ABORIGINAL PEOPLES AND RESTORATIVE JUSTICE:

THE PROMISE OF SENTENCING CIRCLES

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Restorative justice calls for a new relationship between community and government, and nowhere are issues surrounding community-government relations more central and more contentious than with respect to aboriginal peoples. The shift to community finds its roots in the increasingly strong aboriginal political movement where self-government has promoted the building of local institutions, including those related to criminal justice. This paper examines sentencing circles and their potential to generate real change in the lives of victims, offenders and the community.

Various provincial inquiry reports, academic studies, research papers, government documents and even public opinion coalesce around the conclusion that the current justice system has failed Aboriginal people. Three themes have consistently emerged. Aboriginal over-representation is affirmed by report after report documenting the high contact rates of Aboriginal people with police and their disproportionately high rates of arrest, conviction and imprisonment. A second common theme is the existence of discrimination against Aboriginal people at all levels of the existing justice system. These factors have given rise to a third common problem: the perception among Aboriginal people that the criminal justice system is a foreign one, imposed by the dominant white society.[1]

The sentencing process in particular has been singled out and has led to substantial criticism as having an especially negative effect on Aboriginal people. It is at this stage in the justice system where there is the clearest expression of particular societal values. Among other things, Aboriginals view the conventional sentencing process as:

(1) based on a foreign goal of punishment, instead of upon the aboriginal goals of restoration and rehabilitation;
(2) conducted in an improperly adversarial fashion, with sides being taken, hard-

line positions being entrenched, helpful witnesses being challenged as liars, and the accused being treated as an adversary of his own community;
(3) based on the belief that a sentence which is imposed by uninvolved, third-party strangers to the group can be effective, contrary to an aboriginal belief that solutions must be proposed by all of the affected parties if they are to have any chance of being carried out by them; and
(4) focused too narrowly on events, when the real issues center on the quality of relationships which surround all the effected parties.[2]

Some of the recommendations that have been put forward to address these problems include having more native involvement in planning, decision-making, and service delivery; having more recognition of Aboriginal culture and law in criminal justice service delivery and having more community-based alternatives in sentencing. These appear to be the most promising because they fit with aboriginal aspirations of self-government and the philosophy of restorative justice, a fundamentally different approach to the criminal justice system.[3]

"Restorative justice is a general approach to the challenge and opportunity of conflict. It offers a framework for thinking about and responding to conflict and crime, rather than a unified theory or philosophy of justice."[4] The Law Commission of Canada has articulated three fundamental principles of restorative justice: 1) crime is a violation of a relationship among victims, offenders, and the community 2) restoration involves the victim, the offender and community members and 3) a consensus approach to justice.[5]

The recent interest in restorative justice developed as a response to dissatisfaction with certain aspects of the criminal justice system. Concerns have been raised concerning the ability of the correctional system to deter or rehabilitate offenders. The increasing cost of corrections and incarceration specifically is causing a growing number of legislatures and policymakers to reconsider the wisdom of the current retributive system

of justice, which depends greatly on the incarceration of offenders while largely ignoring the needs of victims.[6]

As well, victims of crime have felt increasingly frustrated and alienated by the conventional justice system. The crime is against "the state," and state interests drive the process of administering justice. Victims are largely left out of the court process, except in their role as witnesses. Victims lack important information about what happens to offenders as they progress through the correctional system. They are often not even provided with information about the process, court date changes, or the final disposition of the case. Rarely do criminal justice professionals take time to listen to fears and concerns of crime victims and then ask their input and seek their participation in holding the offender accountable.[7]

The current criminal process does not always do justice for offenders either:

> It encourages many to be passive and to plead guilty in order to receive the most lenient sentence possible. Their crime is objectified and abstracted from the social context in which it took place. Offenders' actions are cast in terms of violations of the Criminal Code rather than as violations of others. The offender's lawyer uses the law to distance the offender as far as possible from the conflict. Offenders are rarely provided the opportunity to develop an appreciation of the impact their actions have on the lives of victims, and seldom are they asked to repair any damage they have caused. Because it offers few incentives for offenders to accept responsibility for their actions, the trial process does little to instill in them respect for the law or respect for others.[8]

By imposing a sentence, criminal courts may settle a conflict, but such a settlement often does little to resolve personal differences between the parties, or improve relationships among parties. The conflict is often worsened by an adversarial court process focused on narrowly defined legal issues. As Judge Barry Stuart point out:

> Courts may change the focus of a conflict but rarely enhance relationships among the parties, mitigate warring attitudes, reveal common ground to foster respect for

> different values, or inspire creative problem-solving to find mutually beneficial outcomes.[9]

The development of Restorative Justice programs is an attempt to refocus crime as a conflict among people, to bring together those affected to address the impact of an offence on the victim, the offender and the community.[10]

Restorative Justice has steadily gained acceptance in Canada and internationally. The rise of restorative justice in Canada both in practice and public rhetoric has been rapid. The first victim-offender reconciliation program began in Kitchener, Ontario in 1974. By 1998, however, a survey conducted by the Correctional Service of Canada found over 200 restorative justice projects operating throughout Canada which attempt to bring offenders, victims and communities together to deal with the aftermath of crime. Likewise, much of the growth of aboriginal justice projects occurred in the late 1980's and 1990's.[11]

Recognition of restorative justice in public discourse has been a phenomenon of the 1990's. The 1969 Ouimet report only briefly recognized the correctional potential of reparation and the 1987 report of the Canadian Sentencing Commission did not make the idea of restorative justice a focal point. The Daubney Committee did, however, express interest and in 1994, the provincial and federal government Ministers of Justice recognized the "holistic" and "healing" approach of aboriginal justice as essential to reform.[12]

