

2010

Mapping the Legal Consciousness of First Nations Voters: Understanding Voting Rights Mobilization

Lesley A. Jacobs

Follow this and additional works at: <https://ir.lib.uwo.ca/aprci>



Part of the [Other Public Affairs, Public Policy and Public Administration Commons](#)

Citation of this paper:

Jacobs, Lesley A., "Mapping the Legal Consciousness of First Nations Voters: Understanding Voting Rights Mobilization" (2010). *Aboriginal Policy Research Consortium International (APRCi)*. 36.
<https://ir.lib.uwo.ca/aprci/36>

2

Mapping the Legal Consciousness of First Nations Voters: Understanding Voting Rights Mobilization

Dr. Lesley A. Jacobs¹

The universal franchise has become, at this point in time, an essential part of democracy. From the notion that only a few meritorious people could vote (expressed in terms like class, property and gender), there gradually evolved the modern precept that all citizens are entitled to vote as members of a self-governing citizenry. Canada's steady march to universal suffrage culminated in 1982, with our adoption of a constitutional guarantee of the right of all citizens to vote in s. 3 of the Charter.²

Chief Justice Beverley McLachlin, *Sauvé v. Canada* (2002)

Introduction

The issue of Aboriginal electoral participation arises not out of concern about how individual Aboriginal voters vote, that is to say, which candidates or parties they support, but rather with electoral participation writ large, that is, whether or not they vote at all. The pattern of electoral participation for Aboriginal peoples varies greatly, depending on context. There is a common pattern of low Aboriginal voter participation in federal elections. In the 2000 federal election, Daniel Guérin determined that voter participation on First Nations reserves was 48%, which was 16% below the overall participation rate.³ At first glance, low turnout among Aboriginal voters should not be surprising. As Alan Cairns has observed, "Part of the explanation is practical. Many urban Aboriginal persons move frequently, have low literacy levels, are unemployed, are disconnected from mainstream society and are distanced from the discussion process that attends federal elections."⁴ In Nunavut, which is composed of a majority of Inuit people, voter turnout at federal elections appears to be the lowest in the country: 54.1% in 2000, 43.9% in 2004, 54.1% in 2006, and 47.4% in 2008—well below the national turnout.⁵ Yet, in other elections, participation rates among Aboriginal voters have been very

high. In Nunavut, for example, the electoral participation in its first two territorial elections was very high—88.6% in 1999, 93.7% in 2004—but it declined significantly in 2008 to 71%.⁶ There are familiar explanations for these patterns. It is often said that these patterns reflect the fact that Aboriginal peoples in Canada, on the one hand, are alienated from many legislative bodies (such as the Parliament of Canada and most provincial legislatures) and, on the other hand, view other legislative bodies (such as that of the territory of Nunavut) as an embodiment of their identity as distinct communities or nations within the Canadian state.⁷ Elections for the latter are to be characterized by high voter turnout among Aboriginal persons, whereas elections for the former yield lower turnout.

This paper seeks to explore an alternative approach to research on Aboriginal electoral participation by building on the insight that electoral participation is fundamentally a matter of rights mobilization. When Canadians vote in federal elections, this is not merely an instance of participation in the democratic process, it is also an exercise of a fundamental right of citizenship. Voting from this perspective is a reflection of an important legal status within the relevant community, a social status embedded in legality. In turn, when individuals do not vote, they are failing to mobilize rights, which is a reflection of both how they see themselves in relation to that community and their status among others within that community. The relevant point is that Aboriginal electoral participation is a gauge on the identity of individual Aboriginal voters and what having the right to vote means to them.

This paper is divided into four sections. The first section outlines the theoretical and methodological framework for the paper. It explains in particular the relevance of asking questions about the legal consciousness of Aboriginal voters: How do individual Aboriginal voters view the legality of the rights mobilization involved in voting? What sort of cultural meanings are bound up in voting? Does this vary according to what the vote is for? What sort of identity must be assumed in order to mobilize voting rights? The second section provides a brief history of First Nations voting rights in Canada. This history is the key to situating the legal consciousness of First Nations voters. The third section provides a map of the legal consciousness—possible symbolic legal meanings of the right to vote—of First Nations voters. The concluding section sketches out some policy implications of this road map for increasing electoral participation in First Nations communities as well as some future directions for research.

It must be emphasized that although I believe that the theoretical and methodological framework advanced in this paper is applicable in research about electoral participation among all of Canada's diverse Aboriginal peoples—First Nations, Inuit, Métis—the specific claims about mapping legal consciousness are applicable only to individual members of First Nations communities. This is because, as I show below, legal consciousness is a reflection of particular histories and people's experiences with the legality of voting rights, and in this regard there has not been uniformity among all Aboriginal peoples. Throughout this paper, First

Nations and Indian (Status and non-Status) are used interchangeably, although the latter is used principally in the context of reporting on provisions of legislation and policy statements.

Theoretical and Methodological Framework

The analysis in this paper rests on the claim that the right to vote and rights mobilization have significant legal meanings beyond the mere impact of individual votes on Canadian elections and representation. The validity of this claim is most evident in judicial decisions by Canadian courts. It has, for example, found explicit expression in the two most significant voting rights cases decided by the Supreme Court of Canada in the past decade.

