

Sentencing Circles and Intimate Violence: A Canadian Feminist Perspective

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Les personnes qui préconisent la justice réparatrice prétendent que ces modèles peuvent profiter aux contrevenants et contrevenantes, aux victimes et aux communautés, tout en redressant des injustices historiques perpétrées contre les peuples autochtones. Ces prétentions s'étendent aussi aux cas de violence intime. Dans le cas des cercles de détermination de la peine convoqués par les tribunaux dans les cas de violence intime au Canada, ces prétentions se sont avérées sans fondements. De fait, en comparant les résultats dans ces dossiers aux études récentes traitant des besoins des femmes battues, ces modèles, dans leur forme actuelle, n'ont pas réussi à redresser l'injustice et l'inégalité sociales que subissent les femmes dans les communautés autochtones au Canada et, dans certains cas, ont «victimisé» à nouveau les survivantes de violence intime.

Advocates of restorative justice claim that these models can benefit offenders, victims, and communities and also address historical injustices perpetrated against Aboriginal peoples. These claims extend to cases of intimate violence. In the case of judicially convened sentencing circles in cases of intimate violence in Canada, these claims have not been borne out. In fact, by measuring the outcomes in these cases against recent studies of battered women's needs, these models as they are currently constituted have inadequately addressed social injustice and inequality experienced by women within Canadian Aboriginal communities and, in some instances, have revictimized survivors of intimate violence.

(T)he notion of culture that has perhaps the widest currency among both dominant and subordinate groups is one whereby culture is taken to mean values, beliefs, knowledge and customs that exist in a timeless and unchangeable vacuum outside of patriarchy, racism, imperialism and colonialism.

Sherene Razack, *Looking White People in the Eye: Gender, Race and Culture in the Courtrooms and Classrooms*

Introduction

The core values and goals of restorative justice in the criminal context are generally considered laudable and progressive.¹ Restorative justice claims to support and heal the survivor, the offender, and the community, while holding offenders accountable for their wrong doing. In many cases, those who support and practice restorative justice claim that it can effectively address social injustice and inequality, particularly that which is experienced within groups who have been criminalized and racialized, such as Aboriginal peoples.² Advocates of restorative justice state also that it is superior to the conventional criminal justice system (CJS) in that it allows both survivor and offender to avoid the trauma and revictimization that is consistently inflicted upon both of them by the CJS.³ These claims extend to cases of intimate violence.⁴

1. For a critique of the goals and values of restorative justice, see Analise Acorn, *Compulsory Compassion: A Critique of Restorative Justice* (Vancouver: UBC Press, 2004).
2. See, for instance, Patricia Monture-Okanee and Mary Ellen Turpel, "Aboriginal Peoples and Canadian Criminal Law: Rethinking Justice" (1992) *UBC Law Review*, Special Edition 248 at 242; Mary Ellen Turpel, "Reflections on Thinking Concretely about Criminal Justice Reform," in Richard Gosse and James Youngblood Henderson, eds., *Continuing Poundmaker and Riel's Quest: Presentations Made at a Conference on Aboriginal Peoples and Justice* (Saskatoon: Purich, 1994), 206 at 210; Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada*, Report of the Royal Commission on Aboriginal Peoples (Ottawa: Canada Communication Group, 1996) at 12-33; and Barbara Hudson, "Restorative Justice: The Challenge of Sexual and Racial Violence" (1998) 2 *Journal of Law and Society* 237.
3. See, for instance, Daniel Van Ness and Karen Heetderks Strong, *Restoring Justice* (Cincinnati, OH: Anderson Publishing, 1997) at 22; Ruth Morris, *Stories of Transformative Justice* (Toronto: Canadian Scholar's Press, 2000) at 3-7; Mark Umbreit, "Restorative Justice through Victim-Offender Mediation: A Multi-Site Assessment" (1998) 1 *Western Criminology Review* 1 at 2; Allison Morris, "Critiquing the Critics: A Brief Response to Critics of Restorative Justice" (2002) 42 *British Journal of Criminology* 596; and Kay Pranis, Barry Stuart, and Mark Wedge, *Peacemaking Circles: From Crime to Community* (St. Paul, MN: Living Justice Press, 2003). For a discussion particularly of Aboriginal peoples, see Monture-Okanee and Turpel, *supra* note 2; and Turpel, *supra* note 2.
4. Joan Pennell and Gale Burford, "Feminist Praxis: Making Family Group Conferencing Work," in John Braithwaite and Heather Strang, *Restorative Justice and Family Violence* (Cambridge: Cambridge University Press, 2002) at 108; Allison Morris, "Children and Family Violence: Restorative Messages from New Zealand," in Braithwaite and Strang, *supra* note 4, 89; Kathleen Daly and John Braithwaite, "Masculinities, Violence and Communitarian Control," in Newburn and Stanks, eds., *Just Boys Doing Business? Men, Masculinities and Crime* (London: Routledge, 1994), 189; Lawrence W. Sherman, "Domestic Violence and Restorative Justice: Answering Key Questions" (2000) 8 *Virginia Journal of Social Policy and Law* 263; Barbara Hudson, "Restorative Justice and Gendered Violence: Diversion or Effective Justice?" (2002) 42 *British Journal of Criminology* 616; Lois Presser and Emily Gaarder, "Can Restorative Justice Reduce Battering? Some Preliminary Considerations" (2000) 27 *Social Justice* 175; and Dr. Joe Couture et al., *A Cost-Benefit Analysis of Hollow Water's Community Holistic Circle Healing Process* (Ottawa: Solicitor General, 2001).

