

DISCOURSE AND DEFIANCE: LAW, HEALING, AND THE IMPLICATIONS OF COMMUNITIES IN RESISTANCE¹

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Legal pluralism has traditionally been conceptualised as co-existing legal orders, and its study has focused upon their jurisdictions, contradictions, and contestations. In this paper we propose a different understanding of legal multiplicities, that of discursive formations of plural legalisms that co-exist within a single legal order. Discursive formations of law are produced, maintained, and transformed by legal institutions, cultural groups and individuals who are interested in creating socio-legal meanings in order to influence or negate legal determinations. These meanings are drawn from cultural narratives that offer alternative categories by which to define social and moral offences, for example, narratives based in spiritual, rather than corporeal, atonement and accountability, and which are threaded into legal discourse to different degrees to suit different agendas. In subverting dominant categories and offering the choice of alternative constructions of identity, new arenas for socio-legal action have emerged. This brings two questions to the fore: Can law accommodate multiple non-legal discourses or 'plural legalisms' into its framework? and What are the implications of 'plural legalisms' for law, given that law shifts as societal attitudes shift? In order to respond to these questions we map the discursive constructions of identity of two men accused of physical and sexual violence as they rely on selected cultural narratives to aid their participation in legal processes. We then examine the links between discursive formations and the various communities who contest

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or contribute to them.

In order to understand the importance of discursive formations to identity and law, we must first fully understand how discourse is defined within current legal and social debates.

Defining Discourse²

Peter Goodrich explains that the concept of discourse is a difficult one to grasp because of its “fashionable if diffuse currency”. For our purposes we use Goodrich’s definition of discourse that applies to the analysis of structural features and the production of meaning within culture.

The most immediate and obvious difficulties to be raised by the term discourse itself are not only those of the multiplicity of differing levels of usage, but more ambitiously, are those of attempting to formulate and substantiate the complex relationship of structural features, or regularities, of systems of communication as discursive formations, to their agency or manifestation in empirical practice. (Goodrich 1987: 125)

Theoretical attempts to study discursive formations link actual utterances with the creation of bodies of knowledge that inform and influence the epistemology of cultural structures. For example, political lobbying and adoption of certain forms of rhetoric, such as rights rhetoric used by gay rights movements (Brigham 1987), have been influenced by and influence law to varying degrees, causing epistemological and/or ideological shifts in legal vantage. Goodrich asserts that although law cannot be analysed solely in terms of discourse, it can neither be left to the auspices of the “formalistic, and indeed naturalistic, legal philosophies”, which have “consistently endeavoured to define law in terms of a common or single essence”, nor to “the content of the legal sphere” (Goodrich 1987: 158). Goodrich insists that this essentialist, and indeed simplistic, view of law is particularly dangerous as it denies that law is predominantly a social practice embedded in complex social contexts.

Carol Smart (1995) speaks of discourse in a similar fashion, drawing on the connection of discourse to the formation of the subject and to the narratives that contribute to the discursive formation of the subject. By discursive formation, Smart means the levels of ideology and rhetoric that are employed by individuals

² This work is developed more fully in Ginn (n.d.).

(as well as institutions) to place themselves within the contexts of culture and society. Smart's theory of discourse, like those of Bruner, Cover and Goodrich, places the 'subject in society' at the centre of discursive analysis.

This emphasis shifts attention away from the idea of pre-given entities (for example, the criminal, the prostitute, the homosexual) towards an understanding of how such subjects come into being at certain moments. This entails a significant shift in perception away from the idea that people exist in an a priori state, waiting for institutions to act on them, towards thinking about subjects who are continually being constituted and who constitute themselves through language and discourse. (Smart 1995: 8)

For Smart, discursive formation becomes less a question of pre-given or established categories or subjects and more a question of how certain identity-linked subjects come into being. Smart also questions the total hegemonic imposition of identities on individuals and notes that people create and maintain their own identity formations as well as having identities ascribed to them. Nonetheless Smart tends to underestimate the power of contradictory discourses to influence law and, unlike Goodrich, encourages us to view law totally within the realm of discourse. Our analysis stands between that of Goodrich and Smart, in analysing both institutional discourse and the construction of discursive identity.

Any discussion of discourse is a discussion of power dynamics. Sally Engle Merry takes up an analysis of the interaction between power and discourse in a discussion of the New England lower court system. She draws from Foucault to define discourse as "a means of exercising power in subtle and disguised ways" (Merry 1990: 110) and links discourse to institutional control, although not exclusively. She further frames discourse within the construction and maintenance of ideologies which espouse different notions of reality. The foundations of discourse, according to Merry, contain implicit justifications for explaining actions and relationships.

The naming of an action or event within a particular discourse, thus interpreting the event's meaning and assessing the motives behind it, is therefore an act of power. Each naming points to a solution. If the family problem is interpreted as caused by a mean and vengeful father, the solution is different than if it is caused by a father afflicted with the disease of alcoholism. (Merry 1990: 111)

Merry asserts that that modern discourses of psychiatry and penology,³ for example, create relationships of power and control that pose not only the vocabulary for relations and social actions, but the means, recipes and remedies for dealing with them as well.⁴ For Merry, it is important to understand the dynamics of social inequality; thus it is *who* constructs “authoritative pictures”, *who* resists them, *who* goes along with them and *how* they are constructed that is most significant. Conley and O’Barr likewise locate discourse as essential to the discussion of power in society. Perceptions of the social world (Merry’s “authoritative pictures”), are intimately related to actions within it.