In the case of *Sauvé v. Canada*, decided in 2002, the Court was asked in effect about the legal status of prisoners in federal jails. At issue was federal legislation that denied those prisoners serving sentences longer than two years the right to vote in federal elections. The Court ruled that the denial of the right to vote for those prisoners violated the legal status afforded them under the Charter of Rights and Freedoms. In her opinion for the majority, Chief Justice McLachlin wrote,

denying citizens the right to vote runs counter to our constitutional commitment to the inherent worth and dignity of every individual. As the South African Constitutional Court said in *August v. Electoral Commission*, 1999 (3) SALR 1, at para. 17, “[t]he vote of each and every citizen is a badge of dignity and of personhood. Quite literally, it says that everybody counts.” The fact that the disenfranchisement law at issue applies to a discrete group of persons should make us more, not less, wary of its potential to violate the principles of equal rights and equal membership embodied in and protected by the *Charter* ... The idea that certain classes of people are not morally fit or morally worthy to vote and to participate in the law-making process is ancient and obsolete. Edward III pronounced that citizens who committed serious crimes suffered “civil death,” by which a convicted felon was deemed to forfeit all civil rights. Until recently, large classes of people, prisoners among them, were excluded from the franchise. The assumption that they were not fit or “worthy” of voting—whether by reason of class, race, gender or conduct—played a large role in this exclusion.⁸

The point that Chief Justice McLachlin is making is that the right to vote and its exercise matters for prisoners not because of its instrumental effect on elections—the impact their votes will have on particular electoral outcomes—but rather because the recognition of that right is a reflection of the status and identity of prisoners. And the symbolic legal meaning of the right to vote is so significant that

it provides the court with constitutional grounds for striking down a legislative provision that excludes prisoners in federal jails from the franchise.

Three years earlier, in *Corbiere v. Canada*, the Supreme Court of Canada addressed a constitutional challenge to the section of the *1985 Indian Act* that extended the right to vote in band council elections only to band members “ordinarily resident” on the reserve. The Court unanimously struck down the section of the *Indian Act* and extended the right to vote in band elections to off-reserve band members. Writing for the majority of the Court, Justices McLachlin and Bastarache together conclude,

the complete denial to off-reserve members of the right to vote and participate in band governance treats them as less worthy and entitled, not on the merits of their situation, but simply because they live off-reserve ... it is clear that the s. 77(1) disenfranchisement is discriminatory. It denies off-reserve band members the right to participate fully in band governance on the arbitrary basis of a personal characteristic. It reaches the cultural identity of off-reserve Aboriginals in a stereotypical way. It presumes that Aboriginals living off-reserve are not interested in maintaining meaningful participation in the band or in preserving their cultural identity, and are therefore less deserving members of the band. The effect is clear, as is the message: off-reserve band members are not as deserving as those band members who live on reserves. This ... results in the denial of substantive equality ... The effect of the legislation is to force band members to choose between living on the reserve and exercising their political rights, or living off-reserve and renouncing the exercise of their political rights. The political rights in question are related to the race of the individuals affected, and to their cultural identity. As mentioned earlier, the differential treatment resulting from the legislation is discriminatory because it implies that off-reserve band members are lesser members of their bands or persons who have chosen to be assimilated by the mainstream society.⁹

Like in *Sauvé*, the claim that the right to vote is infused with symbolic legal meaning is pivotal to the decision of the Supreme Court to strike down federal legislation in *Corbiere*. The obvious similarity and tone between the two judgments neatly illustrates the extent to which justices of the Supreme Court of Canada view voting rights as a reflection of legal status.

In the same way that voting is steeped with symbolic legal meaning for our judges, it makes sense that the right to vote is steeped with symbolic legal meaning for the individual voter. In both *Sauvé* and *Corbiere*, the Supreme Court

was asked to strike down legislation on the grounds that voting was more than just an expression of a preference for a particular candidate in an election. Suppose, however, that we ask a similar question from a different perspective: What is the meaning of voting for the individual Aboriginal voter? My point is that better understanding the answer to that question is pivotal to understanding the decision of individual Aboriginal voters to vote or not, which in turn provides insight into Aboriginal electoral participation.

Like in the Supreme Court cases, this question is fundamentally one about how someone understands the right to vote as a legal status and an expression of legality. In recent socio-legal scholarship, the study of how ordinary persons—as opposed to legal professionals, such as judges and lawyers—understand and make sense of law and legality has come to be referred to as legal consciousness research. The idea of legal consciousness, at its core, is thus how ordinary people, as opposed to legal experts and professionals, understand and make sense of law.¹⁰ Legal consciousness, in this sense of the term, refers to an individual's knowledge or awareness of the law and its potential for resolving disputes and affecting social change.¹¹ The significance of legal consciousness, in other words, is that it provides people with interpretive frameworks to guide their interactions with law and inform their beliefs about law's promise or danger. Any answer to the question I posed above—What is the meaning of voting for the individual Aboriginal voter?—is a claim about the legal consciousness of that voter.

Legal consciousness is more than a simple reflection of attitudes or beliefs about legal rights. It is better thought of as a form of cultural practice in which beliefs and attitudes about legal rights affect practices and what people do; in turn, these practices and actions shape beliefs and attitudes. “In this theoretical framing of legal consciousness as participation in the construction of legality,” explain Ewick and Silbey, “consciousness is not an exclusively ideational, abstract, or decontextualized set of attitudes toward and about the law. Consciousness is not merely a state of mind. Legal consciousness is produced and revealed in what people do as well as what they say.”¹² Legal consciousness is, however, never entirely the construction of a single individual or simply a subjective viewpoint.¹³ It is, in the words of Ewick and Silbey, “always a collective construction that simultaneously expresses, uses, and creates publicly exchanged understandings.”¹⁴ To put this another way, legal consciousness is not a function of doctrinal law, hence changes in doctrinal law do not necessarily lead to parallel changes in legal consciousness.¹⁵ For example, changes to the *Indian Act* do not necessarily lead to changes in legal consciousness among First Nations peoples.

Legal consciousness research is designed to identify shapes and patterns of legal consciousness. This assumes that although the legal consciousness of an individual is constantly changing, there is something instructive about trying to identify the variety of forms it can take. These forms or varieties of legal consciousness are by necessity only ideal types or approximations. The underlying idea that how a person deals with a particular interaction with political and legal institutions and

the law generally—a police stop, a letter from the bank’s lawyer threatening to foreclose on a mortgage in default, a complaint about discrimination against a landlord—is largely a function of the broad position or viewpoint he or she has on law and legality. Moreover, this viewpoint is a reflection of law’s presence in and relevance to a person’s everyday life. Elsewhere, I have introduced the idea of differentiated legal consciousness.¹⁶ Instead of assuming a uniform legal consciousness when crises arise in a particular jurisdiction, my approach has been to treat legal consciousness as varied among groups of individuals differently situated in the crisis. The promise of this differentiated approach to legal consciousness is that it enables me to both draw contrasts between perspectives of differently situated groups within the same jurisdiction—which reinforces the fact that some groups, such as Canada’s Aboriginal peoples, are not homogeneous—and to note commonalities between similarly situated groups in other jurisdictions.