In the context of intimate violence,⁵ one form of restorative justice, the judicially convened sentencing circle, presents challenges to these claims. In many cases, judicially convened sentencing circles have inadequately addressed the social injustice and inequality experienced by women within Canadian Aboriginal communities. While it is still most often characterized as an alternative, the use of restorative justice is clearly entrenched in Canadian criminal justice practices.⁶ In 1998, there were over 400 restorative justice initiatives functioning in Canada.⁷ In fact, the use of restorative justice has become the hallmark of “progressive” governments and communities, making constructive critiques of restorative justice difficult and even “politically incorrect.”⁸ Restorative justice is used in several Canadian jurisdictions to deal with cases of intimate violence.⁹

In the context of intimate violence, feminists and women’s anti-violence advocates worldwide have been critical of the use of restorative justice, despite the promising rhetoric of restorative justice advocates.¹⁰

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5. In this article, I use the term “intimate violence” to denote physical, sexual, emotional, financial, psychological, or spiritual abuse by adult males of adult female partners in intimate relationships. I follow Anne McGillivray and Brenda Comasky, Canadian feminist legal scholars, in using this term in lieu of wife battering, battered woman syndrome, wife abuse, spousal assault, family violence, domestic abuse, domestic assault and domestic violence. Intimate violence is used instead because it speaks to the close, personal relationship between abuser and survivor and “the deep trust presumed to exist among family members, between intimate partners.” Anne McGillivray and Brenda Comasky, *Black Eyes All of the Time: Intimate Violence, Aboriginal Women and the Justice System* (Toronto: University of Toronto Press, 1999) at xiv.
 6. Kent Roach, “Changing Punishment at the Turn of the Century: Restorative Justice on the Rise” (2000) 41 *Canadian Journal of Criminology* 249.
 7. Canada, “Inventory of Canadian Events and Initiatives Related to Restorative Justice” (Ottawa: Correctional Services of Canada, 1998). A 2002 British Columbia inventory of restorative justice programs lists sixty programs in British Columbia alone. British Columbia, *Restorative Justice Programs, Provincial Directory 2002* (Victoria: Minister of Public Safety and the Solicitor General British Columbia, 2002).
 8. Mary Crnkovich, “The Role of the Victim in the Criminal Justice System: Circle Sentencing in Inuit Communities” (Canadian Institute for the Administration of Justice Conference, Banff, Alberta, 11–14 October 1995).
 9. Angela Cameron, *Restorative Justice and Intimate Violence: A Critical Review of the Literature* (Vancouver: British Columbia Institute against Family Violence, 2005); and Angela Cameron, “Stopping the Violence: Canadian Feminist Debates on Restorative Justice and Intimate Violence” (2006) 10 *Theoretical Criminology* 49.
 10. See, for instance, Ruth Busch and Stephen Hooper, “Domestic Violence and the Restorative Justice Initiatives: The Risks of a New Panacea” (1996) 4 *Waikato Law Review* 188; Ruth Busch, “Domestic Violence and Restorative Justice Initiatives: Who Pays If We Get It Wrong?” in Braithwaite and Strang, *supra* note 4, 223; Julie Stubbs, “‘Communitarian’ Conferencing and Violence against Women: A Cautionary Note,” in Mariana Valverde, Linda MacLeod, and Kirsten Johnson, *Wife Assault and the Canadian Criminal Justice System: Issues and Policies* (Toronto: Centre of Criminology, 1995), 260; Julie Stubbs, “Domestic Violence and Women’s Safety: Feminist Challenges to Restorative Justice,” in Braithwaite and Strang, *supra* note 4, 42. Canadian examples include Kelly MacDonald, *Literature Review: Implications of Restorative Justice in Cases of Violence against Aboriginal Women and Children* (Vancouver: Aboriginal Women’s Action Network, 2001); Wendy Stewart, Audrey

