

“Native Ethics and Rules of Behaviour” in the Criminal Justice Domain: A Career in Retrospect

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Abstract

In a 1990 article of the Canadian Journal of Psychiatry, Clare Brant, a medical doctor who spent a career practicing psychiatry among his people, the Mohawk, wrote of how cultural influences in the realm of mental health contributed to errors in medical diagnosis and treatment, too often with destructive results. This article similarly examines the manifestation of Brant's "Native ethics and rules of behaviour" only this time the venue for misinterpretation is the criminal justice domain where the results have proven equally as destructive for Aboriginal peoples. In this article, the author examines how Aboriginal cultural ethics that evolved over time as a means of suppressing intra-group rivalry and conflict - while emphasizing conciliation and restoration - have negatively defined the Aboriginal experience within our prevailing adversarial criminal justice system. Specific examples spanning two decades from both the courts and policing are included to both illuminate and lend perspective to this "cultural divide".

Under the paradigm of a prevailing Aboriginal¹ worldview, there has been a long-standing consistency in documenting the existence of Aboriginal collective behaviours that are most inclusively represented by Clare Brant's "Native cultural ethics and rules of behaviour".² These behaviours, variously described as the ethics of non-interference, individual autonomy, emotional restraint, non-competitiveness, sharing, and the concept of time, can be accommodated under the general rubric of conflict suppression in Aboriginal cultural traditions. As Brant observed during the course of his medical career among the Iroquois, the cultural ethics and behaviours described are thought to be "present in some form in all tribes of North America" (Brant, 1990:534), although he cautioned against any universal application. In this article I present a theoretical model, informed by ethno-science, to demonstrate how these same Native cultural ethics and rules of behaviour, taken individually or collectively, have served to shape the Aboriginal experience in the adversarial-based system of justice that defines the Canadian criminal justice system. In so doing, I will draw on diverse examples that will illuminate a shared Aboriginal worldview, while also recognizing that the processes by which this worldview is manifested can vary across individual Aboriginal cultures.

In a prevailing Aboriginal worldview, the ethic of *non-interference* is derived from a cultural postulate that to interfere in the interactions of others is actually to attempt to exert dominance over that other individual. The ethic finds expression in the freedom of people to act as they please - so long as group welfare is not compromised - with the corollary that to correct behaviour would amount to interference in an individual's inherent right to autonomy in determining their own actions and decision-making process. And, as long as your own behaviour does not compromise the well-being of others, individuals should be left to determine their own actions. Almost fifty years ago, Helm (1961) explained the interdependence between the behavioural ethics of *non-interference* and *autonomy* by emphasizing the use of emotionally-toned behaviour as a means of safeguarding the autonomy of self to make one's own decisions and choices.

The ethic of non-interference is one of the most widely accepted principles of behaviour among Aboriginal people. Twenty years after Helm's observations, Scollon & Scollon's (1981) study of conversation patterns between Athabaskan-speaking Aboriginals and English speakers reinforced the connection between the ethos of autonomy and non-interference by demonstrating how conversation imposes on a listener's "negative" or private face - and the public self-image they may seek to maintain - thereby increasing the likelihood for a coerced change to one's point of view. From their work among the Athabaskan population in Fort Chipewyan, Alberta, these researchers explained conversational taciturnity and volubility in the context of an imbalance in **social distance** and **power**, suggesting that for English speakers, while the superordinate role is linked with spectatorship and the subordinate role with exhibitionism, among the Athabaskan population the opposite was true.

The implications of this observation for the criminal justice setting are profound as notions of relative power and its direct relationship to volubility or taciturnity can portray a court witness, a victim, or an accused person as hostile or possibly even lacking credibility, when they choose to remain silent in the courtroom setting when required to provide a court-solicited response. The expectation to respond in such a setting threatens the listener's "negative" or private face thereby imposing on their mental space and right to autonomy. Other authors have referred to these perceptions by the court as the "un-" words: uncommunicative, unresponsive, unable, unwilling, and uncooperative (Ross, 1989). In the example of an accused person before the courts, the "un-" words frequently lead to negative conclusions about prospects for rehabilitation and may be reflected during sentencing which is, in its simplest form, a societal response to an individual's actions or perceived remorse for those actions.