Logically, the way that people talk about an issue is intimately related to the way that they think about it and ultimately react with respect to it. Discourse is thus a locus of power. Different discourses compete for ascendancy in the world; one [or more] is dominant for a time and then may be challenged and perhaps replaced by another. The dominance of a particular discourse inevitably reflects the power structure of society. (Conley and O’Barr 1998: 7)

These attempts to locate relationships of power through discursive analysis stem, in large part, from the analysis of Michel Foucault, who in his early work wrote of examining discourse as something other than merely “groups of signs ...but as practices that systematically form the objects of which they speak.” He comments that “discourses are composed of signs; but what they do is more than use these signs to designate things. It is the *more* that renders them irreducible to the language...it is this ‘more’ that we must reveal and describe” (Foucault 1972: 49). He later states that discourse can be both “an instrument and an effect of power” (Foucault 1978: 101) elucidating the relationship between the creation, maintenance, and propagation of discourses. There are institutional discourses backed by systems of authority or authorities, collective discourses conceived by consciousness raising and political mobilisation, and personal and individual discourses informed by experience and forged by dialogue, media and rhetoric.

³ Foucault (1972) uses the example of medical discourse to demonstrate similar points about institutionally backed authority.

⁴ These means and recipes may not always reflect the best interests of those involved. Martha Fineman (1988) cites the dominant discourses of the helping professions as negatively influencing legal decisions in child custody cases for mothers while N. Zoe Hilton (1991) laments the newly emerging discourses of neutrality in mediation as detrimental to the interests of battered women.

They compete, blend, and are sometimes born anew as derivative discourses.⁵

In order to examine law as discourse, and its interaction with other discourses, we need to recognise it as a field bound to the intricacies and complexities of human thought and action. Legal discourse has been shaped and is endlessly being reshaped by society as it continuously redefines the *nomos*, or normative universe, in which we live. John Brigham's admonition that "...we must move from law *and* society to the perspective of law *in* society" (Brigham 1987: 304) is particularly insightful. Society does in fact create and maintain law, as Jerome Bruner argues:

...the formal conduct of law is judged against the background of narrative possibility... how it is seen determines the form of interpretative commitment we adopt toward it. In this respect, law can never be regarded as a fixed set of rules (as legal positivists had urged) but as a way of acting within the *nomos*. (Bruner 1992: 110)

Just as society creates and maintains law, so individuals within society interpret and react to it in different ways, whether they be plaintiffs or lawyers, judges or jurors. The ways in which individuals interpret and react to law form the basis of this inquiry. We use two examples within the Canadian legal system to explicate how groups and individuals select some discourses and reject others in order to formulate identities grounded in spiritual and psychological meanings of transgression and transcendence rather than in legal meanings of culpability and punishment.

Throughout this paper we explicate the choices that individuals make as they 'do discourse.' This reflects our understanding that while 'doing discourse' can never be evaded, individuals have some choice as to what discourse or discourses they espouse. This is true inasmuch as their exposure to certain discourses may seem to 'make sense' to them from their particular positioning as subjects. Individuals may choose particular discourses because there is some advantage or alternative application alongside of their 'making sense.' Comaroff and Roberts cite these kinds of strategic maneuvers as attempts to "impose their own *paradigms of argument* upon a case" (Comaroff and Roberts 1981: 117). This type of behavior

⁵ When constructing counter discourses, aspects of the original discourse are re-deployed. For discussions of derivative nationalist discourses see Chatterjee (1993) and Fiske (1996). For a discussion of derivative human rights discourses, see Brigham (1987).

results when individuals differ over the nature of the dispute, and hence attempt to control and construct how the dispute is understood.⁶ What they call paradigms of argument could in fact be loosely compared to discursive frameworks, where individuals argue over the nature of social reality. We refer to the fourth type of dispute as an example of how different discourses can act out in cultural situations, not as a general guideline for dispute forms in our work.

Alternative discourses may take shape in active resistance to the formulations of others. As Foucault points out “there is no relationship of power without the means of escape or possible fight...Every power relationship implies, at least *in potentia* a strategy of struggle...” (Foucault 1982: 225). What we are attempting to do here is demonstrate the ebb and flow of discourse and power within a particular arena, and to chart or map them in ways which shed light on social phenomena.

Can people refuse to ‘do’ discourse? The shortest answer is that they cannot. Certain discourses can be ineffective, as Sally Merry demonstrates in her study of New England Lower Court. A plaintiff deploying a ‘moral’ or ‘therapeutic’⁷ discourse may be thwarted by a judge who refuses to stray from a strictly ‘legal’ discourse, but in all cases alternative discourses have to be formulated or dominant discourses have to be resisted. Discourses can be rejected, accepted, or reformulated, but ‘discoursing’ is always active and ongoing.