These commentators point to gendered power imbalances between the survivor and the abuser, cultural and economic factors that exacerbate the subordination of women, and administrative shortcomings that jeopardize the safety of survivors of violence. While this feminist literature provides a strong theoretical and epistemological foundation, there has been a call for both increased specificity¹¹ and for empirically based research in the feminist analysis of restorative justice.¹² In fact there is an overall paucity of empirical research on restorative justice and intimate violence,¹³ and there have been no systematic evaluations of judicially convened sentencing circles, feminist or otherwise.¹⁴ Most of the evidence for or against the use of sentencing circles is first hand and anecdotal.

Huntley, and Fay Blaney, *The Implications of Restorative Justice for Aboriginal Women and Children Survivors of Violence: A Comparative Overview of Five Communities in British Columbia* (Vancouver: Aboriginal Women's Acton Network, 2001); Mary Crnkovich, "A Sentencing Circle" (1996) 36 *Journal of Legal Pluralism* 159; Emma LaRoque, "Violence in Aboriginal Communities," in Mariana Valverde, Linda MacLeod, and Kirsten Johnson, *Wife Assault and the Canadian Criminal Justice System: Issues and Policies* (Toronto: Centre of Criminology, 1995), 104; Emma LaRoque, "Re-Examining Culturally Appropriate Models of Criminal Justice Applications," in Michael Asch, ed., *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality and Respect of Difference* (Vancouver: UBC Press, 1997), 73; Sandra Goundry, "Restorative Justice and Criminal Justice Reform in British Columbia: Identifying Some Preliminary Questions and Concerns" (Vancouver: British Columbia Association of Specialised Victim Service Providers, 1998); and Lee Lakeman, "Why 'Law and Order' Cannot End Violence against Women and Why the Development of Women's (Social, Economic and Political and Civil) Rights Might" (2000) 20 *Canadian Woman Studies* 24.

11. Stubbs, *supra* note 10 at 42.
12. Hudson, *supra* note 4; and Presser and Gaarder, *supra* note 4.
13. Presser and Gaarder, *supra* note 4; Allison Morris, *supra* note 3; Hudson, *supra* note 4; Sherman, *supra* note 4; and Morris and Gelsthorpe, "Re-Visioning Men's Violence against Female Partners" (2000) 39 *Howard Journal of Law* 412.
14. Robert Coates, Mark Umbreit, and Betty Vos, "Restorative Justice Circles: An Exploratory Study" (2003) 6 *Contemporary Justice Review* 265; Canada, "Victims' Experiences with, and Expectations and Perceptions of Restorative Justice: A Critical Overview of the Literature" (Ottawa: Department of Justice Canada, Victim Issues Research Series, March 2002); Joan Ryan and Brian Calliou, "Aboriginal Restorative Justice Alternatives: Two Case Studies" (Ottawa: Law Commission of Canada, 2002); J. Latimer, C. Dowden, and D. Muise, "The Effectiveness of Restorative Justice Practices: a Meta-Analysis" (Ottawa: Department of Justice, 2001); Russ Immarigeon, "Restorative Justice, Juvenile Offenders and Crime Victims: A Review of the Literature," in G. Bazemore and L. Walgraves, eds., *Restorative Juvenile Justice: Repairing the Harm of Youth Crime* (New York: Criminal Justice Press, 1999), 305; and C. Griffiths, "The Victims of Crime and Restorative Justice: The Canadian Experience" (1999) 6 *International Review of Victimology* 279. However, for recent commentary on Canadian sentencing circles, see Rashmi Goel, "No Women at the Centre: The Use of the Canadian Sentencing Circles in Domestic Violence Cases" (2000) 15 *Wisconsin Women's Law Journal* 293; and Melani Spiteri, "Sentencing Circles for Aboriginal Offenders in Canada: Furthering the Idea of Aboriginal Justice within a Western Justice Framework," in *Proceedings: Third International Conference on Conferencing, Circles and Other Restorative Practices* (Minneapolis: California State University, 2002).

This article has two primary purposes. The first is to provide a feminist context for the discussion of restorative justice models in Canada. Relative to the volume of literature and research on restorative justice generally, there has been little Canadian feminist legal scholarship on the impact of restorative justice on women. The second goal is to begin this process in a concrete way, moving away from abstracted critiques towards examining particular models and individual interventions. To accomplish this goal, I will critically examine several judicially convened sentencing circles used in cases of intimate violence. I will evaluate these judicially convened sentencing circles through the lens of women's needs,¹⁵ as articulated in two Canadian studies.¹⁶

This article focuses on Aboriginal women¹⁷ who are survivors of intimate violence. Judicially convened sentencing circles, unlike other forms of restorative justice, have been used primarily with Aboriginal offenders.¹⁸ I conclude that the judicially convened sentencing circles examined in this article fail to meet the needs of survivors of intimate violence in many instances and, thus, perpetuate the intersecting oppressions experienced by Aboriginal women who are survivors of intimate violence.