Non-interference is, at its basis, the paying of respect to the "negative face" of others. Communication displays are appropriate only when a person is in a position of dominance in relation to whom they are speaking. Where the relationship between speakers is uncertain, Aboriginals will generally opt for silence until that relationship is established. Applying this paradigm to a criminal justice context, police interventions can also be seen to reflect imbalances in dominance and power. In the following model, if we allow dominance to be demonstrated using the typology of volubility and taciturnity, Aboriginals practicing the ethic of non-interference will maintain a large social distance and are taciturn. This is in complete contradiction to the prevailing Euro-Canadian 'mainstream' cultural emphasis on volubility as a means to engage others and extract information, as in the investigative role of a police officer. Examining the dimension of power, it is readily apparent that in a police officer-Aboriginal encounter, the police have the position of power. Let us now turn our attention to this exact scenario using 'D' to represent social distance/taciturnity and 'P' to represent a power position.

Initially our police-Aboriginal contact would appear as (-D) and (-P) as police would attempt to avoid having to overtly resort to their power position (-P), however while in the course of an investigation they would be engaged in volubility and exhibiting little social distance or (-D). By contrast, the Aboriginal person being approached by police would favour respect for social distance or (+D) - particularly among unknowns - and in a collectivist egalitarian tradition would favour a non-existent power differential (-P). As the interaction progresses, the Aboriginal person would continue to respond in accordance with the ethic of non-interference, as shaped by a prevailing Aboriginal worldview, and would continue to favour great social distance and taciturnity (+D). This apparent reticence to engage in conversation quickly exacerbates the encounter with police to the point that the police - empowered by statutory provisions that necessitate cooperation in the course of an investigation - increase the power differential to (+P); the result in this police-Aboriginal encounter now appears as (-D) and (+P) which is the exact opposite of what the expectation would be in an egalitarian Aboriginal worldview. And, as a result of this type of encounter, the application of previously cited "un-" descriptors would be the inevitable result.

During the Royal Commission of the Donald Marshall Jr. Prosecution (1988:np) it was noted that "Indians respond to anxiety provoking situations, such as testifying in court, giving evidence in their own defence, or giving statements to police, by becoming quieter and quieter." Using 'D' to reference social distance - as exhibited by volubility or taciturnity - and 'P' to represent power differentials, Chart 1 depicts what frequently happens in police-Aboriginal encounters. Similar types of responses to enforcement-driven encounters have been documented among such geographically disparate Aboriginal groups as the Athabaskans (Scollon & Scollon, 1981), the Northwest Coast peoples (Seguin, 1982), the Iroquois (Foster, 1982), the Apache (Basso, 1979), the Ojibway (Black-Rogers, 1982), the Cree (Stonechild Inquiry, 2004), and the Chippewa (Ipperwash Inquiry, 2007); each supporting the observation that these actions are representative of a prevailing Aboriginal worldview that finds expression through Aboriginal cultural ethics and rules of behaviour.

A corollary to the ethic of non-interference is the purposeful avoidance of eye-contact. Individualist or low-context³ cultures that form the mainstream in Canada and the United States, have a tendency to conclude that those who will not maintain eye-contact are exhibiting evasiveness. Conversely, when these same low-context cultures endeavour to demonstrate sincerity and respect, every effort is made to establish and maintain eye-contact. Eye-contact can be considered a threat to individual autonomy because it presents a distraction to another person and can be interpreted as an attempt to dissuade a person from their own opinion, by encroaching on their mental space. Consistent with this observation, the avoidance of eye-contact allows an audience to listen without restricting their pondering of what has been said, while simultaneously listeners may look at a speaker more directly without a violation to either's personal autonomy. Basso (1979:51) has described Apache perceptions of "Anglo" eye-contact as "entirely too probing ... a distasteful tendency that Apache take to be indicative of a weakly developed capacity for self-restraint." In a courtroom or police interview setting, the avoidance of sustained and direct eye-contact has caused Aboriginal people to be cast as detached, not attending to what's being said, or appearing as disinterested.