Another important strand in legal consciousness research is exploring the effects of legality on identity. The underlying idea is that often mobilizing legal rights demands taking on a particular identity. Perhaps this is clearest in the case of disability rights law.¹⁷ The past three decades have been characterized by a dramatic expansion by legislatures and the courts in the field of rights for persons with disabilities. Yet, it has been discovered that the pattern of mobilization of these rights is a complex one. In particular, in order for individuals to stand on these rights, they need to identify as persons with disabilities. Taking on this identity is something that some people struggle with and indeed resist, which affects their capacity to mobilize the rights enacted by disability rights law. As one recent study of disability rights mobilization noted, “Not only does identity determine how and when rights become active, but that indeed rights can also shape identity.”¹⁸

I have stressed above that an answer to the question about the meaning of voting for the individual voter is a claim about the legal consciousness of that voter. How that question is answered can provide great insight into voting rights mobilization by Aboriginal peoples, for rights mobilization is a function of what those rights mean to the individuals who hold them. Instead of seeing rights as instruments or tools, rights are viewed from the perspective of what they actually do and how they matter, or do not matter, to their intended beneficiaries. Voting in Canada is, as I emphasized at the outset, a legal right; when individuals choose to vote or not, they are actively mobilizing legal rights. Logically, Aboriginal electoral participation is fundamentally an issue of rights mobilization. For that reason, an important dimension of electoral participation is legal consciousness. How do individual Aboriginal voters view the legality of the rights mobilization involved in voting? What sort of cultural meanings are bound up in voting? Does this vary according to what the vote is for? What sort of identity must be assumed in order to mobilize voting rights?

The focus for the rest of this paper is on the narrower field of the legal consciousness of First Nations voters and its significance for better understanding First

Nations electoral participation. By situating the discussion within the context of the history of First Nations voting rights, I identify significant landmarks in a map of the legal consciousness of First Nations voters.

A Brief History of First Nations Voting Rights

A brief history of the evolution of First Nations voting rights provides the key to situating the legal consciousness of First Nations voters. The standard Canadian history of voting rights over the past 150 years is one of the gradual extension of the right to vote from a very small elite to working-class men to women to young adults. This is the history Chief Justice McLachlin makes reference to in the epigraph of this paper when she refers to “Canada’s steady march to universal suffrage.” An examination of the history of Aboriginal voting rights suggests, however, that for First Nations peoples the march has not been “steady,” but rather one that has looped and weaved. For simplification and brevity, I shall focus here and in the rest of the paper on the voting rights of First Nations.

From Confederation until 1920, members of First Nations communities had no right to vote in federal or provincial elections. The right to vote during this period was regulated by the *Indian Act*, which held that “registered Indians” were not permitted to vote in federal elections. (The terms First Nations and Indian—Status and non-Status—are used interchangeably here, although the latter is used principally because of its frequent usage in legislation and policy statements.) The *Indian Act* viewed Indians as wards of the state, incapable of managing their own affairs, and the appropriate subjects of paternalistic measures designed to serve their own best interests, even if Indians themselves contested that such measures really were in their own best interests. The point is that during this period, Indians were judged as unworthy and undeserving of the right to vote.¹⁹

The *Indian Act, 1876*, introduced the idea of voluntary enfranchisement.²⁰ As Larry Gilbert explains it,

Enfranchisement was the surrender of Indian status and band membership in return for Canadian citizenship and the right to hold land in fee simple. It was based on the theory that aboriginal peoples in their natural state were uncivilized. Once an aboriginal person acquired the skills, the knowledge and the behaviour valued by the civilized society, the aboriginal person might qualify for citizenship.²¹

The *Indian Act, 1876*, allowed Indians to apply for enfranchisement. Applicants who were doctors, lawyers, notaries public, ministers or priests, or who had completed a university degree automatically had their applications approved, giving them the right to vote and enabling them to take their share of land out of the reserve and own it privately. Other Indians who applied for enfranchisement were subject to a review; upon approval they would be “converted” into a “proba-

tionary Indian” for three years. After three years, they would then be able to vote and take their share of land out of the reserve.²² From 1876 until 1920, only 250 Indians successfully applied for enfranchisement.²³

The significance of enfranchisement is obviously that an individual could legally either be an Indian or a voter. There is in the history of the “steady march to universal suffrage” in Canada nothing comparable. And indeed any sort of analogous proposal would have seemed absurd. The granting of the right to vote to women was not, for example, conditional on them ceasing to be women. Nor was there an analogous requirement for those in mental institutions or prisons or those between the ages of eighteen and twenty-one years. For these marginal groups, inclusion in the suffrage was genuinely an achievement. For First Nations, there was nothing to celebrate.

In 1920, the *Indian Act* was amended to allow for a process of involuntary enfranchisement for men from First Nations communities. In effect, rather than having individuals initiate the application for enfranchisement, this process involved identifying individual Indian males who were “deserving” of enfranchisement and pressuring them to apply for it.²⁴ The impetus for this amendment was the low number of individuals who opted for voluntary enfranchisement. After two years, objections from the First Nations community led to the repeal of this amendment, although the route to voluntary enfranchisement was preserved.