Cultural Narratives and Discursive Identities

Bishop Hubert Patrick O’Connor was brought to trial on several criminal charges for sexual and indecent assault during his tenure as principal at Saint Joseph, The Cariboo Indian Residential School, in the 1960s.⁸ O’Connor confirmed he had

⁶ Comaroff and Roberts develop a four part model of Processual Forms situated along a continuum that moves from the greatest procedural rigidity and least complex strategies to the greatest procedural flexibility and most complex strategies. The most flexible disputes are said to occur when the conflict is being initiated by one or the other party for specific political ends that transcend the narrow contingencies of the incident or issue itself.

⁷ Conley and O’Barr (1990) cite the two primary discourses in their study as ‘rule centered’ and ‘relational.’

⁸ O’Connor was first brought to trial in 1991 at which time the court stayed the charges because crown counsel had failed to provide his legal counsel with all the

fathered a child with a former resident, then a young staff member, but denied any criminal wrongdoing claiming instead a consensual relationship. He also denied having sexual contact with any other student or staff member. In July 1996 he was convicted of indecent assault and rape (now sexual assault) and in September of that year sentenced to two and a half years in prison. His lawyer immediately filed an appeal and applied for bail for his client while he awaited the British Columbia Court of Appeal's decision. Incarcerated in July 1996, O'Connor, aged sixty-eight and suffering ill health, was initially denied bail and then refused parole on the grounds that he was 'an untreated sex offender' (*Vancouver Sun*, 22 March 1997, B1); he was then released on bail five days later. In July 1997 his appeal was granted and subsequently heard by the British Columbia Court of Appeal at the end of November. This paper is concerned primarily with events up to that date.

At his sentencing O'Connor issued a short, written statement that reflected Catholic doctrine of wrongdoing while simultaneously avoiding admission of legal guilt or remorse for harm. "I feel sad that after 35 years of working for the aboriginal people that my life had come to this. If I had not broken my vows of chastity, I would not have been here today. I have paid a very heavy price" (Todd 1997). Soon afterwards Archbishop Adam Exner called for compassion and forgiveness for O'Connor saying that he had "suffered enough" by reason of his legal ordeal and his enforced retirement as an active Bishop. While recognising the validity of the conviction, Exner rejected requests for further punishment under canon law arguing that the church's statute of limitations had run out and that the extreme measure of excommunication would serve no ecclesiastical purpose.

Bishop O'Connor's statements reveal his identity as constructed through Catholic doctrine. This cultural narrative, which venerates martyrs and directs a man's primary obligations to Church and God provided O'Connor with widely affirmed symbols of identity that resonate through society: heroism, suffering, sacrifice, and martyrdom. Christian doctrine generally, and Catholic precepts of suffering and sacrifice in particular, offer a cultural narrative replete with the defining symbols of a fallen man, which may be deployed to construct a biography of suffering and humiliation that neither draws upon judicial categories of guilt nor upon psychological categories of abused/abuser. Rather than submitting to earthly

evidence it had gathered. Specifically, the prosecutors did not release all available personal papers or medical records. The crown appealed and the issue went to the Supreme Court of Canada, after which the crown was granted the right to resume its prosecution and ordered to release medical records.

DISCOURSE AND DEFIANCE
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punishment, the fallen man looks beyond society for redemption knowing the only forgiveness that matters is God's.⁹ The concept of divine forgiveness does not require social accountability symbolised by obligatory acts of remorse or compensation. Thus we can read O'Connor's statement as an appeal for understanding from the Church and forgiveness from God.

Broken vows and harmful acts may connote personal suffering (as well as transgression), which may be venerated to the point of evoking a persona of martyrdom when the fall from grace brings public humiliation, loss of social stature and authority, or financial hardship. Moreover, the Christian doctrine of *felix culpa*, or 'the happy fall' proclaims that human failure makes possible a greater good, just as the fall of humanity made possible the greater good of Christ.

As a member of the Oblates of Mary Immaculate, a Catholic mission order dedicated to services to the poor and expressive of special devotion to the Virgin Mary, the Bishop was particularly enabled in constructing an autobiography that implies martyrdom. In commemorating both their century and a half of service to Aboriginal peoples of North America and the recent canonisation of their nineteenth century founder, the Oblates and their supporters have constructed Oblate identity as one of masculine heroism, personal suffering, and immense sacrifice. Emulating the early Christian martyrs, who died from unspeakable tortures, the Oblates record their own hardships and challenges as extraordinary mental and physical ordeals endured ministering in the dark wilderness, where they describe themselves as suffering from unrelenting isolation from their peers, and personal frustrations in the face of their converts' resistance to Catholic doctrines and authority (Cronin 1976; Huel 1996; Leflon 1996).

Seen in this context O'Connor's personal expression of martyrdom was not unique; nor was it expressive of mere arrogance and self-interest as alleged by the trial judge and parole board. Rather his martyrdom surfaced in a discursive construction of a once highly-esteemed man who suffered for the 'good' of others who had now rejected him. O'Connor's claims to having paid a heavy price resonated with his sympathisers who called upon the public to remember the good O'Connor accomplished for the native peoples. Indeed, his supporters validated the Bishop's representation of himself as dedicated to sacrifice. "We wonder

⁹ The contrary notions of the importance and meaning of forgiveness was debated in the press, with one correspondent writing to the *Weekend Sun*, 'A child in her first year of catechism would be aware that the only forgiveness a sinner requires, and it suffices for all, is God's' (Saturday Review, 5 October, 1996, D4).

where all the media ethicists were when the call went out for people to give their lives to the education and advancement of native people? Thousands of Catholic religious answered that call” (*Weekend Sun*, Saturday Review 5 October, 1996, D24). His supporters also evoked common concepts in order to represent O’Connor as a man ‘fallen from grace’ because he failed when tempted by a sexually potent woman. In response to media accounts and trial evidence, for example, a sympathiser complained to the editor of the largest provincial newspaper, *The Sun*, “There was never any talk about the sexual potency of a woman in her late teens, and the effect it might have on a middle-aged celibate male, especially if there was flirtation involved” (Saturday Review 5 October, 1996, D24).