In 1996 the Aboriginal Justice Strategy (AJS) was announced in 1996 to address over–representation of Aboriginal people in the criminal justice system and to respond to Aboriginal communities' desire for greater control over the administration of justice. The "AJS" provides funding, some of which is cost-shared with provinces and territories,

to community-based justice programs. Justice Canada delivers the AJS in partnership with the Department of Indian Affairs and Northern Development (DIAND). Justice Canada also works closely on the AJS with the Solicitor General of Canada, specifically the Royal Canadian Mounted Police, Aboriginal Policing and Aboriginal Corrections, who provide complementary services in other areas of the justice continuum. The AJS was originally to end on March 31, 2001, however, in the Speech from the Throne (January 30, 2001) the federal government made a commitment to renew the AJS in order "to significantly reduce the percentage of Aboriginal people entering the criminal justice system, so that within a generation it is no higher than the Canadian average." The strategy was renewed for another five years with about $57.5 million over five years. Sentencing circles are among the justice initiatives supported.[13]

In 1996, as well, the *Criminal Code* was amended to add principles of sentencing, which include providing reparations for harm done to victims or the community and promoting a sense of responsibility in offenders as well as acknowledgement of the harm done to victims and to the community. The Supreme Court of Canada recognized the importance of this approach in its landmark decisions, *R v. Gladue* and *R. v. Proulx.* In *Gladue*, the court embraced restorative justice, with its emphais on reparation, acknowledgement of harm, community sanctions and aboriginal traditions as a legitimate and valuable approach to sentencing. In *Proulx,* the court related restorative approaches to Parliament's concerns about reducing reliance on imprisonment and has contrasted the restorative and punitive aims of sentencing. The Law Commission of Canada also endorsed restorative justice in its 1999 paper *From Restorative Justice to Transformative Justice.*[14]

The restorative approach has been embraced by those seeking to counter the destructive effect of the criminal justice system on Aboriginals because its emphasis on healing rather than punishment is very much in harmony with traditional notions of native justice.[15] There are, however, some important differences. Indigenous peoples draw upon their own cultural and spiritual practices that have developed since time immemorial while restorative justice is a new alternative to the dominant system. In discussing alternative dispute resolution, Monture-Okanee argues that aboriginal justice does not embrace the same philosophy and agenda as this movement. Aboriginal justice is different and much broader. The emphasis of restorative justice is on individual accountability and responsibility, while aboriginal justice is on collective responsibility. In aboriginal justice, the process of restoration and healing takes place within a larger circle of relationships – often an extensive clam system. In fact, the basic terms taken for granted in Western criminal justice systems, such as "justice" and "guilt" do not have any similar terms in many indigenous languages.[16]

The Aboriginal concept of the medicine wheel teaches that everything is interrelated and evolves in a circular pattern. An Aboriginal community is a circle that is broken when a wrong is committed. The circle must be repaired through healing:

> The medicine wheel also teaches us that we have four aspects to our nature: the physical, the mental, the emotional and the spiritual. Each of these aspects must be equally developed in a healthy, well-balanced individual through the development and use of volition.[17]

To apply this concept it is necessary to understand why the wrong occurred and how the parties were affected by it. To understand, it is necessary to examine the four aspects of a person to detect the imbalance and attempt to restore that balance. Restoring balance heals the individual and the community:

> justice in Aboriginal eyes requires looking well beyond a particular act and well beyond the individual who did it. Instead, the enquiry must have a much broader focus, looking at all the formative events leading up to the act and at all the other people who interact with each accused in the course of his or her life.[18]

Viewing crime holistically means "pulling together health, education, social service and economic resources to redress the underlying problems of crime."[19]

A sentencing circle is a process whereby community members contribute to sentencing decision-making in cases involving other community members. The aim is to bring to the circle the best information available in order that an appropriate sentence can emerge.[20] It is viewed as a way of building partnerships with communities and securing their commitment to help the offender abide by a plan agreed to in the circle.[21] There is no express provision in the Criminal Code, however, available judicial comment suggests that circle sentencing is based in the court's broad sentencing discretion, which retains for the judge, ultimate decision-making power.[22] The exercise of judicial discretion is important at two stages of the process: at the beginning, when the judge agrees to conduct the circle and at the end, when the judge accepts, rejects or modifies the recommendation of the circle.[23]

The first official use of a sentencing circle occurred in 1992 in the Yukon Territorial Court in Canada. In response to the Crown's assertion that "the community" wanted a native – a chronic offender convicted of assaulting a police officer – to go to jail, Judge Barry Stuart invited members of the offender's *actual* community to participate in a sentencing circle, thereby reviving that native way of dealing with troublesome individuals and situations. The offender's actual community indicated that they did not want the offender to go to jail and that they were willing to help rehabilitate him. Judge Stuart, acting on the community's wishes, ordered two years' probation and

the offender responded by turning his life around. As the reputation of this spread, the practice of circle sentencing proliferated throughout native communities in Canada and elsewhere and some argue that it should be applied throughout the whole of modern society.[24]

A circle process can be initiated in a variety of ways. It may be recommended by a judge, requested by an offender through counsel or by the victim or suggested by a community justice committee. Support groups are usually formed for the victim and the offender. Multiple circles with the support groups may be held before the larger circle occurs. After the circle process has produced a plan by consensus of the whole circle, follow-up circles typically monitor it.[25]

Judge Barry Stuart stresses the importance of pre-hearing preparations. He suggests that they contribute in numerous ways to the achievement of real differences.