However, it is important to recognize that for women and children from First Nations communities, involuntary enfranchisement was an inherent feature of the enfranchisement provisions of the *Indian Act* until 1951. The reason is that when a man applied for enfranchisement, his wife and children were automatically considered enfranchised, even if they were not specified in the application. Beginning in 1951, male applicants applying for enfranchisement were required to include reference to women and children in order for them to be enfranchised. However, it also needs to be noted that until 1985, Aboriginal women lost their Indian status when they married someone who did not have Indian status.²⁵

In 1960, Parliament enacted the *Canada Elections Act* which granted all “registered Indians” the right to vote. The relevant context for this legislation was threefold. The first important factor was the negative international attention that the American South was receiving for its denial of voting rights for African Americans. The second important factor was the passage of the Canadian Bill of Rights in 1960, which made reference to equality and non-discrimination but did not include an explicit right to vote (in contrast to the 1982 Charter of Rights and Freedoms). Finally, this development was part of the main theme of the government’s Indian policy since 1945, which involved a shift from traditional protection and paternalism towards “self-government for the Indian people” and “a policy of decolonization.”²⁶ In 1948, a special joint committee of the Senate and the House of Commons proposed revisions to the *Indian Act*, “designed to make possible the graduate transition of Indians from wardship to citizenship and to help them to advance themselves ... it be the duty and responsibility of all officials dealing

with Indians to assist them to attain the full rights and to assume the responsibilities of Canadian citizenship.²⁷ Granting all Indians the right to vote in 1960 was part of that gradual transition.

What it actually meant to grant in 1960 all Indians the right to vote without condition remains contested. In the 1960s, two views emerged, which, to a large extent, continue to frame the issue. One view was expressed clearly by another parliamentary committee in 1967. The Hawthorn Committee held, “Integration or assimilation are not objectives which anyone else can properly hold for the Indian ... Indians should be regarded as ‘citizens plus’; in addition to the normal rights and duties of citizenship, Indians possess certain additional rights as charter members of the Canadian community.”²⁸ The identification of Indians as citizens plus by the Hawthorn Committee was intended to express the idea that Indians should enjoy the right to vote and other rights of citizenship as a complement to their distinctive identity and special status as Canada’s First Nations.

The other view received its best-known expression in the 1969 white paper issued by the Trudeau government, “Statement of the Government of Canada on Indian Policy.” A. D. Doerr provides a comprehensive summary of the white paper:

In substantive terms, the objective of the 1969 proposals was to promote the full and equal participation of Indian people in the social, cultural, economic and political life of Canada. Indians were to be given the same freedoms, rights and opportunities as other Canadians in addition to the recognition of their cultural heritage and identity as a vital element of a multi-cultural society. The basic assumption upon which the proposals were based was the principle of equality ... It was the Department’s [of Indian Affairs and Northern Development] view that the existing legislation institutionalized a system of apartheid and oppression ... Land was the only area in which the federal government felt it had an obligation to continue to provide for special legislative protection to the Indian people ... For all other intents and purposes, Indians were to become subject to the same laws which applied to other Canadians.²⁹

In practical terms, whereas the citizens plus view embraced special status for Indians, the alternative view advanced the idea of equal status for Indians.

Much of the criticism, especially by Indian organizations, of the equal status view was, and continues to be, that the effect would be eventual assimilation. The reaction of the National Indian Brotherhood to the Trudeau government’s white paper, for example, was, “If we accept this policy, and in the process lose our rights and lands, we become willing partners in cultural genocide. This we cannot do.”³⁰ The irony is that the consequences of a policy of equal status would

be no different from the consequences of the enfranchisement provisions of the *1876 Indian Act*: being ascribed the right to vote and other rights of citizenship excluded the possibility of continuing to be Indian. Special status, not equal status, was viewed as the policy route to avoid assimilation and cultural genocide.

Although all Indians gained the right to vote in 1960, the actual change in governance brought about by this development was minimal. In very few federal ridings is the number of registered Indian voters significant enough to affect who is ultimately elected. And in the past fifty years, very few First Nations candidates have been successful.³¹ By the time the Royal Commission on Aboriginal Peoples issued its final report in 1996, the whole issue of individuals from First Nations communities being included in the suffrage was a marginal concern in those communities. The right to vote was seen as neither a major achievement nor a vehicle for change.³²

Mapping the Legal Consciousness of First Nations Voters

The framework for this paper has sought to establish that the legal consciousness of First Nations voters is pivotal to understanding electoral participation in Canada's First Nations communities. Electoral participation is a question of exercising rights mobilization. Answering the question, What does voting mean to individual First Nations voters? is pivotal, for rights mobilization is a function of what those rights mean to the individuals who hold them. How then should the study of the legal consciousness of First Nations voters be approached?

The approach taken below is modelled on a groundbreaking book, *The Common Place of Law: Stories from Everyday Life*, by Patricia Ewick and Susan Silbey. In that book, Ewick and Silbey describe their study of the legal consciousness among ordinary residents of New Jersey.³³ Based on detailed survey interviews of 430 persons, they constructed three different stories about legality that they found encapsulated the view of law among those persons and how those views affected their mobilization of legal rights and other resources in their society. These stories are, in effect, ideal types or forms of legal consciousness or ways to participate in or experience legality. They provide a map for understanding the legal consciousness of the residents of New Jersey, a guide that helps us better understand when those people—the legal subjects—turn to the courts, when they choose to exercise their legal rights or not, and so on. Of course, Canada's First Nations communities constitute different legal subjects—different terrain—and therefore a very different legal consciousness map is needed.

Using an approach similar to Ewick and Silbey, I propose to sketch a map of the legal consciousness of First Nations voters. Unlike the impressive mapping by Ewick and Silbey, which is based on extensive survey fieldwork, my mapping is largely conjecture, shaped by the brief history of First Nations voting rights reviewed above. It leaves open the possibility of undertaking extensive fieldwork

involving survey interviews that would validate or refine this map. The purpose of the map is to better understand the terrain of the First Nations voter.