Much has been written on the ways in which the CJS, in specific circumstances, oppresses women and marginalizes women's needs.¹⁹

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15. Basing feminist theory and practice in the lived experiences of women and girls is a well-established feminist epistemology. See, for instance, Joanne Minaker, "Evaluating Criminal Justice Responses to Intimate Abuse through the Lens of Women's Needs" (2001) 13 *Canadian Journal of Women and the Law* at 81 at 75; Christine Overall, *A Feminist I: Reflections from Academia* (Ontario: Broadview Press, 1998) at 173; Sharlene Frank, "A Needs Assessment for an Aboriginal Women's Transition House" (Vancouver: Feminist Research, Education, Development and Action Centre, 1996); Dianne Pothier, "Connecting Grounds of Discrimination to Real People's Real Experiences" (2001) 13 *Canadian Journal of Women and the Law* 37; Elizabeth Comack, *Women in Trouble* (Halifax: Fernwood, 1996); and Marilyn Assheton-Smith and Barbara Spronk, "Women and Social Location: Our Lives, Our Research" (Ontario: Canadian Research Institute on the Advancement of Women, 1993).
 16. Minaker, *supra* note 15 at 81; and McGillivray and Comasky, *supra* note 5.
 17. I am not an Aboriginal woman, nor do I purport to speak for Aboriginal women. This article is informed by the activism, writing, and scholarship of Aboriginal women who have written and spoken about this issue from their perspectives. My focus on Aboriginal women is also a tribute to the work of the late Marlee Kline, whose attention to intersectionality has been an inspiration to many feminists. I wish also to express my sincere gratitude to the women of the Aboriginal Women's Action Network in Vancouver, British Columbia, who were so generous with their time, energy, and courage and who helped me to attain what understanding I possess of the complexities of this topic. Any errors or omissions are, of course, my own.
 18. There have been some exceptions. See, for instance, SheshaShit Community Circle, "A Healing Circle in the Innu Community of Sheshashit," in Wanda McCaslin, ed., *Justice as Healing: Indigenous Ways* (St. Paul, MN: Living Justice Press, 2005), 177.
 19. See, for instance, D. Currie, "Battered Women and the State: From the Failure of Theory to a Theory of Failure" (1990) 2 *Journal of Human Justice* 77; Kathleen Daly, "Men's Violence, Victim Advocacy, and Feminist Redress" (1998) 28 *Law and Society Review* 77; Elizabeth Sheehy, "Legal Responses to Violence against Women in Canada" (1999)

As Elizabeth Pickett, in her work on family mediation demonstrates, neither conventional nor “alternative” approaches to ending intimate violence are a panacea, when both are grounded in ideologies and practices that marginalize women.²⁰ By starkly dichotomizing restorative justice and the CJS, we fail to see the ways in which they both perpetuate women’s oppression and, therefore, overestimate the potential for social transformation in both models as they are currently applied in Canada.

Foundations: The Practice and Theory of Restorative Justice

Practice: Judicially Convened Sentencing Circles

Sentencing circles are one of a number of criminal justice interventions labelled as restorative justice that are currently in use in Canada. Other forms of restorative justice include victim offender mediation, the alternative measures, and the conditional sentencing regimes outlined in the *Criminal Code*,²¹ and individualized initiatives designed and run by Aboriginal peoples or faith-based groups under agreements negotiated with provincial and territorial governments. Each of these forms deals with intimate violence and its survivors differently and should be considered individually in light of the concerns outlined in this article and in other feminist literature on restorative justice.