> The feelings, attitudes and perceptions carried into the circle profoundly affect the success of the circle. The more care, support, information and attention invested in key participants before the circle, the more likely parties can move beyond fear, hostility, anger and other negative blockages to constructively advance their interests.[26]

Support groups made up of family, friends and lay resource people are crucial to the circle process and can offer victims immediate empathy as well as tangible assistance to help them move beyond pain and anger and onto the path of healing. Equally important, support groups help victims find answers about the offender. If this information and support is provided before the hearing, victims are more likely to participate and participate in a way which promotes their best interests as well as the best interests of the offender and the community.[27]

With respect to offenders, the decisions and directions taken can greatly depend on the immediacy of support received. From their support groups, offenders receive the assistance required to start their healing journey. While offenders will clearly be told that what was done was very wrong and cannot be tolerated, they will hear offers for help and recognition of their potential for change. Support groups will also prepare offenders to speak on their own behalf in the circle. This is vital. Accepting responsibility, apologizing, making a commitment to change and asking for help are all profoundly personal matters, steps that can only be taken by the offender if there is to be credibility, empathy and acceptance from others.[28]

Pre-hearing preparation is crucially important for recidivists to adjust to demands for their direct, open and honest participation. Offenders must move beyond the past by finding the courage to let go of the need for excuses or explanations, no matter how justified they may be. In the circle, the offender must summon up the courage to speak for himself and to hear directly from victims and others who are disgusted or disappointed in their behaviour. Pre-circle preparation can mean the difference between an offender abusing the circle or using the crucial chance to change that a circle can provide. It is here that offenders have a chance to act on their commitment to change. A failure to act or begin a rehabilitative program, or to cut back substance abuse will question the suitability of offenders for the community process, and may shift the offender from the community to the court.[29]

Equally important is the pre-hearing preparation of judicial officials such as judges, Crown counsel, and police.

> Without engagement in pre-hearing preparation, justice officials who enter the circle ‘cold’ make it difficult to gain the common ground, trust and confidence

> that are prerequisites for effective participation in a consensus building process with 20-30 others over a two to three hour hearing. Equally, for others from the community, the presence of a 'stranger' in the circle can hinder open, frank discussion. To move past enthusiastic policy statements about community justice, and fully engage justice agencies in community partnerships, many perceptions must change. More talk will not change long standing justice agency practices. Change can only come by experiencing the potential of active involvement in a community partnership. Engaging local justice officials in all pre-hearing preparatory steps can constructively change perceptions and practices of justice officials, especially those of Crown counsel who are 'strangers' to the community.[30]

Besides changing perceptions, pre-hearing preparation also plays a role in a number of other ways. It greatly expands the breadth of participation in the circle and in community issues. Pre-hearing steps enable the Justice Committee and support groups to identify and involve key people. The information shared can remove barriers for some and encourage others to participate. It also enhances the quality and quantity of information available to participants before the circle is conducted. If parties receive information early, they are less likely to form hardened positions. In addition, participants acting upon misinformation are apt to adopt and ardently pursue positions that undermine their best interests. Pre-hearing preparation offers the best if not the only opportunity for all participants to determine whether the circle offers the best alternative to pursue their interests, and thereby make the commitment required to reap the full potential of circle sentencing.[31]

Pre-hearing preparation also removes surprises and raises the comfort level. All participants gain a better understanding of the process, about what is expected of them and about the expectations of others. Reducing fears and tensions allows for open, honest exchanges and maximizes the creative problem solving of circle hearings.[32]

At the actual hearing, there may be an inner circle and an outer circle, the inner made up of people directly involved in the discussions, and an outer for those who want to observe and speak only when called upon. The circle always includes a judge, Crown and defense counsel, court recorder, community members and the offender. A probation officer, a court worker, a youth worker, police officers, community workers, the victim and family members as well as members of the offender's family are also usually present.[33]

The setting of the circles is much less formal than the conventional courtrooms in which sentencing hearings are held; the circle may be held wherever there is space and agreement of participants, for example, in band halls.[34] Rather than wearing a robe and sitting above the accused and being separated from him by the bar, the judge joins in the circle with the accused.[35]

The circle setting promotes not only a sense of informality but also a sense of equality among participants:

> The circle significantly breaks down the dominance that traditional courtrooms accord the lawyers and judges. In a circle, the ability to contribute, the importance and credibility of any input is not defined by seating arrangements. The audience is changed. All persons within the circle must be addressed. Equally, anyone in the circle may ask a direct question to anyone else.[36]

The facilitator is usually an Elder of the community (called a "keeper") whose role is primarily to keep the process orderly and periodically to summarize for the benefit of the group.[37] The circle begins with the Elder saying a prayer or performing the sacred Sweet Grass Ceremony, and speaking a few words usually of thankfulness and understanding of how things are. Typically he or she will hold an eagle feather or other sacred object while speaking and, when finished, will pass it to the next person in the

circle. While an individual holds the sacred object he or she has the floor and no one else is permitted speak.[38]. Every participant is heard both in expressing their perspectives and feelings about the crime and in proposing and committing to solutions. The circle process allows members to express their norms and expectations, leading to a shared affirmation by the circle not just for the offender, but for the community at large. This context can lead to renewed community identity and strengthen community life for its members through participation.[39]

The discussion and decisions go well beyond what is conventionally covered in sentencing processes. The discussion can involve any number of topics, including the underlying causes of the crime, the extent to which the community shares responsibility for the crime and for doing something about it, and the details of potential sentences.[40] There is no sworn testimony or cross-examination of the participants, and there are no rules regulating the statements that may be made.[41]

A circle process is set apart from other decision-making processes by the presence and encouragement of a spiritual experience. Different aspects of the circle may generate the emergence of spirituality for each participant. The opening ceremony, a participant sharing their personal story or their pain, the sense of connectedness to others in the circle, or the courage revealed by many in the circle may promote a spiritual experience.[42]

While some processes engage the emotions surrounding conflicts, most discourage or exclude emotions. A court adjourns to enable a witness to gain his or her composure or to calm down the emotions of spectators. Even though there are deeply felt motions within a courtroom, the conventional process ignores and suppresses them.