Above, I have emphasized how legal consciousness is a reflection of beliefs about legal rights and how those beliefs affect mobilization. The tie-in to voting is that it is, at base, the exercise of a legal right. The map I offer involves categorizing three types or forms in which the right to vote might be envisioned by a member of a First Nations community. Each form of legal consciousness invokes cultural tropes, schemas, and resources that position that legal status and the individual in relation to it. The point of demarcating these types of identifiers is that voting rights mobilization for Canada's Aboriginal peoples, within a legal consciousness framework, can be understood as an expression of what those rights mean to them. It provides a road map for different ways in which First Nations voters might answer fundamental questions of legal consciousness: How do individual First Nations voters view the legality of the rights mobilization involved in voting? What sort of cultural meanings for them are bound up in voting? Does this vary according to what the vote is for? What sort of identity must be assumed in order to mobilize voting rights? The three corresponding forms of legal consciousness are, I suggest, more than mere reflections of the historical legacy of voting rights among First Nations peoples; they identify the different symbolic legal meanings of voting for individuals from these communities and, in turn, why they may or may not exercise their right to vote.

The Enfranchised Voter

For most disadvantaged groups, the right to vote is an achievement that can be mobilized without symbolic losses or costs. Within the context of, for example, the suffragette movement, gaining the right to vote was an achievement of recognition and an acknowledgement of difference.³⁴ Whilst the grounds for denying women the right to vote had been principally based on questioning the competence of women to vote and holding that their interests could be expressed by male voters, granting women the right to vote can be construed as a rejection of both of these claims. The right to vote for women is an acknowledgement of the equal status of men and women in elections—everyone's vote counts. The same point can be made about the achievement of the right to vote for African Americans through the civil rights movement. At their core, the landmark U.S. civil rights achievements are grounded on the recognition of equal status for African Americans in civil society.³⁵

As the brief history of First Nations voting rights shows, the idea of an enfranchised voter was not celebrated within First Nations communities. There is little common ground in terms of voting rights between Canada's First Nations peoples and other historically disenfranchised groups such as women and African Americans.³⁶ Until 1960, the provisions for enfranchisement in the *Indian Act* were grounded on the denial of equal status for Indians. Voting rights were not available to all First Nations peoples. The ascription of the right to vote in a federal

election precluded the possibility of recognition as an Indian. First Nations culture and identity were simply not recognized as the equal of other national identities. Individuals had to give up their First Nations identity to attain the right to vote. The symbolic legal identity of a voter is, in this form of legal consciousness, one of being a non-Indian.

Thus, historically, the practice of enfranchisement in First Nations communities amounted to a polarized choice for an individual: exercise the right to vote in federal elections or maintain your Indian identity. To vote meant not just disengaging from your community, but also giving up a legal status and the concrete entitlements that went with it. It was an acknowledgement of, indeed, acceptance of the view that First Nations culture and identity is impoverished and not the equal of other national identities in Canada. Historically, the law made exercising the right to vote and enjoying First Nations identity incompatible for individuals.

Seen in this light, not voting for some individuals from First Nations communities can be seen as a mode of resistance against this traditional discourse of unequal status and the denial of recognition. The opportunity not to participate in federal elections can be understood as creating the space for this counter-narrative. What may appear to be apathy is in fact a strong statement about the baggage that the right to vote carries in the relationship between the Government of Canada and First Nations. When individuals partake in this mode of resistance, they are involved in a process of collective legal consciousness. They are participating in the construction of a particular alternative legal identity of Aboriginal persons. It is not the case that each individual is constructing their own particular identity; the identities are not infinitely various but limited.

This mode of resistance is, I think, quite unique to individuals from Canada's First Nations. Of course, not voting as an act of resistance is not in itself unique. Individuals may not vote in elections as expressions of resistance or dissent from, for example, the candidates, or a flawed process, or for other similar reasons. Typically, among disadvantaged groups voting is a means to reinforce one's status as an equal. What I am suggesting is that for some First Nations persons *not* voting is the means to reinforce their claim to equal status.

This form of legal consciousness can provide insight into low levels of electoral participation in First Nations communities. Even with very significant changes to doctrinal law (especially since 1960) the historical legacy of the voting rights provisions of the *Indian Act* may well be shaping the legal consciousness of some individuals and contributing to their decisions not to participate in federal elections. Obviously, the actual reach of the memory of the enfranchisement experience for First Nations voters—Does it only affect older voters? Is the memory weaker among younger voters?—is something that is best explored through careful fieldwork and interviews.

The Citizen Plus Voter

From a different perspective, the right to vote for Indians may be seen not as a denial of the equal status of persons from First Nations communities but rather as an affirmation of the special status of those persons.³⁷ The idea of citizen plus expresses the view that Indians can enjoy the right to vote and other rights of Canadian citizenship as a complement to their distinctive identity and special status as Canada's First Nations. Exercising the right to vote does not give particular substance to that special status but merely serves to reinforce the view that being ascribed the right to vote does not threaten a person's identity as an Indian. It is therefore the polar opposite perspective of the enfranchised voter.

Electoral participation in this form of legal consciousness has a positive, status-enhancing element for the First Nations voter. Voting is a meaningful way for First Nations in their relationship to the federal government to ground their claim as a national group with special status within the Canadian state. Exercising the right to vote does entail the individual taking on a particular identity, but in this case the identity is one that allows that individual to enjoy both membership in a First Nations community and Canadian citizenship.

The internal logic of this mode of legal consciousness is that it encourages electoral participation rather than abstention. Whereas for the enfranchised Indian voter there is a strong case not to vote, for individuals from First Nations communities with the citizen plus mode of legal consciousness there is a compelling case to participate in federal elections.

The Disenfranchised Voter

For some First Nations persons, especially those who gained the right to vote in federal elections under the *1960 Canada Elections Act*, having the right to vote has not significantly affected parliamentary representation nor has it impacted public policy in the area of Indian affairs. From this perspective, exercising the right to vote in federal elections is either futile or a form of complicity. The futility stems from the claim that voting by First Nations peoples has no real impact on the outcome of federal elections. Only two federal electoral districts have a majority of First Nations electors, and less than a dozen First Nations candidates have been elected to Parliament. The complicity arises because it is often argued that as a matter of fairness, if someone participates in an electoral process by voting, that person is bound to accept the legitimacy of the outcome.