By phrasing his indirect apology within a Catholic discourse that evokes temptations of the flesh, O’Connor positioned himself as a man of God who had faltered. He shirked his legal and moral obligations to the women, and lamented that his life as a religious ‘ha[d] come to this’ because he failed to observe an institutionally-demanded vow of celibacy. By placing his regrets outside of the law and beyond the appeals of the plaintiffs to acknowledge them and their pain, O’Connor sustained an exclusive and venerated social position as a holy man. In this position he felt no need to acknowledge the personhood of the woman before him nor to seek their forgiveness. Indeed, he rejected the challenge to reconsider his identity as an abuser of the innocent and refused to stand as an equal in law and spirit to the women before him. His statement to the court enabled him to express regret for a difficult situation while denying guilt or culpability for social wrong doing.

As with religious narratives of temptation and forgiveness, psychological narratives that import concepts of wounding and healing also offer discursive resources to those who wish to displace legal culpability. Treatment programmes for men who batter, which have become popular with the judiciary and legal authorities in Canada and the United States, are predicated upon psychological understandings of psycho-sexual trauma and dysfunction. They place their faith in the capacity of helping professionals to re-educate dysfunctional behaviour.

Martin,¹⁰ was convicted of assaulting his partner Melanie in 1994, and served five months of a six-month jail sentence for his abusive actions. Prior to imprisonment, he attended and ‘successfully’ completed (at least according to his

¹⁰ The names Martin and Melanie and Nicky are pseudonyms. In 1996 Melanie shared her story of their relationship as well as several documents with Patty Ginn.

counsellors) a voluntary treatment program for men who batter their wives. Martin's relationship with Melanie was complex, being fraught with separations, reconciliations, and negotiations toward the cessation of abusive behaviour. These negotiations were played out through Melanie's and Martin's participation in the system of legal control as represented by involvement of police, lawyers, and other justice personnel, and by systems of psycho-social treatment located in the treatment centres and counselling rooms of two small, northern towns. Continued violence on Martin's part resulted in the final spousal separation between Martin and Melanie, although they remained linked through their son, Nicky, as a putative family unit.

Martin also placed his story of wrongs and suffering within, among others, a spiritual narrative. Unlike Hubert O'Connor, however, Martin initially appeared to acknowledge his wrongdoing and to be remorseful, albeit not necessarily within the premises of law. During a brief separation Martin appealed to Melanie in a letter.

Understand I realise how unwillingness to open up to you has caused this untimely parting of my soul mate.... All my actions and reactions were made in childlike mentality reverberating back to adolescence or upbringing.... Your acceptance of my selfish actions is one of the main reasons I simply can't control my sobbing, wailing and crying since we've been apart.... I now have to face my past in order for these psychotic behaviour patterns to stop and be non-existent in me....I don't expect anything from [sic] contempt for the way I have treated you.... [I] realise the irreparable damage done to this woman...

Martin constructed his own identity by appealing to a wide range of discourses. We can trace the discursive formulation of Martin's identity through his participation with the aforementioned systems and his new-found belief in a mix of new-age spirituality, native spirituality, and healing symbology. Over the course of his separations and treatments, Martin transformed his life story from legal categories of abuse, violation, and culpability to a self-inscribed tale of spiritual awakening following trauma and turmoil that resulted in a new-found personhood. His rejection of the categories of legal wrongdoing and accountability was based in an extended discourse of healing and rebirth, a spiritual awakening premised on his past abusive behaviour.

...he acknowledges what he did...but what he says is that everything in your life happens for a reason...in jail he started doing sweat lodge...now he is apprenticing as a medicine healer

in a sweat lodge [laughs]. And so he says that he's really happy for where he is today, and that in order for him to get where he is today he had to go through everything, so he doesn't regret anything...

According to Melanie, Martin's spiritual awakening materialised in prison when he met an Indigenous spiritual leader from whom he acquired knowledge of shamanistic healing practices. This awakening continued after his release, and he carries it on today as a shaman's apprentice. Martin's spiritual awakening also emerged from his interpretation of a popular novel, *The Celestine Prophecies*, which can be read as an exhortation to embrace a new-age philosophy of self-actualisation grounded in an eclectic, non-Christian spirituality. This reading led Martin to merge the cultural narrative of a new-age philosophy with spiritual discourses grounded in Indigenous symbolic orders and practices: guardian spirits, shamans, and vision quests. This intertwined discourse allowed Martin to claim an identity he had formerly eschewed, that of being 'Native.' Melanie described his transformation:

...he is Metis and he had always hated Indians...now he is in a Native sweat lodge. So he is accepting that part of himself, and he believes in a creator, and - have you ever read the Celestine Prophecies? It is a wonderful story, but it is a story... it's a story about all the stages that we go through in our lives and all the realisations that we come to, well he was given it in jail and it is like his bible now, it's the truth for him now...he was visited by the Spirit of Grandmother Grizzly in the sweat lodge and now he thinks he is half Grizzly bear.¹¹

However, Martin did not eschew psychology entirely in his spiritual quest; rather he absorbed each discourse into the other. He simultaneously positioned himself as a man of suffering, whether that be as a survivor of childhood trauma or of prison, or as a man who had transcended this state because he could now manage his anger. From this discursive matrix he emerged as a renewed man now positioned as a potential father to his son. The pseudo-religion offered in psychological/spiritual healing, he claimed, had led him to faith in himself and to his arrival as a complete person. Thus he assumed a stance of self-reliance in his

¹¹ Martin's narrative takes on the common structures of culture hero tales, so beautifully explicated in a range of work by Joseph Campbell. From victim and villain he emerges as the young hero who is cast before a series of tests and temptations in order to win spiritual and social acclaim.

quest, and in doing so proclaimed his commitment to an inner journey.

I now have to face my past in order for these psychotic behaviour patterns to stop and be non-existent in me. With my deepest regrets and on my own doing I will face these alone....

However, his compunction did not discourage him from diminishing his accountability for deliberate wrongdoing. Now turning to defining symbols of spiritual transcendence, Martin claimed neither to regret nor deny his actions toward Melanie, for to do so would be to denounce the person he had become. In short, his life journey had an integrity of its own; each step down the path of suffering and pain had contributed to his ultimate spiritual apex. As Martin repositioned himself from a childhood victim of unidentified trauma to a man on a spiritual quest so he shifted his efforts for self-renewal from the psychological practices that turn inward to ones that seek guidance from beyond society. As with culture heroes of many Indigenous narratives, Martin came to rely on female wisdom, in this instance Mother Grizzly Bear. He now turned to Mother Grizzly Bear for guardianship and to *The Celestine Prophecy* for a model of behaviour. In so doing, Martin came to see his acts of violence as mistakes that had led him to his newly acquired spiritual strength.

Martin's spiritual awakening during his incarceration constituted a means by which he could deny the legal or moral culpability of his actions through his asseverations that his new positive identity was necessarily based on his former negative identity. Here it is important to note that Martin's understanding of spiritual discourse was not one which Melanie shared or sympathised with; rather she understood it as an identity which was constructed outside of her calls for personal accountability. She stated:

Yeah!...I kind of agree with the principle because I think that everything does happen for a reason, but to think that I had to get the shit kicked out of me for him to be who he is today offends the hell out of me...he acknowledges his responsibility for it but at the same time there was a bigger picture or reason for it all, so in that way he takes the responsibility off of himself.

Martin's first discursive attempt to elude personal accountability through his appeal to psychological discourse converges with his spiritual appeals leaving a discursive residue that evades any legally-defined sanction and solidifies into one point: Martin is not really responsible for his violent behaviour.

In sum, in his autobiographical construction, Martin now laid claim to entering into a spiritual journey from the man he was to the man he had become. This allowed him to discredit the legal categories of offender or perpetrator and to question the efficacy of the dominant society's practices of penal deterrence and rehabilitation.

O'Connor's and Martin's reliance on extralegal discourses to construct alternative categories frustrated the women they harmed by denying them justice and reconciliation on their own terms. Ironically, O'Connor was able to side-step his plaintiffs' expectations by evading psychological precepts of wounding and healing, through which the women understood themselves as victims and survivors, while Martin deployed the same narrative resources to avoid legal culpability and personal accountability. Discourses of healing metaphorically transfer the concept of a harmed or wounded body that can be treated by physical and pharmaceutical cures to the wounding or trauma of the psyche and/or the spirit.

Charles Whitfield, a popular American writer in the field of sexual abuse and childhood trauma, proposes that the innocence of childhood is ruptured by childhood abuse, which to him constitutes a range of negative and harmful actions visited upon a child by an adult, most often adult kin. In arguing "[c]hild abuse is the single most common cause of mental illness" (Whitfield 1995: 31), he asserts that *inter alia* any, or any combination, of the following indicate emotional and spiritual trauma: shaming, humiliation, criticising, patronising, inflicting fear. Covert sexual actions such as flirting or seducing demonstrate mental abuse, while physical abuse ranges from spanking, through sexual abuses to beating and torture.

According to Whitfield and others who share his views, childhood trauma is later revealed in a range of compulsive and addictive disorders and age regression. Inability to live as a 'complete' adult is represented as being an 'adult child' or as having denied the 'inner child' of pre-trauma innocence. Treatment is effected through group therapy with the guidance of a helping professional and follows established stages in which the survivor of childhood abuse recovers and moves from being an adult child to a whole person with a 'True' or 'Real' Self. Notably Whitfield, who publishes self-help guides, 'workbooks' and therapists' guides, cautions adult children 'in recovery' to be wary of those 'not recovering' as the latter are deemed more prone to constitute 'unsafe' or invalidating adults than those who are, or have been, in recovery. He further distinguishes between abuse survivors who are in recovery, and who thereby acknowledge the veracity of childhood memories of abuse, from 'retractors' who once acknowledged but now deny suffering childhood abuse. Because such categorisations lay the boundaries

for collective identities, they hold strong appeal for former residents of the residential schools who share the misery of cultural assimilation and physical and sexual abuses.