Circles do the opposite. They encourage emotions to be expressed and worked through. By sharing and respecting emotion, the circle can be opened to spiritual experiences.[43]

Among advocates, the particular sentence produced by a peacemaking circle is viewed as less important than *how* each circle builds individual, family, and community capacity to accept responsibility and become self-reliant. While reaching a fair sentence that works is important, changing perspectives about what communities can do and creating new, cooperative working relationships can do much to change the underlying conditions of crime.[44] The transforming of relationships is also very important. There are many cases in which an offender will fail to carry out the sentence but will still maintain the support and the encouragement arising from new relationships formed in the circle.[45]

Judge Barry Stuart stresses that in circle sentencing, the peacemaking traditions of aboriginal cultures, currently adapted and popularly referred to as mediation and consensus-building principles, are essential. To what extent each circle process respects these principles, greatly determines whether it will achieve its goals. He insists that much of the pre-circle process should be dedicated to ensuring peacemaking principles are respected and govern the circle process. He provides a brief account of these principles:

Peace Within: Finding "peace within" is an essential component of peacemaking. A circle's success is directly related to how participants (especially offenders and victims) have progressed in finding "peace within". It is a journey which begins by overcoming the excuses and denials used to avoid responsibility for harmful conduct and acknowledging a desperate need for help. It is not an easy journey, but one which develops a renewed belief in oneself and others.

Right Relations: "Right relations" is another integral part of peacemaking. "Right relations" require mutual respect and an understanding, but not necessarily acceptance of different values. To attain "right relations", the circle requests of all participants to actively show genuine respect for others in what they say, and in how they listen. Creating "right relations" prepares parties to accept greater responsibility for resolving their differences. By an early, and unwavering emphasis on "right relations", the circle participants become aware of the importance of settling not just substantive issues but in building or rebuilding relationships.

Harm to One is Harm to All: The circle process relies upon the understanding of all participants that the well-being of any individual is directly related to the well-being of the community. While offenders must take responsible for their harmful conduct, and show genuine remorse, family and other community members must share the responsibility of peacemaking. This provides the necessary basis to build "peace within" and "right relations".

Consensus: In circles, the aim is to move beyond the initial position of participants to determine underlying interests and to build the foundation for consensus. Creative solutions are pursued to accommodate the interests of all involved. In striving to reach a consensus, the process recognizes the importance of all interests, and fosters respect and understanding for differences.

Inclusive: To make certain that all interests are included, the circle seeks to be as inclusive as possible. Great effort is made to extend the base of participation for the strength of the process is directly to the breath of community participation. No one is excluded unless their conduct shows disrespect for the circle. It is not so much a matter

of numbers but rather a question of balance. In order to come to a consensus, all interested parties must be listened to, respected, fairly treated and provided with an equal opportunity to participate.

Forward Looking: Peacemaking focuses mainly on future relationships. In circles, the history of issues and of people provides important guidance for determining requirements for building a different future.

Dependence upon all of these peacekeeping principles establishes for many aboriginal peoples the foundation for dealing with conflict in a "good way".[46]

Judicial analysis of the role of circle sentencing has been varied. In *R. v. Rich,* Justice O'Reagan of Newfoundland's Supreme Court (Trial Division) considered its role within the existing system as "a form of diversion in the sentencing process" whose function was to "strongly suggest alternatives to incarceration."[47] Judge Desjardins of the New Brunswick Provincial Court described the sentencing circle in *R. v. Nicholas* as "embracing the trappings of a conventional sentencing hearing and the sacred teaching of the native way of life" and commented that this process was "a small but tangible beginning of a bridge across the cultural divide."[48] In *R v. Taylor*, Justice Milliken of Saskachewan's Court of Queen's Bench compared it to a pre-sentence report and stated that "[t]he only difference appears…to be that a pre-sentence report is prepared by a probation office in writing" He pointed out that "[t]he same persons who are at a circle are usually interviewed for a pre-sentence report."[49] Other judges, however, believe it holds much greater promise. On appeal, Chief Justice Bayda ascribed a broad role for circle sentencing:

> A sentencing circle is much more than a fact-finding exercise with an aboriginal twist. While it may and does serve as a tool in assisting the judge to fashion a "fit"

> sentence, and in that respect serves much the same purpose as a pre-sentence report, a sentencing circle transcends that purpose. It is a stocktaking and accountability exercise not only on the part of the offender but on the part of the community that produced the offender. The exercise is conducted on a quintessentially human level with all interested parties in juxtaposition speaking face to face, informally, with little or no regard to legal status, as opposed to a clinical, formal level where only those parties with legal status participate and only at their respective traditional physical, cultural and ceremonial distances from each other. The exercise permits not only a release of information but a purging of feelings, a paving of the way for new growth, and a reconciliation between the offender and those he or she has hurt. The community to which the offender has accounted assumes an authority over and responsibility for the offender – and authority normally entrusted to professional public officials to whom the offender does not feel accountable.[50]

Judge Barry Stuart suggests that "once [sentencing circles are] fully engaged, once the potential of communities to work in concert with the professional justice system is realized, the cumulative savings in monetary and human terms will be enormous."[51] More recently, he has argued that circle sentencing has the potential to engender moral growth, foster positive attitudes, empower individuals, resolve difference, generate enduring solutions, remove the causes of crime, build a sense of community and to create safe communities.[52]