The focus of this article is on judicially convened sentencing circles, a form that is most often used in Aboriginal communities by non-Aboriginal judiciary in the disposition of sentences where a finding or admission of guilt has been entered. The decision to use a circle in a given case, and the ultimate sentencing outcome, rests solely with the presiding judge and is conducted under his or her common law sentencing powers. This practice is in contrast to sentencing circles convened under an agreement between a particular Aboriginal community or faith-based group and a provincial or territorial government (an optional protocol). Under such agreements, it is primarily the Aboriginal community, not the non-Aboriginal judge, which convenes the circle and shapes the sentence. Such circles are usually accompanied by an established healing protocol or program that may include counselling, drug and alcohol

19 Canadian Woman Studies 62; Christine Boyle, “A Duty to Retreat” (1991) 25 UBC Law Review 60; Laura Burt “The Battered Woman Syndrome and the Plea of Self-Defense: Can the Victim and the Accused be Strangers?” (1993) 27 UBC Law Review 93; Dianne L. Martin, “Retribution Revisited: A Reconsideration of Feminist Criminal Law Reform Strategies” (1998) 36 Osgoode Hall Law Journal 151; and Christine Boyle, Marie-Andree Bertrand, and Celine Lacerte-Lamontagne, *A Feminist Review of Criminal Law* (Ottawa: Minister of Supply and Services Canada, 1985).

20. Elizabeth Pickett, “Familial Ideology, Family Law and Mediation: Law Casts More than a ‘Shadow’” (1991) 3 Journal of Human Justice 27 at 29.

21. *Criminal Code*, R.S.C. 1985, c. C-46, s. 264.

treatment, or cultural practices. The Hollow Water program is perhaps the best-known Canadian program of this kind and has been dealing with cases of intergenerational sexual abuse and intimate violence for about a decade.²² Some programs authorized by optional protocols specifically exclude cases of intimate violence.²³

Although judicially convened sentencing circles were in limited use prior to 1992,²⁴ *R. v. Moses* is widely recognized as the jurisprudential starting point for sentencing circles in Canada.²⁵ This case marked a major departure from conventional sentencing practices by allowing members of the Aboriginal community where a crime took place to discuss sentencing options with the presiding judge in an open forum. As is currently the case in most judicially convened sentencing circles, the community members in *Moses* acted as advisors, while the final decision rested with the sentencing judge. Presiding Territorial Court Justice Barry Stuart describes the dynamics of the circle in *Moses*:

Rearranging the court in a circle without desks or tables, with all participants facing each other with equal access and equal exposure to each other dramatically changes the dynamics of the decision-making process... The circle breaks down the dominance that traditional court-rooms accord lawyers and judges... Community involvement

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22. Therese Lajeunesse, "Community Holistic Circle Healing: Hollow Water First Nation" (Ottawa: Solicitor General, 1993); Therese Lajeunesse, "Community Holistic Circle Healing in Hollow Water, Manitoba: An Evaluation" (Ottawa: Solicitor General Canada, 1996); Couture et al., *supra* note 4; and Royal Commission on Aboriginal Peoples, *supra* note 2 at 159. The Hollow Water sexual offender circle is an example of an optional protocol that deals with cases of intimate violence. It exists by virtue of a written agreement between the Manitoba Department of Justice and a group of professionals and volunteers formed to address the issues of intergenerational sexual abuse in that community. It allows the community to determine a program for offenders that often entails treatment in the community in lieu of incarceration. The CJS is involved to receive a plea of guilty or, if there is a trial (which the program attempts to avoid), to pass a sentence using a circle, and in a secondary supervisory role through probation officers. Although the Hollow Water program itself has been subjected to some critical scrutiny and warrants further specific research from the perspective of the survivors of intimate violence, this critique is beyond the scope of this article.
23. For example, the Aboriginal Ganootamaage Justice Services of Winnipeg and the Aboriginal Legal Services of Toronto Community Council Program do not accept cases of intimate violence. See Royal Commission on Aboriginal Peoples, *supra* note 2 at 173-4; and Kathy Mallet, Kathy Bent, and Dr. Wendy Josephson, "Aboriginal Ganootamaage Justice Services of Winnipeg," in Jocelyn Proulx and Sharon Perrault, eds., *No Place for Violence: Canadian Aboriginal Alternatives* (Halifax: Fernwood and Resolve, 2000), 62.
24. Justice Cunliffe Barnett recounts having used similar restorative justice methods as early as 1978. Cunliffe Barnett, "Circle Sentencing/Alternative Sentencing" (1995) 3 *Canadian Native Law Reporter* 1 at 3.
25. *R. v. Moses* (1992), 71 C.C.C. (3d) 347 (Y. Ter. Ct.) [*Moses*]. This case is almost universally cited in the cases discussed here as the leading authority on the practice, values, principles, and benefits of sentencing circles.

through the circle generates new information about the accused and the community. The circle, by enhancing community participation, generates a richer range of sentencing options and by improving the quality and quantity of information provides the ability to refine and focus the use of sentencing options to meet the particular needs in each case.²⁶

This form of decision making has been adopted in many courtrooms across Canada in dealing with Aboriginal offenders and has been used in a number of cases involving intimate violence against women.²⁷