As with the enfranchised voter, there is a compelling case for the disenfranchised Indian voter not to participate in federal elections, although for quite different reasons. The right to vote for the disenfranchised Indian voter has a particular meaning that discourages individuals from mobilizing that right. That meaning is not one that makes reference to the historical legacy of the *Indian Act*, but rather one that makes a prognosis about voting today and what that will mean in the future.

Conclusion

This paper has sought to view Aboriginal electoral participation through the lens of the legal consciousness of individual Aboriginal voters. Mapping the legal consciousness of First Nations voters offers some promising insight into what the right to vote means for individual voters, and hence why they may or may not mobilize their right to vote. The outlines of the map offered above suggest the shape that fieldwork in First Nations communities could take, involving detailed interviews with individuals as well group breakout sessions that would validate or refine the three forms of legal consciousness I have identified.

Endnotes

- 1 The policy implications of any legal consciousness map are not a simple matter of applying some kind of formula. Clearly, with respect to increasing First Nations electoral participation, Elections Canada and other agencies should be embracing and disseminating the importance of the vision that grounds the legal consciousness of the citizen plus voter. This vision holds that mobilizing voting rights through First Nations electoral participation in federal elections serves to reinforce recognition of the special status of Canada's First Nations peoples. Elections Canada's public policy initiatives should focus on engaging with the legal consciousness of First Nations voters.

Before identifying specific policy initiatives, two broad points about legal consciousness that are relevant to public policy should be emphasized. The first is that changes in legal consciousness rarely track changes in doctrinal law or in response to statistical evidence. Whilst legal professionals may adjust their beliefs about law in accordance with doctrinal law reform, ordinary people rarely do so with any reliability. Perceptions and personal experience are more often the most significant influences on changes in legal consciousness.³⁸ The second point is that most individuals do not operate in their everyday lives with only one form of legal consciousness. Although the three forms of legal consciousness—the enfranchised voter, the citizen plus voter, the disenfranchised voter—are represented as distinct and contradictory, for any individual First Nations voter each form of legal consciousness will have some sort of hold on them, competing to prevail at any one time.

Possible concrete initiatives to engage with the legal consciousness of First Nations voters are varied and can build on some of the initiatives that Elections Canada has already undertaken. Outreach to First Nations youth is a promising example. There is, in fact, very little empirical research about legal consciousness among youth (not just Aboriginal youth), which should not be confused with the well-established field of research that examines legal and civic knowledge among Canada's youth.

It seems likely, however, that the legal consciousness of First Nations youth can be affected by positive experiences with elections. Although this may require amendments to existing legislation, Elections Canada could, for instance, establish a special program that offers paid scrutineer-like positions to First Nations youth during federal elections. Elections Canada could do this independently or in cooperation with federal political parties. Likewise, Elections Canada could cooperate with federally funded Aboriginal groups to organize leadership or candidate forums explicitly devoted to Aboriginal issues or Aboriginal youth issues, and provide means via advanced interactive technology for First Nations youth to participate by moderating and asking questions.

Much of Elections Canada's activities addressing electoral participation will occur outside the election window. Mapping the legal consciousness of First Nations voters also suggests a general direction for all educational programs, not just those targeted at youth, designed to increase electoral participation in First Nations communities. Instead of principally informing people in these communities about their right to vote, it is probably more fruitful to discuss explicitly the history of the evolution of the right to vote among Canada's First Nations. These sorts of educational programs should address what voting means to First Nations peoples. By discussing the logic of the Supreme Court's decision in *Sauvé* or *Corbiere*, for example, it is more likely that the legal consciousness of the individual First Nations voter will be engaged.

BA, MA, University of Western Ontario; D.Phil., University of Oxford. Professor of Law and Society, Director, York Centre for Public Policy and Law, York University, Toronto, Canada. Email: jacobs@yorku.ca Website: ycpl.osgoode.yorku.ca. I am grateful for helpful written comments on an earlier draft from Chris Plecash and several individuals at Elections Canada, Alain Pelletier, Miriam Lapp, and Paul Laronde.

- 2 *Sauvé v. Canada (Chief Electoral Officer)*, [2002] 3 S.C.R. 519, 2002 SCC 68 at paragraph 33.
- 3 D. Guérin, "Aboriginal Participation in Canadian Federal Elections: Trends and Issues," *Electoral Insight* 5(3) (2003), <http://www.elections.ca/eca/eim/article_search/article.asp?id=22&lang=e&frmPageSize=&textonly=false>. See also Elections Canada: Electoral Law, Policy, and Research, "Aboriginal People and the Federal Electoral Process: Participation Trends and Elections Canada's Initiatives (January 2004)," <<http://www.elections.ca/content.asp?section=lo>>