Although claims abound to support the general benefits of these processes, there is not yet any empirical evidence to support them. In addition, a number of concerns have been identified. Given the attention to aboriginal justice and the fact that aboriginal community justice is often portrayed as the ideal, certain issues and the roles for the community in justice should be examined. Often it is assumed that if community is involved in dispensing justice, the problems identified with the conventional system are automatically alleviated. Carol LaPrairie warns against simplistic thinking and stresses

the need to critically and realistically examine aboriginal communities as well as justice initiatives.[53]

One concern is the difficulty if not the impossibility of defining, demarcating and demystifying "community." While the community is rarely defined, the "good" of the community and meeting community "needs" are frequently advanced. LaPrairie maintains that this is most evident in the sentencing literature by advocates such as Judge Stuart. The notion of community implies a certain level of involvement and participation of communities and community members in the sentencing of offenders, the restoration of rights of victims, and their general empowerment, including responsibility for social control functions. The difficulty is defining the community for the purpose of fulfilling these obligations because in sentencing circles it is anyone who desires to participate.[54] It has also been suggested that including an unlimited number of "stakeholders" may inadvertently dilute the primacy of the victim and the offender by involving and giving power to unrepresentative community members.[55]

It is critical that those who participate in local justice initiatives actually represent the community. If participation is limited to a self-selection group and no effort made to ensure that a cross-section of the community participates, this may result in the presence of only offender or victim supporters leading to a process referred to by Retzinger and Scheff as the "engulfment" of offenders. This is a process by which supporters protect the offender through a serious of exculpatory remarks effectively discouraging the offender from taking responsibility for his or her behaviour.[56]

Much of the current popularity of restorative justice is related to its promise to include crime victims and respond to their concerns. It will be difficult, therefore, to

maintain support for such justice initiatives if this is not found to be the case. Some representatives of Canadian victims' groups have in the past criticized programs on the basis that they blur distinctions between victims and offenders and that their members have no desire to spend time with offenders. When they do participate, crime victims may not be as satisfied with the results as offenders and this may lead to concerns that restorative justice is more for offenders than victims.[57]

The concerns of power, control and participation are brought to the fore in complex layers by issues surrounding aboriginal women. Gender inequality, particularly within aboriginal political leadership, can result in aboriginal women to be greatly underrepresented in aboriginal government and organizations. Since they are particularly vulnerable to discrimination during the development and implementation of justice initiatives, it must be assured that they are participants during all stages of an initiative and that their concerns are addressed. For example, in many communities there are extremely high levels of violence perpetrated against women, as well as tolerance for such violence.[58] As the Aboriginal Justice Inquiry of Manitoba found:

> The unwillingness of chiefs and councils to address the plight of women and children suffering abuse at the hands of husbands and fathers is quite alarming…the failure of Aboriginal government leaders to deal at all with the problem of domestic abuse is unconscionable.[59]

Much discussion, education, and planning is required to ensure that their interests are served and safety guaranteed.[60]

The introduction of circle sentencing in an Inuit community in Nunavik, Quebec is illustrative of a number of problems. A judge decided to conduct a circle in a case involving a man who pleaded guilty to assaulting his wife. There was very little prior organization or preparation and the parties involved were not told why the judge was

holding a circle. There was no discussion as to the history and purpose of sentencing circles or how circles related to Inuit traditions. During the actual circle, the focus was on the offender while the victim was nervous, afraid, and spoke very little. The harm done to the offender's wife and family was basically not discussed. It was certain high profile individuals in the community who dominated the discussion. Since only specific individuals decided who would participate in the circle, it was not clear how representative of the community the group was. Apparently, subsequent to the circle, she had been beaten again. [61]

Justice Co-Ordinator Mary Crnkovich describes the power imbalance which existed between the offender and the victim:

> Aside from the fact that the sentence was based on a proposal presented by the accused, the victim could hardly, in her position, oppose such a proposal or complain that it was not working. Again to suggest that her attendance [for counseling] would keep the accused honest, demonstrates, in the author's view, the judge's misunderstanding of the life circumstances of this woman as a victim of violence. How could this woman speak out against her husband? How could she speak out against the mayor [and] …others in her community [who attended the sentencing circle]? Did the judge really believe she would speak out based on the history of this case to date? The victim's actions or lack thereof during the circle, demonstrated the degree of fear and deference paid to her spouse.[62]

This case highlights the importance of pre-hearing preparation, as advocated by Judge Stuart, to identify and address power imbalances and the obvious lack of understanding in the community about the process. The Hollow Water Holistic Circle Healing in Manitoba dealing with sex abusers adopted such an approach. In cases of serious child sexual abuse, each offender and victim was provided with a separate support team, and the two were not brought together until such time as they could face each other on equal footing. When a sentencing circle was held, the victim was encouraged, but not

required to attend. If the victim chose to participate, he or she was accompanied by a specific worker for support.[63] An evaluation of the program, however, suggests that many of the problems may not have been overcome or that crimes involving abuse may not be appropriate for sentencing circles. The most important finding in this respect is that 72% of offenders and only 28% if victims found the sentencing circle a positive experience. In addition, only 34% felt that the community was supportive of them after going through the program.[64]

This last statistic gives rise to another related issue. It is not only the power dynamics between abusers and abused which need to be understood. There are also community power dynamics at work in many aboriginal communities. One of the many strengths of indigenous communities is extended family networks and "community-mindedness" which can be used to end violence in homes. Unfortunately, that strength can become a great weakness when it is utilized to prevent disclosure of violence or abuse and leaves victims in danger.[65] Caution regarding power imbalances in the context of a request for a community-based sentencing hearing was expressed by the Ontario Court of Justice (General Division) in *R. v. A.F.* The victim had been outcast from her community as a result of her complaint and the ensuing criminal proceeding.[66]