These types of misattributions to behaviour stem from the expectations of the dominant low-context cultural pattern that both fosters and interprets sustained eye-contact as a means of conveying sincerity, interest, and truthfulness. All too often police occurrence reports - that are ultimately used to inform court proceedings - contain these exact types of observations pertaining to non-verbal communication; the interpretation of which is, by overwhelming majority, framed from within a mainstream individualist or low-context cultural paradigm (Prowse, 1997). Chart 2 depicts the salient differences between the dichotomies of collectivist / high-context and individualist / low-context cultural patterns.

The cultural ethic of *emotional restraint* can be viewed as a corollary to, and extension of, the behavioural ethics of non-interference and individual autonomy, wherein the overt expression of emotion is controlled as a means of ensuring continued autonomy. To do otherwise would be viewed as an attempt at coerced agreement or compliance. Emotional restraint has been cited as a contributing factor in incidents of psychosocial disturbance among Aboriginals, whose repressed hostility "often explode[s] into the open under the influence of alcohol and is inappropriately visited upon innocent bystanders" (Brant et al. 1981:535). The suppression of emotional displays in the public sphere has - in cases of those charged with criminal acts - risked an interpretation of lacking remorse for one's actions; an observation that has implications for the sentencing process and eventual eligibility for early forms of release from incarceration. The ethics of *non-competitiveness* and *sharing* find explanation when they are discussed in the context of each other. The practice of non-competitiveness suppresses conflict by averting intra-group rivalry and subsequent personal embarrassment to those less successful. Sharing is an extension by which intra-group rivalry is further suppressed because it discourages the hoarding of material goods. As a practice, sharing influences against power relationships by correcting for the social dimension of dominance that could reasonably flow from acquiring and maintaining excess.

Research among the Navajo by Kunitz & Levy (1994) demonstrated how the ethos of sharing while engaged in drinking maintained the ethic of non-interference. An emphasis on sharing-while-drinking was seen to be a crucial social control mechanism designed to avoid individual excess. Because of the emphasis placed on individual autonomy, Aboriginal participants are much less likely to intervene in instances of excessive use, even if it should become socially disruptive. As a result, sharing is used as a way to safeguard against individuals drinking to excess and potentially leading to social disruption. Intoxication is not gauged by the conventional police standards that cite ambulatory impairment, slurred speech, dilated pupils, or 'passing out', but rather is evaluated in relation to a behavioural standard (Medicine, 1983). Aboriginals charged with public intoxication have overwhelmingly commented that their initial charges - and often arrest detention - remained a mystery to them. Invariably the phrases "But I wasn't bothering anybody" or "I wasn't doing anything wrong" were uttered, and lend insight into the Aboriginal person's assessment of their drinking habits (Prowse, 1997).

What was being witnessed by the use of such comments was the application of a behavioural standard to the public consumption of alcohol. In the mind of those being processed for public intoxication, the criteria for being charged by police was not the application of physical indicators, but rather how they conducted themselves in that public place while drinking. At the level of the individual drinker, their ability to refrain from interfering with others was the internalized barometer used to assess intoxication. Aboriginal drinking patterns can be seen to be shaped by cultural factors such as the ethic of sharing and the collectivist notion of public space. Gatherings in such public places located outside regular drinking establishments renders the Aboriginal participants vulnerable to police charges arising from provincial offences of public intoxication. Although not criminal in nature, such a charge frequently results in police attempts to detain the intoxicated individual(s); an action that is often resisted and can quickly escalate to the laying of more serious criminal charges, frequently those of assaulting a police officer and/or obstruction of that police officer by those in attendance who may also perceive police actions as interference.