- i&document=abor&lang=e&textonly=false>.
- 4 A. Cairns, "Aboriginal People's Electoral Participation in the Canadian Community," *Electoral Insight* 5(3) (2003), <http://www.elections.ca/eca/eim/article_search/article.asp?id=21&lang=e&frmPageSize=10&textonly=false>.
 - 5 Elections Canada, "Official Voting Results," <<http://www.elections.ca/scripts/OVR2008/default.html>>.
 - 6 CBC News, "Voter Turnout Drops in Nunavut" (October 28, 2008), <<http://www.cbc.ca/nunavutvotes2008>>.
 - 7 See for instance K. Ladner, "The Alienation of Nation: Understanding Aboriginal Electoral Participation," *Electoral Insight* 5(3) (2003): 21–24, <http://www.elections.ca/eca/eim/article_search/article.asp?id=22&lang=e&frmPageSize=&textonly=false>; and J. Dalton, "Alienation and Nationalism: Is it Possible to Increase First Nation Voter Turnout in Ontario?" *Canadian Journal of Native Studies* 27(2) (2007): 247–91.
 - 8 *Ibid.*, at paragraphs 35, 43.
 - 9 *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203 at paragraphs 17, 18, 19.
 - 10 D. Engel and F. Munger, *Rights of Inclusion: Law and Identity in the Life Stories of Americans With Disabilities* (Chicago: University of Chicago Press, 2003); P. Ewick and S. Silbey, *The Common Place of Law: Stories from Everyday Life* (Chicago: University of Chicago Press, 1998); M. B. Nielsen, "Situating Legal Consciousness," *Law and Society Review* 34 (2000): 1055–90; M. Umphrey, "The Dialogics of Legal Meaning," *Law and Society Review* 33 (1999): 393–423.
 - 11 D. Trubek, "Where the Action Is: Critical Legal Studies and Empiricism," *Stanford Law Review* 34 (1984); S. E. Merry, *Getting Justice and Getting Even: Legal Consciousness Among Working-Class Americans* (Chicago: University of Chicago Press, 1990). For the idea that there are competing conceptions of legal consciousness, see P. Ewick and S. Silbey, "Conformity, Contestation, and Resistance: An Account of Legal Consciousness," *New England Law Review* 26 (1992): 731–742.
 - 12 P. Ewick and S. Silbey, *The Common Place of Law*, 46.
 - 13 Although almost all existing research on varieties of legal consciousness has focused on individuals, some has focused on organizations. See E. Larson, "Institutionalizing Legal Consciousness: Regulation and the Embedding of Market Participants in the Securities Industry in Ghana and Fiji," *Law and Society Review* 38 (2004): 711–36; and L. A. Jacobs, "Differentiated Corporate Legal Consciousness in International Human Rights Disputes: Security and Transnational Oil Companies in Sudan," *APDR Research Notes* 1(3) (2008): 37–49, <http://apdr.iar.ubc.ca/publications/ejournal/APDR_1.3/APDR_1.3_LJ.pdf>.
 - 14 P. Ewick and S. Silbey, *The Common Place of Law*, 46.
 - 15 See for example L. A. Jacobs, "Legal Consciousness and the Promise of Law and Society," *The Canadian Journal of Law and Society* 18(1) (2003): 61–66.
 - 16 L. A. Jacobs, "Rights and Quarantine During the SARS Global Health Crisis: Differentiated Legal Consciousness in Hong Kong, Shanghai, and Toronto," *Law and Society Review*, 41(3) (2007): 511–53.
 - 17 D. Engel and F. Munger, "Rights, Remembrance, and Reconciliation of Difference," *Law and Society Review* 30 (1996): 7–54, and *Rights of Inclusion*, Chapter 3.
 - 18 D. Engel and F. Munger, *Rights of Inclusion*, 242.
 - 19 Committee for Aboriginal Electoral Reform, "The Path of Electoral Equality," in *Report of the Royal Commission on Electoral Reform and Party Financing, Volume 4* (Ottawa: Government of Canada, 1991), 235–36. See also J. Dalton, "Alienation and Nationalism," 251–252.
 - 20 The distinction between voluntary and involuntary enfranchisement comes from L. Gilbert, *Entitlement to Indian Status and Membership Codes in Canada* (Toronto: Carswell, 1996), 24.
 - 21 *Ibid.*, 23.
 - 22 *Ibid.*, 23–24.

- 23 J. Carens, *Culture, Citizenship, and Community* (Oxford: Oxford University Press, 2000), 186.
- 24 L. Gilbert, *Entitlement to Member Status*, 24.
- 25 *Ibid.*, 25. Clearly, there is scope here for considering the provisions of the *1869 Indian Act*, which stripped Indian women who married non-Indians of their Indian status, as likewise de facto involuntary enfranchisement.
- 26 A. D. Doerr, "Indian Policy," in *Issues in Canadian Public Policy*, eds. G. Bruce Doern and V. Seymour Wilson (Toronto: MacMillan of Canada, 1974), 37.
- 27 Quoted in R. H. Bartlett, *The Indian Act of Canada, Second Edition* (Saskatoon: University of Saskatchewan Native Law Centre, 1988), 6n21. The 1967 phrase "citizen plus" has been retrieved by A. Cairns, *Citizens Plus: Aboriginal Peoples and the Canadian State* (Vancouver: UBC Press, 2000).
- 28 H. B. Hawthorn, ed., *A Survey of the Contemporary Indians of Canada: Economic, Political, Educational Needs and Policies, Vol. I* (Ottawa: Government of Canada, 1967), 13.
- 29 A. D. Doerr, "Indian Policy," 40–41.
- 30 Quoted in *ibid.*, 41.
- 31 See for instance J. Dalton, "Alienation and Nationalism," 254–56.
- 32 See for example the comments by A. Cairns, "Aboriginal Electoral Participation." Whilst the Royal Commission on Electoral Reform and Party Financing (for which Cairns was the director of research) recommended the establishment of Aboriginal electoral districts with corresponding seats in Parliament, the Royal Commission on Aboriginal Peoples recommended a separate Aboriginal legislative assembly.
- 33 P. Ewick and S. Silbey, *The Common Place of Law*, especially Chapter 3.
- 34 See for example L. A. Jacobs and R. Vandewetering, "Introduction," in *John Stuart Mill's The Subjection of Women: His Contemporary and Modern Critics* (New York: Caravan Books, 1999).
- 35 I have argued this at length in *Pursuing Equal Opportunities* (New York: Cambridge University Press, 2004), Chapter 3.
- 36 Unlike these other groups, First Nations peoples possess a special, legally recognized status, which was put in jeopardy by the extension of the right to vote.
- 37 For theoretical accounts of how equal status is consistent with special status, see for example L. A. Jacobs, *Pursuing Equal Opportunities, op. cit.*, as well as W. Kymlicka, *Liberalism, Community, and Culture* (Oxford: Oxford University Press, 1989).
- 38 An interesting question to ask is whether it is possible for the legal consciousness of the First Nations voter to change at all. Here, I believe that a fruitful parallel may be gained by investigating changes in legal consciousness in First Nations communities with regard to litigation over the past couple of decades. In Canada, when Aboriginal persons have sought legal change, they have often turned, not to the Parliament of Canada, but rather to the courts. Aboriginal litigants have in the quarter-century achieved some significant court victories, often against the Government of Canada. For opposing views about how to treat these cases, see R. Knopf and F. L. Morton, *The Charter Revolution and the Court Party* (Peterborough: Broadview Press, 2000) and K. Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law, 2001). In the same way that I have sketched a map of the legal consciousness of First Nations voters, it would be possible to sketch a map of the legal consciousness of First Nations litigants with a view to better understanding when and why these litigants mobilize their rights and turn to the courts. I suspect that such a map would reveal significant changes in legal consciousness among litigants.