In Native communities, there are inter-family conflicts and families with more power. Therefore, there are real concerns about patronage and that the views of certain residents will greatly influence decision-making regarding the administration of justice. Power relationship could significantly impact all facets of community-based justice initiatives including the perception of the seriousness of an offense, how the victim is treated, the response to the offender and how decisions are made.[67]

In addition, most of the community justice literature on sentencing circles assumes a level of involvement and participation of the community for which little evidence exists. The level of participation and involvement is rarely specified but the community, once identified through the involvement of certain participants, is thought to have the ability to determine the precise needs of offenders and victims and the resources and willingness to meet these needs.[68] However, it is unrealistic to assume that all communities have the interest, willingness or capability to confront crimes, especially violence. The Chair of the Inuit Justice Task Force in Nunavik stated that "the region we come from is bare of infrastructure and resources to deal with these kinds of issues. A community is swamped dealing with the magnitude of problems."[69] Findings from the evaluation of the Hollow Water program also reveal that community members expressed concerns about dealing locally and with chronic serious offenders.[70] Community involvement depends on having individual members who are willing and able to volunteer. While community members may have the commitment, a common complaint in many communities is that it is always the same people who volunteer and eventually "burn out."[71]

A related issue is the ongoing problem with repeat offenders in aboriginal communities. The resources needed to deal with occasional offenders may be quite different from those required to respond to chronic offenders. This suggests that local projects must be careful about assessing and selecting those offenders for whom there are available and appropriate resources.[72]

Time limitations also place significant restrictions on the use of circle sentencing. The circle process described by Judge Stuart seems theoretically intensive and capable of

meeting the multiple needs of diverse stakeholders due to its stress on the importance of prior organization and preparation of all participants before the actual sentencing circle is held. However, the process is highly labour-intensive which thereby may limit its potential for broad system impact.[73] Heavy schedules are common in many rural and northern courts. A court docket day can include anywhere between twenty and fifty accused appearing before the court. Given these substantial demands on the court system, time considerations may also necessitate the selective use of circle sentencing if there is no significant increase in court resources.[74]

There are also legitimate concerns with respect to accountability. Many have claimed that because of the grassroots nature of community, accountability is automatic in community-based projects. However, experience has shown that this is not necessarily the case. Some accountability issues for Canadian aboriginal justice systems are identified by Roger McDonnell. He argues that "accountability in its most prominent form requires a commitment to the notions of individuality, equality and impartiality. This means that an accountable person must be someone who is willing to situate himself or herself at the level of the social whole."[75] LaPrairie argues that in contemporary aboriginal communities there is no one person who can speak for the interests of the whole society. Therefore, judges in sentencing circles or other participants who assume certain individual or groups speak for the community, may be excluding other valuable and important community insights and perspectives.[76]

Some people doubt that circles can have an impact on the high rate of incarceration for aboriginals because of the criteria for inclusion in a circle. An examination of the criteria used in reported cases reveals two weaknesses: they are highly

restrictive and inconsistent from judge to judge. While one judge suggests that circles are only appropriate when the crime is serious enough to cause concern within the community, Justice Grotsky states that a sentencing circle is only appropriate when the period of imprisonment would be otherwise minimal[77]. In *R. v. Morin*,[78] Judge Milliken chose to hold a sentencing circle even though a federal prison was a likely outcome. Judge Fafard adds other criteria such as the requirement that disputed facts be resolved before the circle, and that the case be one that would be willing to take a chance and depart from the usual tariff.[79] While appellate courts in a number of provinces have supported circle sentencing to some degree, they have not been definitive in setting criteria in terms of the offences and offenders that are potential candidates for circle sentencing. Julian Roberts and Carol LaPrairie insist that there is clearly a need for national standards if there is to be consistency of application across the country.[80]

Accounts of sentencing circles appeal to several sentencing goals, including the utilitarian aims of rehabilitation and crime prevention and notions of restorative justice. Judge Stuart has conducted hundreds of sentencing circles and he has stated that "Circle sentencing and other community justice processes do spectacularly better than formal justice agencies."[81] Unfortunately, no empirical research has yet been done to back up such a claim. At this point, it is unclear to what extent sentencing circles can promote the goals more effectively than conventional sentencing hearings.[82] There is also a need for research on a more comprehensive set of outcomes reflecting the circle process' intent to bring a measure of healing to the community, the victim, the offender and their families.[83]

These concerns regarding circle sentencing have not been raised to suggest a lack of merit in pursuing local justice in aboriginal communities, but rather to identify the need for greater clarity in the development and delivery of local justice services and to stress that living up to visions of aboriginal justice is not an easy or quick matter. Circle sentencing cannot be viewed as a panacea or a quick fix to problems with the mainstream system. The rebalancing of power, revitalization of communities, and implementation of aboriginal justice is a complex process. Restorative justice is an evolving process and criticism can be valuable when it is used as a vehicle for refining policy and practice.

While power and control must be returned to indigenous communities, the responsibility for the multitude of problems facing contemporary communities cannot rest solely on aboriginal shoulders. Government also has obligations and responsibilities. The state's role in funding restorative justice programs gives it important leverage to ensure that proceedings are conducted in accordance with public norms such as fairness, openness, and non-discrimination.