While judges in cases such as *Moses* relied only on their common law powers of sentencing discretion, since 1999 the use of circles by the judiciary has been sanctioned by the Supreme Court of Canada's decision in *R. v. Gladue*,²⁸ and circles have become more of a fixture on the Canadian legal landscape. *Gladue* is significant in that it demands, for the first time, that the judiciary take into account the effects of colonialism on the lives of Aboriginal offenders in the sentencing process. This links sentencing circles to section 718.2(e) of the *Criminal Code*. The Supreme Court of Canada found this provision to be remedial, mandating sentencing judges to take a proactive sentencing approach by paying "particular attention to the circumstances of aboriginal offenders."²⁹ This case clearly found that judges must actively and consciously consider the effects of colonization on Aboriginal offenders.³⁰ *Gladue* outlines sentencing goals and factors that will assist a sentencing judge in ascertaining "the types of sentencing procedures and

26. *Ibid.* at 347-8. For perspectives on the functioning of sentencing circles in Aboriginal communities and their traditional role, see Mallett, Bent and Josephson, *supra* note 24 at 71; Barry Stuart, "Sentencing Circles: Turning Swords in Ploughshares," in Joe Hudson and Burt Galaway, eds., *Restorative Justice: International Perspectives* (Monsey, NY: Criminal Justice Abstracts and Press, 1996) at 193; Alex Janvier, "Sentencing Circles," in Gosse and Youngblood Henderson, eds., *supra* note 2 at 301; and Ross Gordon Green, *Justice in Aboriginal Communities: Sentencing Alternatives* (Saskatchewan: Purich, 1998).

27. See, for instance, *R. v. Naappaluk*, [1994] 2 C.N.L.R. 143 (Q.C. (Crim Div.)); *R. v. Bennett*, [1992] Y.J. No. 192 (Y. Terr. Ct.) (QL); *R. v. Charleyboy*, [1993] B.C.J. No. 2854 (B.C. Prov. Ct. (Crim Div.)) (QL); *R. v. Green*, [1992] Y.J. No. 217 (Y. Terr. Ct.) (QL) [*Green*]; *R. v. H.K.C.*, [1997] S.J. No. 577 (Sask. C.A.) (QL); *R. v. Taylor*, [1995] 104 C.C.C. (3d) 346 (Sask. C.A.); *R. v. Morris*, [2004] 3 C.N.L.R. 295 (B.C. Prov. Ct.) [*Morris*]; and *R. v. J.J.* [2004] 192 C.C.C. (3d) 30.

28. *R. v. Gladue*, [1999] 1 S.C.R. 688 [*Gladue*]. While technically dealing with conditional sentences, this case has been cited extensively to support the use of other restorative justice forms, including alternative measures and sentencing circles. See Roach, *supra* note 6.

29. *Criminal Code*, *supra* note 21 at s. 718.2(e).

30. Kent Roach and Jonathan Rudin, "Gladue: The Judicial and Political Reception of a Promising Decision" (2000) 42 *Canadian Journal of Criminology* 335 at 344-5; and Judge Mary Ellen Turpel-Lafonde, "Sentencing within a Restorative Justice Paradigm: Procedural Implications of *R. v. Gladue*" (1999) 43 *Criminal Law Quarterly* 34.

sanctions that may be appropriate for the offender because of his or her particular aboriginal heritage or connection.”³¹ Sentencing circles are used by the judiciary to satisfy this requirement for culturally appropriate sentencing procedures.³²

Advocates of restorative justice view the *Gladue* decision, and criminal justice interventions that follow this case, as a tool for addressing social injustice and inequality as it is experienced within Aboriginal communities. According to several Canadian commentators, the practice of taking evidence of the impact colonialism has on offenders into account, and reducing the use of incarceration against Aboriginal offenders, helps to address injustice against all Aboriginal peoples.³³ It is because of the important role that sentencing circles have played, and will continue to play, in offences involving Aboriginal offenders that I examine their specific efficacy in cases of intimate violence.

Theorizing Judicially Convened Sentencing Circles

There is some controversy about whether judicially convened sentencing circles are a true form of restorative justice. In fact, the definition of restorative justice is itself unclear and evolving.³⁴ Judicially convened sentencing circles are clearly framed as a form or type of restorative justice.³⁵ It is also clear, however, that even by standards set by some restorative justice advocates sentencing circles fall short of what is considered to be restorative justice in a variety of ways.³⁶ Sentencing circles have been embraced

31. *Gladue*, *supra* note 28 at para. 65.