Saint Joseph was one of many Canadian residential schools run by Christian missionaries for Indigenous students. In the past decade disclosures of serious abuses of students led to convictions of paedophiles for assaults against male and female students and to out-of-court settlements between former students and religious corporations. Expressions of 'consciousness of colonisation' (Comaroff and Comaroff 1992: 235) as lived through childhood trauma, adult stigma and adult lives of suffering and misdemeanours are not uncommon amongst former residents of colonial educational institutions. Recognition of the assimilationist goals of colonial education - to eradicate Aboriginal languages, cultures, and spirituality - is a central feature in the contemporary struggle to re-establish healthy Aboriginal communities. In a discourse derived from psychology of sexual development, former students establish their identity as 'survivors' of residential school who have either 'worked through' their trauma, that is, who have recovered, or who continue to be afflicted by a lifetime of social and psychological disorders: lack of self-esteem, addictions, violence, compulsions, and abusive behaviours. Afflicted adult life experiences are now categorised in this derivative discourse as 'mission school syndrome,' and are marked by discord attributed to a range of abuses and traumas including 'spiritual violence' defined as

... any behaviour or situation which denies or undermines an individual's identity, values, and beliefs. This form of violence includes denying an individual the expression of their [sic] language, their way of praying, for example, as well as ridiculing or shaming their way of life. (Assembly of First Nations 1994: 190).

The spirit is wounded by defining it through an alien belief system and by introducing such alien concepts of morality as 'sin, evil and the devil' (Assembly of First Nations 1994.: 58). In Indigenous perspectives a wounded spirit, or life source, may become lost through afflictions such as alcoholism, which may even result in death (Assembly of First Nations 1994: 55).

For the former students of Saint Joseph's, calling the Bishop to account through legal discourses was only partially fulfilling. Although he was convicted and imprisoned for his assault of one woman, O'Connor was found not guilty of other charges. Punitive sentencing, moreover, did not force an acknowledgement of the

women nor their personal suffering. Thus in addition to appealing to legal concepts of criminality, the plaintiffs and their supporters also drew upon discourses of trauma and healing. As young Aboriginal girls they were subjected to the unequivocal authority of the man of God before them. Their religious training had led them to accept that their priest had received a call from God, that priesthood, as any religious vocation, constituted a divine gift. Thus in their youthful innocence they could not act out a moral choice, the right or wrong of sexual relations outside of marriage, when faced with religious acquiescence to the masculine, God-granted authority of the Bishop.

Healing discourse situated the confrontation between the former principal and students in an extralegal relationship. It called upon the Bishop to accept voluntarily his place in this new relationship by acknowledging the women on their own terms as well as on the terms of a Catholic discourse of caring for the parishioner rather than to resort to laments regarding his institutional vows. His resistance, the plaintiffs claimed, limited their personal healing, for acknowledgement of their position as victims who suffered wrong-doing would to a large extent vindicate their own adolescent actions, years of silence, and perhaps years of traumatised behaviour that caused afflictions in others.

Nonetheless by disclosing their abuse and seduction by the priest, the plaintiffs may re-enter their communities in a new, postcolonial, social role. For the women not only protested violation of their individual human rights, but also contested the cultural violence steeped in colonial assimilation and paternalism, from which their people as a whole continue to suffer. In doing so they acquired an identity as 'warriors' or 'heroes,' that is, as Indigenous individuals who publicly, and at great risk to themselves, confronted the powers of colonialism. As another former student during O'Connor's principalship writes: "The women who laid charges against O'Connor are being hailed as heroes in our community.... The courage they have shown is tremendous" (Sellars 1996).¹²

Melanie's social position did not offer her the same opportunities for public acclaim within a clearly constituted community of resistance. When Melanie

¹² The women are not the only ones in their communities to take complaints of sexual abuse to the court. Two other members of the Oblates were convicted of sexual abuse of male students during O'Connor's tenure as principal. One did acknowledge his responsibility in a manner that satisfied the plaintiffs and their community and participated in healing circles with them. O'Connor now faces a civil suit that charges he was negligent in his obligations for not having taken action against his staff.

chose to appeal to the discourses of treatment and healing, Martin's treatment offered little distinction between Melanie's victimisation as abused, and Martin's psychological recovery from his status as both abused and abuser. By situating an abusive relationship as dysfunctional, as a skill deficit or as an issue of anger control, and by allowing violent men to trade on their identities as abused, treatment initiatives did not end Martin's violent behaviour. Given that treatment could not end the violence in her relationship, and with no claims of a collective shattered spiritual identity, Melanie resorted to a legal claim of physical harm, recognising that the emotional harm perpetrated upon her constituted an extralegal claim for which she could not ask redress.

When she had exhausted all legal and treatment remedies, Melanie finally seated herself within a discourse that rejects as flawed both legal and psychological remedies for wife abuse. She embraced a feminist discourse that not only criticises the patriarchal nature of legal and psychological systems, but also situates the problem of wife abuse as one of gendered power dynamics. Melanie now asserted that patriarchy is "in every part of our society, it's enforced through media, which is owned by corporations...through everything...."