Overcoming power dynamics is a great challenge facing today's Native communities. To help ensure the full participation of aboriginal women, resources and funding must be provided to aboriginal women's groups at the local, regional and national level.[84] As well, circle sentencing initiatives must include women at all stages of development and implementation. If committees are established, they should be composed of a cross-section of individuals, including women of different generations and both sexes. A coordinated, inter-agency approach to responding to crime is also recommended. The responsibility for decision-making must be shared by several people

in the community to help in reducing individual and family biases as well as any family or community pressures on a single justice representative.[85]

Government involvement is a very contentious issue because it is seen as an infringement of the right of self-determination, however, given the extent of violence against women, the tolerance for it and community dynamics, many argue that there is a necessity for a process of monitoring and accountability in any circle sentencing initiative which deals with such matters.[86] While the justice initiative needs to be community-based outside resources and training are required. Cases of domestic violence highlight the importance of ongoing support at the local level for both victim and offenders. It is unrealistic to expect that a few hours in a sentencing circle will permanently change historic patterns of offending and imbalances of power. Certainly, sentencing circles can be catalysts to begin significant changes in behaviour on the part of offenders. Any hope of achieving this goal, however, depends on the availability and success of locally accessible resources, including support, treatment, and counseling for victims and offenders, and in cases involving abuse, close supervision of offenders and protection of victims.[87]

Restorative justice demands much of the community. Sentencing circles in rural areas are supported and coordinated by community volunteers who are very involved in a multitude of community activities. Lawyer Sid Robinson suggests that a salaried infrastructure is required to support circle sentencing.[88] Daniel Kwochka agrees. He believes that as sentencing circles become increasingly common, we may be expecting too much of people and proposes that an honorarium or similar payment made to participants would be appropriate. He states that "a judge's ultimate authority to define

the proper parties, a power that should be exercised only with great restraint, would guard against the creation of a class of professional participants, although such a role may be appropriate in the case of elders."[89] One should add, however, that caution should be exercised in employing the term "elder" and in choosing elders to work in this area. Due to the fact that there are elders who are sexual offenders and victims of family violence, it has been suggested that criteria should be established before they assume a leading role.[90]

There are also accountability issues that must be addressed. Governments and funding sources should be accountable to the public, to communities, and to the project. For Carol LaPraire, "accountability would involve providing technical assistance and support to projects, allowing sufficient time for adequate project development, implementation, and establishment; creating an environment of openness and respect among all parties."[91] Kent Roach suggests that the state may also have an important role in providing mechanisms of accountability should participants be aggrieved by a restorative justice proceeding conducted by a community group.[92]

In deciding whether or not to hold a sentencing circle the court is exercising a judicial function. This means that the decision must not be made arbitrarily but in accordance with certain criteria. The credibility of the administration of justice depends on the public, aboriginals and others to know what is happening in the development of sentencing circles. The establishment of formal guidelines would ensure consistency of application across the country.

Formal guidelines suggesting the range of cases that may be concluded in this manner would also address the limited time available for sentencing circles.[93] At the same time, guidelines could provide direction as to which types of cases would be best

suited to circle sentencing. Implementing circle sentencing and using them for a wide range of offences and offenders without reference to offender needs and community resources may end in failure for both offender and community. In addition, it may also divert attention and precious resources away from more effective criminal law reform initiatives.[94]

Adopting formal guidelines presumes, however, that we know what kinds of cases are most suitable and most likely to benefit from circles, and what procedures are desirable. At this point in time, however, there are a number of questions that still remain. While some communities feel that they can assume responsibility for many offenders and effectively respond to minor crimes, there is a 'threshold' of offense severity beyond which they feel comfortable. This threshold of seriousness may vary across the communities and may depend upon a number of factors, including the available personal and community resources. One question is whether violence against women constitutes, or should constitute crimes above the community threshold and, thus, should be excluded from sentencing circle proceedings. Given some of the concerns that have been raised, an argument could be made that indeed it should.[95] In a society which associates imprisonment with taking crime seriously, restorative justice is thought by the general public to be most suitable for less serious crimes.[96]

Although Judge Stuart, in *Moses,* recognized that the "circle may not be appropriate for all crimes" one may question whether it is possible to predetermine the appropriateness of circle sentencing merely on the basis of the offence committed, without considering the specific circumstances of both the offence and the offender as he advocates. Green points out that judicial adherence to starting-point sentences for such

offences as sexual assault will likely restrict the use of sentencing circles.[97] However, in response to the suggestion that some cases may be predetermined as unsuitable for circle sentencing simply due to established sentencing tariffs, Professor Tim Quigley argues that, except in clear cases such as homicide, the broad discretion open to a sentencing judge makes it difficult to predetermine what and how long a sentence should be:

> [T]hese restrictions [on circle sentencing] put the cart before the horse. It is only during the process itself that it can be learned whether the offender is remorseful and motivated to change, whether the community is willing to provide the necessary support and, perhaps most fundamentally, what is the appropriate sentence for this offender.[98]

Similarly, in *Nicholas,* Judge Desjardin, rejected the idea that sentencing circles be used only for offences where the normal range of sentence is less than two years. He viewed "the nature of [an] offence and possible range of sentence" as factors to be considered in, but not determinative of, a sentencing circle application.[99]

At the sentencing stage, the judicial fixation on avoiding disparity is seen by proponents of restorative justice as a major barrier because the criminal justice system and the public share a major premise: that jail is the worst punishment a judge can hand out and no other sentence can equal it. The fate of these "rediscovered procedures hangs in the balance as long as courts of appeal are overly concerned about the uniformity of sentences in their jurisdiction. Uniformity hides inequality, impedes innovation and locks the system into its mindset of jail."[100]

Law reformers have long recognized Canada's over-reliance on incarceration and have developed other options. However, these alternative measures are generally used only where imprisonment is considered unnecessary, or where they are used as additional controls on an offender who would not have been given a custodial sentence. They have

rarely been viewed as a substitute for jail and, seemingly, when the starting point approach mandates custodial sentences there can be no substitute.[101] Daniel Kwochka argues that the best approach to advance the case for restorative justice is by promoting its unique goal: repairing the relationships of the offender, the victim, and the community, rather than devising sanctions that are as punitive as incarcerations.