32. See, for instance, *R. v. Morris*, 2004 BCPC 43; and *R. v. J.K.E.*, 1999 YTYC 0501.

33. See, for instance, Roach, *supra* note 6 at 88; Turpel-Lafond, *supra* note 30; and T. Quigley, “Are We Doing Anything about the Disproportionate Jailing of Aboriginal People?” (1999) 42 *Criminal Law Quarterly* 129.

34. Susan Sharpe, “How Big Should the Restorative Justice Tent Be?” in Howard Zehr and Barbara Toews, eds., *Critical Issues in Restorative Justice* (Monsey, NY: Criminal Justice Press, 2004).

35. See, for instance, Teritorial Judge Heino Lilles, “Circle Sentencing: Part of the Restorative Justice Continuum” (paper presented to the third International Conference on Conferencing Circles and Other Restorative Practices, August 2002), <www.iirp.org/library/mn0/mn02_lilles.html >; Barry Stuart, “Circle Sentencing: Turning Swords into Ploughshares,” in Joe Hudson and Burt Galaway, eds., *Restorative Justice: International Perspectives* (Monsey, NY: Criminal Justice Abstracts and Press, 1996), 193; and D. Cooley, “From Restorative Justice to Transformative Justice: A Discussion Paper” (Ottawa: Law Commission of Canada, 1999) at 20.

36. Jonathan Rudin, “Aboriginal Justice and Restorative Justice,” in E. Elliott and R. Gordon, eds., *New Directions in Restorative Justice; Issues, Practice, Evaluations* (Portland OR: Willan Publications, 2005) at 89–114; and LaPrairie and Dickson-Gilmore, *Will the Circle Be Unbroken? Aboriginal Communities, Restorative Justice, and the Challenges of Conflict and Change* (Toronto: University of Toronto Press, 2005).

by numerous lower court judges,³⁷ various Canadian governments,³⁸ and almost every court of appeal³⁹ as a *bona fide* form of restorative justice. Particularly as restorative justice practice grows internationally, and Canada is looked to as a leader in using restorative justice to deal with intimate violence, we must avoid misunderstandings regarding the possibilities and limitations of specific forms or practices. While it may be clear to some who promote restorative justice that sentencing circles are not always a truly restorative response, they are, for all intents and purposes, *adopted* as restorative justice in institutionally significant ways.⁴⁰

In the final analysis, the import of having judicially convened sentencing circles labelled as true restorative justice is both political and practical. A more subtle and nuanced understanding of restorative justice and its promises and pitfalls is required in the Canadian political context and by Canadian restorative justice practitioners. It is vital that they select, fund, and apply models that more closely approximate current best practices and standards and that are explicitly thoughtful about what restorative justice means and to whom. Calling judicially convened sentencing circles “restorative justice” does not make them so. I think that the practice of judicially convened sentencing circles falls short both of the values, goals, and practices laid out by restorative justice researchers, practitioners, and advocates *and* of the needs of women survivors. The following two sections place some important theoretical underpinnings as well as the practice of judicially convened sentencing circles within the larger context of restorative justice theory generally.

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37. See, for instance, Barry Stuart, Kay Pranis, and Mark Wedge, *Peacemaking Circles: from Crime to Community* (St. Paul, MN: Living Justice Press, 2003); D.H. Eber, *Images of Justice* (Kingston and Montreal: McGill-Queen's University Press, 1997); Judge Barry Stuart, “Circle Sentencing: Turning Swords into Ploughshares,” in B. Galaway and J. Hudson, eds., *Restorative Justice: International Perspectives* (New York: Criminal Justice Press, 1996) at 193; Claude Fafard, “On Being a Northern Judge,” in Gosse and Youngblood Henderson, eds., *supra* note 2 at 403–4; and The Honorable A.C. Hamilton, *A Feather Not a Gavel* (Winnipeg: Great Plain, 2001).
38. British Columbia, for instance, has clearly adopted a restorative justice approach in intimate violence cases where “the case is not likely to produce a conviction or the victim is unwilling to testify.” The Honorable Geoff Plant, Q.C., “Reforms to Spousal Assault Policy” (2003) 61 *The Advocate* 589 at 590. Alternative measures, which includes sentencing circles, are used in these circumstances.
39. See, for instance, *R. v. B.L.*, [2002] A.J. No. 215 (QL); *R. v. Williams*, [1998] M.J. No. 482 (QL); *R. v. Johns*, [1995] Y.J. No. 132 (QL); *Morris*, *supra* note 27; *R. v. Morin*, [1995] 101 C.C.C. (3d) 124; *R. v. J.J.*, 2004 NLCA 81; *R. v. Nunner* (1976), 30 C.C.C. (2d) 199 (Ontario C.A.); *R. v. Hudson* (1982), Ontario Court of Appeal, Oral Judgement, 7 January; *R. v. Muise* (1994), 94 C.C.C. (3rd) 119 (N.S. C.A.); and *R. v. Sangster* (1973), 21 C.R.N.S. 339 (Que. C.A.). There has never been a sentencing circle case heard at the Supreme Court of Canada.
40. Jonathan Rudin, “Aboriginal Justice and Restorative Justice,” in E. Elliott and R. Gordon, eds., *New Directions in Restorative Justice: Issues, Practice, Evaluations* (Portland, OR: Willan Publications, 2005), 89; and LaPrairie and Dickson-Gilmore, *supra* note 36.