The acceptance of a feminist cultural narrative locates battering as a choice, not a psychological pathology, and violence against women as a collective tool of domination that cannot be stopped by individual legal process. Romany comments on the ineffectiveness of legal controls premised on discourses of dysfunction, arguing that they protect the abuser at the expense of the abused. '[L]egal guarantees of women's dignity, bodily integrity, and self-determination,' she argues, relegate violated women to 'the alleys while...the victims of 'psychological dysfunction' travel the main roads' (1995: 287). Thus, in adopting a feminist discourse, Melanie located herself in a community of women who seek answers in transformative politics that emphasise the societal inequality between women and men.

The cultural narrative of feminism offered Melanie opportunities to define her experience, and hence herself, while entering into collective resistance against remedies that favour the so-called dysfunctional. However, this resistance did not offer her any clear legal vantage in her position as a battered woman. Feminist political narratives, unlike the cultural narratives available to O'Connor, his plaintiffs, or to Martin, are not grounded in widely affirmed symbols of identity. There is no clearly defined nationhood of women, nor do feminist narratives offer a battered woman the same type of cohesive symbols, such as the 'warrior identity' and the post-colonial consensus, that are used by ex-school residents to establish nationhood. In short, there is no plural legal order to which Melanie could appeal. As a consequence of the blended discourses of law and healing,

which threatened to deprive her of a consciousness of the criminality of wife battering, Melanie remained an individual claimant linked *to* a strong cultural narrative, rather than *through* a cultural narrative to a symbolic and geopolitical nation. Within a symbolic extra-legal discourse, healing is a refuge for some and an excuse to others. Thus Melanie's discursive identity, unlike that of the women in the O'Connor case, was excluded from any recognised legal response.

Implications

Forcing women like Melanie into the alley ways of legal protection is but one of the implications of the boundless opportunities to construct new identities and to raise new demands for law to address. Law has no precedent for healing the psyche or restoring the spirit. Nor is it clear that legal authorities understand the cultural meanings attached to these discourses. Furthermore, when law accepts the appeal to treatment, it loses the ability to determine rightful action from wrongdoing. By treating offenders as if in recovery or as victims, it conflates the abuser and abused, and the constituted categories on which law rests dissolve. This is exemplified in the mandated treatment of batterers. In this context, opportunities to manipulate symbols of identity that evade criminalization and accountability abound and are open to continuous redefinition.

Legal absorption of various discourses resulting in treatment, alternative justice systems, and mediation paves the way for demands that law welcome other social remedies into legal mandates. Tracing the discursive arena in which both the traditional discourses of law (those centring around culpability, accountability and punishment) and the seemingly extra-legal demands placed on law (recognition of psychological, Christian, and other spiritual discourses) leads us to questioning how law can administer the social remedies which it is being continually challenged to address. Dissolution of traditionally accepted categories of legal subjects raises questions of how law will define, or empower, additional jurisdictions based on either folk law or extra-legal discourses. Intermingling discourses collide, combine, and are absorbed by or into one another creating discursive residues which deny the simplicity of any singularly sourced identity formation. These formations offer individuals the material from which to choose a range of discursive identities and afford groups the means by which to resist the status quo. One thing is glaringly apparent: Law cannot predict the direction these new and unpredictable demands might take.

This presents some difficulties. If law, in fact, does empower or accept some discourses over others, what kinds of residual effects will result? Will all collective identities be empowered? While law may, for example, recognise the

colonial power of the Church and State over First Nations women within the larger framework of oppression of First Nations people, it may not recognise the gendered inequalities present within traditional psychological and treatment discourse, nor those within legal institutions themselves. This may result in the imposition of colonial notions of gendered relations on First Nations communities.¹³

In other words, law chooses from a buffet of discourses as well, and the final effect may not suit our palates. Law recognises the colonial power of the Church and state over Indigenous women within the larger framework of oppression of Indigenous people; what it does not recognise are the gendered inequalities present within traditional psychological and treatment discourse nor those within legal institutions themselves. Law absorbs into its own hierarchy of knowledge the gendered relations of First Nations communities. Likewise, law does not recognise a 'nation' of women, nor can any perpetrator be brought to court for gender crimes against the collectivity. Feminists like Melanie do not have the same appeals to larger cultural narratives as those whose symbols of identity are validated. Even when these symbols are accepted, they can be subverted or utilised by others to obtain very different goals.

All of this suggests that the manner in which we have conventionally conceptualised legal pluralism is now in question. It is time to turn our gaze to the construction of plural legalisms within a single legal order and to ask how, and with what implications, some are citizens enabled to re-construct their identity and subject position before the law while others are not.

Epilogue

The Appeal Court of British Columbia rendered its judgement on Bishop O'Connor in spring 1998. It acquitted him of the charge of indecent assault, ruled that the trial judge had erred (through point of law) and ordered a new trial on the rape charge. In June, with the consent of the sole remaining complainant, O'Connor successfully evaded a further trial by negotiating an alternative justice procedure--a healing circle with his victims at Alkali Lake, a First Nations community. In a tersely worded statement of fewer than 300 words, O'Connor issued an 'apology' in which he refers to his "unacceptable behaviour which was

¹³ Discursive and social consequences for Aboriginal women of conferring powers of nationhood upon Aboriginal collectivities has been developed more in Fiske (1996).

totally wrong". While he ceased alleging that he had been seduced or that he had been a partner in consensual sexual relations, he made no admission of criminal behaviour nor of accountability to the women. Rather, he restated his regret that he had broken his vow of chastity.