References

- Barlett, R. H. 1988. *The Indian Act of Canada*, Second Edition. Saskatoon: University of Saskatchewan Native Law Centre.
- CBC News. October 28, 2008. Voter Turnout Drops in Nunavut. <<http://www.cbc.ca/nunavut-votes2008/>>.
- Cairns, A. 2000. *Citizens Plus: Aboriginal Peoples and the Canadian State*. Vancouver: UBC Press.
- Cairns, A. 2003. Aboriginal People's Electoral Participation in the Canadian Community. *Electoral Insight* 5(3). <http://www.elections.ca/eca/eim/article_search/article.asp?id=21&lang=e&frmPageSize=10&textonly=false>.
- Carens, J. 2000. *Culture, Citizenship, and Community*. Oxford: Oxford University Press.
- Committee for Aboriginal Electoral Reform. 1991. *The Path of Electoral Equality*. Report of the Royal Commission on Electoral Reform and Party Financing, Volume 4. Ottawa: Government of Canada.
- Corbiere v. Canada* (Minister of Indian and Northern Affairs), [1999] 2 S.C.R. 203.
- Dalton, J. 2007. Alienation and Nationalism: Is it Possible to Increase First Nation Voter Turnout in Ontario? *Canadian Journal of Native Studies* 27(2): 247–91.
- Doerr, D. 1974. *Indian Policy*. In *Issues in Canadian Public Policy*, eds. G. Bruce Doern and V. Seymour Wilson. Toronto: MacMillan of Canada.
- Elections Canada. Official Voting Results. <<http://www.elections.ca/scripts/OVR2008/default.html>>.
- Elections Canada: Electoral Law, Policy and Research. Aboriginal People and the Federal Electoral Process: Participation Trends and Elections Canada's Initiatives (January 2004). <<http://www.elections.ca/content.asp?section=loi&document=abor&lang=e&textonly=false>>.
- Engel, D., and F. Munger. 1996. Rights, Remembrance, and Reconciliation of Difference. *Law and Society Review* 30: 7–54.
- Engel, D., and F. Munger. 2003. *Rights of Inclusion: Law and Identity in the Life Stories of Americans With Disabilities*. Chicago: University of Chicago Press.
- Ewick, P., and S. Silbey. 1992. Conformity, Contestation, and Resistance: An Account of Legal Consciousness. *New England Law Review* 26: 731–42.
- Ewick, P., and S. Silbey. 1998. *The Common Place of Law: Stories from Everyday Life*. Chicago: University of Chicago Press.
- Guérin, D. 2003. Aboriginal Participation in Canadian Federal Elections: Trends and Issues. *Electoral Insight* 5(3). <http://www.elections.ca/eca/eim/article_search/article.asp?id=22&lang=e&frmPageSize=&textonly=false>.
- Gilbert, L. 1996. *Entitlement to Indian Status and Membership Codes in Canada*. Toronto: Carswell.
- Hawthorn, H. B., ed. 1967. *A Survey of the Contemporary Indians of Canada: Economic, Political, Educational Needs and Policies*, Vol. I. Ottawa: Government of Canada.
- Jacobs, L. A. 2003. Legal Consciousness and the Promise of Law and Society. *The Canadian Journal of Law and Society* 18(1): 61–66.
- Jacobs, L. A. 2004. *Pursuing Equal Opportunities*. New York: Cambridge University Press.
- Jacobs, L. A. 2007. Rights and Quarantine During the SARS Global Health Crisis: Differentiated Legal Consciousness in Hong Kong, Shanghai, and Toronto. *Law and Society Review* 41(3): 511–53.
- Jacobs, L. A. 2008. Differentiated Corporate Legal Consciousness in International Human Rights Disputes: Security and Transnational Oil Companies in Sudan. *APDR Research Notes* 1(3): 37–49. <http://apdr.iar.ubc.ca/publications/ejournal/APDR_1.3/APDR_1.3_LJ.pdf>.
- Jacobs, L. and R. Vandewetering, eds. 1999. Introduction. In *John Stuart Mill's The Subjection of Women: His Contemporary and Modern Critics*. New York: Caravan Books.
- Kymlicka, Will. 1989. *Liberalism, Community, and Culture*. Oxford: Oxford University Press.
- Knopf, R., and F. L. Morton. 2000. *The Charter Revolution and the Court Party*. Peterborough: Broadview Press.
- Ladner, K. 2003. The Alienation of Nation: Understanding Aboriginal Electoral Participation. *Electoral Insight* 5(3): 21–24. <http://www.elections.ca/eca/eim/article_search/article.asp?id=22&lang=e&frmPageSize=&textonly=false>.

- Larson, E. 2004. Institutionalizing Legal Consciousness: Regulation and the Embedding of Market Participants in the Securities Industry in Ghana and Fiji. *Law and Society Review* 38: 711–36.
- Merry, S. E. 1990. *Getting Justice and Getting Even: Legal Consciousness Among Working-Class Americans*. Chicago: University of Chicago Press.
- Nielsen, M. B. 2000. Situating Legal Consciousness. *Law and Society Review* 34: 1055–90
- Roach, K. 2001. *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue*. Toronto: Irwin Law.
- Sauvé v. Canada* (Chief Electoral Officer), [2002] 3 S.C.R. 519, 2002 SCC 68 at paragraph 33.
- Trubek, D. 1984. Where the Action Is: Critical Legal Studies and Empiricism. *Stanford Law Review* 34.
- Umphrey, M. 1999. The Dialogics of Legal Meaning. *Law and Society Review* 33: 393–423.