The cultural ethic of *non-confrontation* as a means to avoid intra-group hostility in a collectivist Aboriginal worldview, is closely linked to the ethic of non-interference. What separates the two is the context: non-interference applies to a passive context where choice exists, whereas the protocol for non-confrontation finds expression in active encounters where the element of choice does not exist. Examples of Aboriginals providing self-incriminating statements to police demonstrate the manifestation of the ethic of non-confrontation. Confessing to something you did not do can be considered easier than telling a police officer, or any person in authority, that they are wrong (Ross, 1992). The effects of power differentials - real or perceived - during interactions with Aboriginals also lends perspective to this example, as we see the participant with the power dictating and the other exhibiting deference or compliance. The relationship between the Aboriginal cultural value of respect and the role of personal responsibility toward restoring balance and facilitating healing, offers an alternate explanation for why Aboriginals may confess and then plea "guilty" in courtroom settings. In Aboriginal cultures, the pursuit of justice and the methods of attaining it involve restoring equilibrium to the community.

Consistent with this intent, we have seen the presence of "Native ethics and rules of behaviour" designed to mitigate conflict situations and thereby assure the continuity and harmony of the social group. Aboriginal languages reinforce the importance of maintaining equilibrium or restoring balance to a *status quo ante* state, and indeed the concepts of "justice", "way of life", and "respect" may regularly be represented by the same word, as each finds expression through the other. Therefore, to plead "not guilty" in a situation of wrong-doing and, in so doing, deny an allegation that is known by all to be true, is "seen as dishonest and such a denial would be a repudiation of fundamental, highly valid, though silent, standards of behaviour" (Sinclair, 1994:175). The notion that 'truth' can be extracted by an adversarial process of argumentation is incompatible with both Aboriginal behavioural ethics designed to suppress conflict and with the contextual subjectivity of 'truth' inherent in the Aboriginal worldview: a worldview which gives primacy to speaking your 'truth' as you know it. The recognition of Aboriginals freely speaking their truth - which may include admitting guilt to police and the courts - has been referred to as the "but' story" (Little Bear, 1994). In other words, they speak their truth but also expect to be able to explain the "but" situation that has influenced their actions, and for which that truth is relative and socially constructed by the context surrounding those actions.

This emphasis on situational context as a mitigating factor in the determination of guilt has long been documented in the literature. Over a half-century ago, Kluckhohn (1959) observed that among the Navajo there is no intrinsic 'rightness' or 'wrongness' to an act in and of itself. Rather, circumstances surrounding an act define whether or not there are consequences, and if so, they are flexible: situation-specific and context-determined. Complicating the telling of 'truth' as you know it, is the structure of the English language with its emphasis on nouns designed to label or name, as opposed to Aboriginal languages emphasizing process-focused verbs. Verb-based Aboriginal languages emphasizing process resist viewing actions as discrete entities, whereas a descriptive noun-based English language gives primacy to naming specific actions devoid of context. This notion of process also extends to how time is perceived and treated.

In the dominant North American model⁴ - as is the case with individualist cultural orientations widespread - time is treated as a tangible with which we are pre-occupied: we can spend time, waste time, run out of time, and never seem to have enough time. This prevailing low-context or individualist cultural obsession with time - where it is precise and of one type or monochronic - is in complete opposition to the high-context or collectivist orientation of Aboriginal peoples. In the Aboriginal worldview time is often referred to as polychronic: a term that describes its situational flexibility as shaped by contextual and relational occurrences reflective of a complex network of relationships. Note the following courtroom exchange between a Crown Prosecutor and an Aboriginal witness to a theft:

Prosecutor: Do you know what time these events occurred?
 Witness: Night time; it was dark out.
 Prosecutor: Approximately what time of night?
 Witness: It was after I had gone to bed.
 Prosecutor: Approximately what time would you estimate?
 Witness: All I know is it was dark; after I had gone to bed and before morning.
 Prosecutor: What time did you go to bed?
 Witness: I don't know; it was dark a long time.