He insists that the boundary between offences that mandate imprisonment and those that do not must be redrawn. He believes that restorative justice can be accommodated in a system that recognizes imprisonment as the ultimate sanction: the answer is not to exaggerate the severity of alternative sanctions but instead to stress the harsh and brutal nature of imprisonment and to reconsider when its use is justified. The answer is to recognize the value of liberty and to condemn its routine degradation through the casual resort to imprisonment. Courts and legislators must undertake a fundamental re-evaluation of when incarceration is necessary, and this re-evaluation must be from a completely new perspective.[102]

He points out that if prison has a deterrent effect, then reserving that penalty for only the most serious offences, would certainly strengthen it. At present, he argues, the stigma and denunciatory effect of jail is lost when so many are imprisoned. Imposing short jail sentences also tends to undermine public confidence in the justice system. Offenders serve only a small portion of their sentences due to early release programs, offenders become eligible for day parole after serving only one-sixth of their sentence, and become eligible for full parole after serving one third. He argues that it is better to avoid short jail sentences instead of raising false public expectations that, if not fulfilled, discredit the system. If this was done, Aboriginal people would benefit disproportionately

since they are the ones serving the most short-term sentences. With the end of short jail sentences, starting point sentences would seem quite excessive. Courts would then have to ask if the particular offender would have to be incapacitated or denounced. If that was the case, the punishment paradigm might be appropriate. If one was faithful to the rational and principled use of imprisonment, he suggests that the answer should be no around 90% of the time, a result that would allow the restorative paradigm the freedom to develop and to demonstrate success. In addition, some of the resources saved through more selective incarceration could be shifted to fund programs like sentencing circles.[103]

While Aboriginal justice is rooted in restoration rather than punishment, there is little doubt that Aboriginal people share the notion of jail as a severe punishment and as necessary to protect society in some circumstances. While it is of crucial importance to conduct experiments in victim, offender and community reconciliation, a completely restorative approach appears "unlikely to provide the basis of a theoretically respectable or socially acceptable system of dealing with serious crimes."[104]

Judge Barry Stuart asserts that the negative impact of the criminal justice system has on individuals, families and communities is not a consequence of inadequate professional resources, but rather of using the formal process when other community processes are more appropriate. For many societal functions and many types of conflict (particularly those conflicts that communities recognize they cannot or do not wish to handle), existing adversarial processes may be better suited than peacemaking circles.[105]

It is clear that there is a lack of evaluative material about circle sentencing. What is needed is the results of rigorous empirical research rather than anecdotal evidence to understand how sentencing circles can be used most effectively. La Prairie maintains that,

> Research to answer some of the central questions about community justice is required and should involve a long-term, ethnographic approach rather than a standard evaluation model which relies almost exclusively on interviews with key players, and an analysis of a limited number of data sources."[106]

She insists that such an evaluation should be carried out by disinterested researchers, not by advocates or critics.[107]

In order to improve the quality of sentencing research, Julian Roberts advocates the creation of a permanent sentencing commission. The function of a sentencing commission is not merely to develop and modify sentencing guidelines. It also serves to co-ordinate policy as well as basic research. He maintains that "absent such a body, sentencing research will remain a rather ad-hoc enterprise, guided more by the immediate priorities of the federal Department of Justice, or the particular interests of individual researchers, than by any comprehensive, integrated strategy."[108]

He also maintains that it is important to develop sentencing research which is sensitive to the interests and concerns of the appellate courts. Without a sentencing commission, or formal sentencing guidelines, trial court judges are guided by the appellate courts across the country. There are signs that these courts have become more interested in the results of sentencing research.[109]

Perhaps the most important issue to be resolved concerns the collection and dissemination of national sentencing statistics. There is no annual publication which focuses exclusively on sentencing trends. National sentencing statistics are an indispensable element of a rational and comprehensive sentencing research program. He warns that unless greater resources are allocated to the issue of research on sentencing, Canada will behind other nations in terms of understanding this critical component of the criminal process. In his opinion, nowhere is the gulf more striking than between criminal

justice policy and criminal justice research. Clearly, research and policy need to be better integrated. In order to achieve this, the research capability must be improved, and this means better statistics. And of course policy-makers and politicians must pay more attention to the results of systematic research.[110] This should certainly be the case with respect to any evaluation of circle sentencing.

What must be kept in mind with respect to any evaluation, as well, is that restorative justice measures success in a manner that is different from the traditional criminal justice system. Community justice initiatives are about much more than lowering recidivist rates; community processes such as circle sentencing have the potential to:

> Engender moral growth among all participants; foster positive attitudes about others; empower individuals, families and communities to take responsibility for conflict in their lives and constructively resolve differences with others; generate innovative, enduring solutions; remove underlying causes of crime; build a sense of community; create safe and healthy communities; educate participants about causes of crime and the importance of community prevention.[111]

Stuarts argues that while sentencing circles can significantly reduce recidivism, focusing on recidivist rates loses sight of other important contributions and ignores why these contributions must be reinforced, staffed and funded in completely different ways than formal justice processes.[112] As Micheal Braswell points out,

> [t]hese are, admittedly, more difficult goals to measure but real social justice is a more complex value than the more limited concerns of the contemporary criminal justice system. Real social justice represents a more long-term, rather than short-term, view, and promises to be longer lasting and less likely to see repeated problems.[113]

Aboriginal communities are embarking on a long road of healing and revitalization. While there are a number of concerns that must be addressed, sentencing

circles have the potential to generate real change in the lives of victims, offenders and community members. At this point, the process must continue to be supported and provided with a real opportunity to produce success.

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