts. Emma LaRocque, who seeks resolution of violence against women within traditional frames, makes a similar appeal to her aboriginal audience: "As native women, ... we are challenged to change, create, and embrace 'traditions' consistent with contemporary and international rights standards" (LaRocque 1996: 14).

Thus through judicious acceptance of the postmodern concept of the discursively constituted subject, we can draw on the full range of these turns to normative

traditions for alternatives to the rights-bearing subject of dominant jurisprudence. In doing so it is necessary to recognize "that narrated selves are constituted in cultural terms whose force is primarily moral in the broad sense" (O'Neil 1996: 190). By way of illustration, traditional, socio-centric legal codes premised on concepts of obligation and generosity, as opposed to ego-centric notions of individual rights, constitute a moral subject whose actions of generosity and pity are defined by a code of respect and compassion. Rhetoric of the moral subject provides "concrete specifics of the epistemological and praxeological grounds on which the struggle for veracity takes place" (O'Neil 1996: 69). For instance, the Lake Babine and Yinkdene First Nations of Central British Columbia (formerly known to us as the Carrier) encode the moral subject in a reciprocity of respect and 'pity', or generous actions that spring from an acute awareness of the needs of others and that are connected in powerful ways to a conception of 'law' or the 'way of the people'. Endurance and self-reliance in times of adversity do not harden the subject but foster helping behaviour; adverse conditions give rise to claims of a moral or social nature that are encoded within discourses of the relations between the human and the spirit.

For example, the Babine and Yinkadene peoples confront critical questions concerning the meaning of contemporary practices of wealth exchanges, that, through the use of money as the medium of establishing honour and respect, implicitly carry within them confrontation between western notions of 'utilitarian man' and moral personhood grounded in indigenous understandings of complementarity and responsibility for the fulfilment of the needs of others. The tensions and debates concerning traditional practices and the code of respect in which they are enacted evoke deep philosophical debates that can be represented in broad moral questions rather than in legalistic terms. The application of traditional, socio-centric, law depends upon social status and the relationship between contestants rather than upon concepts that demand uniform judgements that derive from precedent. Within traditional law, therefore, appropriate social relations are fostered through balancing respect and pity in acts of generosity, while veracity and honour are filtered through representations of the self within moral and spiritual discourses that require each individual to be responsible for fulfilling the needs of others.<sup>11</sup>

In conclusion, confrontation between legal epistemology and contemporary

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<sup>11</sup> Appeals to the moral subject are seen by Sharon Venne to explain the settlers' quest for lands from the Cree Nation (Treaty 6). She describes the Queen's representative, Alexander Morris, as "appealing to the Indigenous people to enter into treaty [by speaking] of the poverty and starvation of the Queen's people who wanted to farm the lands of the Indigenous peoples (Venne 1997: 192).

anthropological theorizing has seemingly created a political and intellectual dilemma for the legal anthropologist engaged in questions of aboriginal rights and the quest for social justice. This has been posited both as a problem of advocacy at the expense of dispassionate scholarship and as a theoretical turn that threatens to do harm to aboriginal peoples. In seeking a solution, we must be wary of assuming that the ethical answer is to defend making contributions to knowledge without having a clear understanding of how we construct that knowledge and how we in various ways refuse knowledge from the margins as theoretically sound in its own right. With respect to understanding 'tradition' and 'boundedness' as aspects of legal discourse, one solution is to reconsider the discursive formation of the legal subject as viewed ontologically.

Writing from a position of resistant sensibility requires us to decenter western philosophy of the pragmatic, utilitarian subject through careful empirical accounts grounded in culturally specific representations of the subject. We must be sensitive to the impact of embracing postmodern notions of the partiality of truth and the 'fictive' nature of ethnographic scholarship without giving due consideration to the Ethno-centric basis of this view and its potential to undermine scholarly appreciation for normative discourses on which customary laws and legal subjects are grounded. We must comprehend 'local knowledge' as theoretically based and epistemologically sound in its own right and not merely as data for our own theorizing. The discursive context in which concepts emerge and have moral or legal force not only require empirically accurate renditions but must be placed against an interrogation of the ways in which contemporary western academic practice still re-creates colonial polarities through construction of differences even within postmodern theorizing. We must resist theoretical boundaries established by the academy in its own interests and deconstruct academic assumptions as to who can be treated as a credible producer of knowledge and how and when that knowledge can be disseminated across boundaries. Accurate empirical renditions of the subject recognize that the urban elites' penchant for theory for theory's sake submerges and resubjugates situated knowledges and political autonomy by creating what Moore calls the "modish duck pond" of postmodern theory (Moore 1994), which rejects as outdated and/or 'immoral' ethnographic discourses of difference that speak to and offer legal validity for political projects of indigenous peoples. Through recognition of alternative modes of theorizing the subject within situated knowledges, our goal should be to critically re-frame our notions of objectivity and normative description by accepting a multiple-lensed viewing of tradition that takes into account the entire process of observation and interaction that leads to intellectual classifications and theoretical generalizations wherever they occur.

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