For this particular witness time did not have a precise monochronic dimension, but rather was indeed shaped by contextual [night time] and situational [after bed and before morning] factors. Similar observations have been made in Australian courts which have noted descriptions of time varying contextually and ranging from a period of minutes to weeks or months (R. v. *Anunga* (1976) as cited by Sinclair, 1990). The following is an explanation of time provided by a Blackfoot elder during a court proceeding wherein there seemed to be an inordinate 'lag' between the Crown Prosecutor asking a question of an Aboriginal witness and their response to the court. As explained:

The stereotype of an Indian that takes forever and a day to answer or make a decision, that stereotype is true, but that's because the person has to think of the spider web network of relationships. In a very singular way, your justice system just looks at that one person and it's an either/or notion. (Anonymous elder)

The delay the elder was referencing varied between 8 to 15 seconds in contrast to the usual mainstream response turnaround time of 3 to 5 seconds. The observation by many in attendance in this particular court setting was that the witness was struggling with their testimony at the least, and perhaps not even sure of that testimony. The elder's explanation however offered an alternative explanation.

Differing concepts of time between Aboriginals and non-Aboriginals in the criminal justice realm is all too frequently revealed by the emphasis placed on its passage; an issue of particular contention in police operational procedures. Aboriginal land occupations and/or stand-offs attended by police are predicated on “progress”; progress that is defined by a resolution within time frames prescribed by law enforcement agencies possessing the power differential (+P) and exhibiting little regard for Aboriginal expectations for social distance (+D). In Canada, federal Inquiries into the Oka, Quebec and Ipperwash, Ontario land occupations and resultant stand-offs with police, both revealed government and police communications emphasizing the need for “progress” in negotiations to occur within prescribed time frames (Standing Committee Aboriginal Affairs, 1991; Ipperwash Inquiry, 2007).

While the above discussion has focused on the manifestation of Aboriginal cultural ethics and rules of behaviour within the criminal justice arena, the structure⁵ of Aboriginal languages has also posed problems during intercultural communication events. Darnell's (1982) work among the Cree demonstrated the ambiguity which can surround an apparently straightforward affirmative response of “yes”. Because the Aboriginal worldview interprets talking as a “placing of information on the interactional floor” (1982:71) communication is an event wherein “yes” does not necessarily mean agreement but rather that you have been heard. As observed by Ross (1992) it may also mean “no” but that the listener does not want to contradict the speaker as a person in authority. In short “yes” may be an affirmative response, it may be a “no” but that the listener is exercising the ethic of non-confrontation and would rather not disagree with the speaker, or it may simply mean that the speaker is being heard by the listener.

Another example of the limitations to translation posed by language can be found in transcripts from the Royal Commission on the Donald Marshall, Jr. Prosecution from Nova Scotia (1988) which referenced the inflexional tone of the *Mi'kmaq* language which uses word-endings to convey emotion. Aboriginal languages that don't use voice qualifiers such as tone to convey emotion, can cause some to reach the conclusion that a witness is lacking assertion or resolve. Equally problematic in Aboriginal languages such as *Mi'kmaq* is that the word “guilty” has no translation equivalent and translates most closely to the word “blame” which, when posed as a question, begs two very different interpretations. Saying “yes” to being guilty is quite different than responding “yes” to being blamed; one is an affirmative response to an unlawful act and the other to an accusation. The following example from an Australian court case reinforces the potential seriousness of incompatible linguistic structures:

Police (terminology) and legal English sometimes is not translatable into the aboriginal languages at all and there are no separate aboriginal words for some simple words like 'in', 'at', 'on', 'by', 'with', or 'over', these being suffixes ... 'Did you go into his house?' means to an English person 'Did you go into the building?' But to an aboriginal it may also mean, 'Did you go within the fence surrounding the house?' (R. v. *Anunga* (1976) as cited by Sinclair, 1990).