Through his apology, O'Connor was enabled to 'name' the nature of his relationship with the women, their communities and his god. His apology appropriated the discourse of his victims and sought to relocate himself as their fellow in suffering: "Our views of the case may be different, but I know that it is time to bring us together and to heal". The ambiguity of his statement (what wound of his needs to be healed?) subverted the women's efforts to introduce new modes of talking and thinking about sexual violence and reinforced the patriarchal power structure of the church and colonial society. However his apology may have been received by the women themselves, it appealed to the popular media whose response continued to be shaped by cultural narratives of male vulnerability and stereotypes of female sexuality. The *Vancouver Sun* referred to the "native Indian women with whom he had sex", while a local radio talk show host proclaimed that O'Connor "should answer before his fellow man" for violating his oath of chastity.

For Melanie, the abuse, manipulation, and revictimization continues within the legal arena as Martin continues to sue for full custody of their child, Nicky, so that he can remove him from the province. Melanie feels the emotional strain of being constantly forced into court and of having the violence in their past deemed irrelevant to custody issues.

References

ASSEMBLY OF FIRST NATIONS

1994 *Breaking the Silence: An Interpretative Study of Residential School Impact and Healing as Illustrated by the Stories of First Nations Individuals*. Ottawa, Canada: First Nations Health Commission, Assembly of First Nations.

BRIGHAM, John

1987 'Right, Rage and Remedy: Forms of Law in Political Discourse.' *Studies in American Political Development* 2: 303-313.

BRUNER, Jerome

1992 'Psychology, Morality, and the Law,' In Daniel M. Robinson (ed.), *Social Discourse and Moral Judgement*, San Diego: Academic Press.

CHATTERJEE

DISCOURSE AND DEFIANCE

Jo-Anne Fiske and Patty J. Ginn

- 1986 *Nationalist Thought and the Colonial World: A Derivative Discourse.* London: Zed Books.
- COMAROFF, John and Jean COMAROFF
1992 *Ethnography and the Historical Imagination.* Boulder: Westview Press.
- COMAROFF, John and Simon ROBERTS
1981 *Rules and Processes: The Cultural Logic of Dispute in an African Context.* Chicago: University of Chicago Press.
- CONLEY, John M. and William M. O'BARR
1998 *Just Words: Law, Language, and Power.* Chicago: University of Chicago Press.
- 1990 *Rules Versus Relationships: The Ethnography of Legal Discourse.* Chicago: University of Chicago Press.
- CRONIN, Kay
1976 (1959) *Cross in the Wilderness.* Toronto: Toronto Mission Press.
- FINEMAN, Martha
1988 'Dominant Discourse, Professional Language, and Legal Change in Child Custody Decision Making.' *Harvard Law Review* 101: 727-774.
- FISKE, Jo-Anne
1996 'The Womb is to the Nation as the Heart is to the Body: Ethnopolitical Discourses of the Canadian Indigenous Women's Movement.' *Studies in Political Economy* 51: 65-95.
- FOUCAULT, Michel
1978 *The History of Sexuality Vol. 1. An Introduction.* New York: Random House.
- 1972 *The Archaeology of Knowledge and the Discourse of Language.* New York: Random House.
- 1982 'The Subject and Power.' In Herbert L. Dreyfus and Paul Rabinow (eds.), *Michel Foucault: Beyond Structuralism and Hermeneutics.* Chicago: University of Chicago Press.
- GOODRICH, Peter
1987 *Legal Discourses.* London: MacMillan Press.
- GINN, Patty J.
N.D. 'Wife Battering, Institutional Appropriation, and Treatment Discourse: A Struggle For Discursive Control. Unpublished MA Thesis, University of Northern British Columbia.
- HILTON, N. Zoe
1991 'Mediating Wife Assault: Battered Women and the New Family,' *Canadian Journal of Family Law* 9: 29-53.
- HUEL, Raymond Joseph Armand
1996 *Proclaiming the Gospel to the Indians and the Metis.* Edmonton: University of Alberta Press.

LEFLON, Jean

1994 *De Mazenond 1782-1864, Founder of the Oblates of Mary Immaculate*. Washington: Council for Research in Values and Philosophy.

MERRY, Sally Engle

1990 *Getting Justice Getting Even: Legal Consciousness among Working-Class Americans*. Chicago: University of Chicago Press.

ROMANY, Celina

1994 'Killing the "Angel in the House": Digging for the Political Vortex of Male Violence Against Women.' In Martha Albertson Fineman and Roxanne Mykitiuk (eds.), *The Public Nature of Private Violence: The Discovery of Domestic Abuse*. New York: Routledge.

SELLARS, Bev

1996 'O'Connor doesn't deserve any sympathy,' *The Vancouver Sun*, 24 September.

SMART, Carol

1995 *Law, Crime and Sexuality*. London: Sage.

TODD, Douglas

1997 'Healing can't start until the arrogance stops.' *The Weekend Sun*, Saturday Review, D20.

WHITFIELD, Charles L.

1995 *Memory and Abuse: Remembering and Healing the Effects of Trauma*. Deerfield, Florida: Health Communications Inc.