Further examples of Aboriginal language-structure-derived miscommunication can be found among Algonquian language pronouns that connote whether the referent is animate or inanimate, but not to its sex. Both ‘beings’ and objects can be referenced as animate depending on whether an object's spirit, and hence the implied notion of its power, is being referenced. As a consequence, personal pronouns refer to everyone as a male and “may be less sensitized to always noticing a person's sex as a significant attribute of that individual” (Kehoe, 1992:604). The implications for a court witness who struggles with referencing the proper sex are self-evident and, analogous to Ross' (1989) example of “un-“ words, these could be equally labelled with a host of “in-“ words: incompetent, inconsistent, indecisive; all of which diminish a person's credibility in the Canadian adversarial-based system of justice.

Yet another of the ways in which the structure of Aboriginal languages can impose impediments to intercultural communication within the criminal justice realm, can be found in a lack of reference to the future. The absence of a future tense in Aboriginal languages has been explained by some as an extension of the ethic of non-interference in how the present will proceed: events should follow a natural and unaltered progression which could be unduly influenced if reference was made to the future. The Aboriginal emphasis on the present can not only create confusion, but has been cited for its ability to potentially diminish the effectiveness of future-oriented deterrence programs, such as those that characterize aspects of our correctional system. (James, 1979) Taken together, the above examples provide diverse illustrations of how Aboriginal cultural ethics, rules of behaviour, and language structures can influence the outcome of Aboriginal interaction within our prevailing adversarial system of justice. In Canada, government-initiated task forces have continued to cite issues of intercultural miscommunication and misinterpretation as problematic and, all too frequently, as negatively defining the Aboriginal experience in the criminal justice system.⁶ And, while it is acknowledged that police are the “gatekeepers” to the criminal justice system, this article has attempted to provide a model for interpretation that has implications for the courts and correctional systems, as well as other Eurocentric systems of justice.

Chart 1

Aboriginal expectation:	+D and -P	+D and -P
Police actions:	-D and -P	-D and +P

Passage of time →

Chart 2**Low / High Context Cultures Continuum**

<u>Low-context</u>	...	<u>High-context</u>
• individual focus		group focus
• verbal information		background context
• emphasis on message		emphasis on relations
• emphasis on what's said		emphasis on how it's said
• heterogeneous beliefs		homogeneous beliefs

Adapted from: Hall (1976)

Endnotes

¹ The term Aboriginal includes those of North American Indian, Metis, or Inuit (Eskimo) ancestry. The term Native is used where the authors cited have preferred its use in their work.

² Authors have variously referred to elements of these behavioural characteristics as "features of historic personality" (Hallowell, 1955), "postulates" (Hoebel, 1960), "traits" (Couture, 1978), "values" (James, 1979; Couture, 1985), "virtues" (Medicine, 1983).

³ Edward T. Hall developed use of the terms low-context and high-context to dichotomize different cultural emphasis placed on the context surrounding one's actions. Geert Hofstede applied a similar dichotomy to cultures worldwide using the terms individualist and collectivist according to the primacy placed on the individual or the group collective.

⁵ For the purposes of this article, the writer is specifically speaking of Canada and the United States when reference is made to North American individualist cultural traditions. This is being done in order to give recognition to Mexico as modelled in a collectivist cultural tradition as opposed to its individualist North American counterparts.

⁴ Saussure (1974, as cited by Hanks (1994:25)) notes that the French language clearly demarcates *langue* as that collective part of language that deals with grammar, and *parole* as that individual part of language dealing with speech or "actual talk". The English language uses the word language as an inclusive terminology to encompass both aspects.

⁶ Government initiated task forces citing these elements span 20 years. Among the first to make this observation were the Aboriginal Justice Inquiry of Manitoba (1989) and the Task Force on the Criminal Justice System and its Impact on the Indian and Metis Peoples of Alberta (1991); more recently, the Saskatchewan Commission on First Nations and Metis Peoples and Justice Reform, 2004 and the Ipperwash Inquiry (2007).

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