Culture and Gender

Discussions of judicially convened sentencing circles, their potential to address the needs of survivors and offenders, and their potential for social transformation are consistently framed in ways that marginalize or obscure women's experiences of (intersecting) oppression(s). Much of the literature and case law on restorative justice generally discusses the problems and promises of restorative justice models in gender-neutral terms and with little or no attention to gender inequality.⁴¹ In the context of judicially convened sentencing circles, this inequality manifests itself in a number of ways. First, any perceived inequalities are discussed primarily in relation to culture and race and are routinely described as existing exclusively between the Aboriginal offender and the non-Aboriginal criminal justice officials or non-Aboriginal Canadian society. Gender inequalities that may co-exist with these power dynamics are marginalized or ignored. Sherene Razack describes this as an impoverished formulation or understanding of culture:

[T]he notion of culture that has perhaps the widest currency among both dominant and subordinate groups is one whereby culture is taken to mean values, beliefs, knowledge and customs that exist in a timeless and unchangeable vacuum outside of patriarchy, racism, imperialism and colonialism.⁴²

The gender-neutral nature of most sentencing circle discourse and its consistent use of impoverished notions of culture obscure the gendered nature of intimate violence.

Second, in the cases examined, there is little or no recognition of the systemic discrimination and disadvantage faced by all women and a serious lack of analysis of the circumstances of women who live at the intersection of multiple oppressions such as race and poverty. The social injustices and inequalities that sentencing circles purport to address successfully are described only in relation to race and culture. Restorative justice principles, as utilized by the judiciary in these cases, are presumed to apply to everyone in an equal way, providing equal benefit and advantage to all who participate. This assumption is premised on the notion that survivors and offenders start from similar positions of power and are given equal access to the resources that support them in speaking to their interests. The reality of the position of Canadian women in the home, social, economic, and political spheres belies this gender-neutral, formal equality approach.

41. With the notable exception of the feminist literature mentioned in this article.

42. Sherene Razack, *Looking White People in the Eye: Gender, Race and Culture in the Courtrooms and Classrooms* (Toronto: University of Toronto Press, 1999) at 58.

Aboriginal Laws and Legal Orders

The role of Aboriginal laws, and legal orders in sentencing circles is complex but extremely important. In the cases examined in this article, a central concern is that of the over-incarceration of Aboriginal peoples. There are both implicit and explicit claims that the adherence to, and promotion of, Aboriginal “culture” legitimates the practice of judicially convened sentencing circles. While I wholeheartedly agree with the principle that we must address the over-incarceration of Aboriginal people and that Aboriginal laws and legal orders have a legitimate place in the Canadian legal landscape, I disagree with the ways in which these principles have been actualized in judicially convened sentencing circles.

While the roots of contemporary restorative justice are a tangle of various world views, philosophies, and spiritual practices and values, those models practised in Canada can be divided into Western restorative justice and Aboriginal justice. By “Western,” I refer to restorative justice theory in Western democracies such as the United States, Canada, New Zealand, Australia, the United Kingdom, and Europe, which was developed by restorative justice theorists such as John Braithwaite,⁴³ Heather Strang,⁴⁴ and Howard Zehr⁴⁵ in the context of Christian spirituality and prison abolition. Although Western restorative justice claims to draw upon other cultures (including (pan)-Aboriginal culture) and time periods in its development, it is primarily fashioned as a response to the perceived social injustices entrenched in, and perpetuated by, the contemporary criminal justice systems in Western societies.

Aboriginal justice can be defined as methods of dealing with crime that are designed and run by and for Aboriginal peoples, and which reflect Aboriginal laws and legal orders. Like Western restorative justice, Aboriginal justice takes place partly or completely outside of the conventional criminal justice system and includes several different forms and approaches. Despite some important similarities, there are fundamental differences between the Western restorative justice movement and Aboriginal justice—politically, historically, socially, philosophically, and at a “nuts and bolts” functional level.⁴⁶ Aboriginal laws or legal orders are partly characterized by

43. John Braithwaite, *Crime, Shame and Reintegration* (New York, NY: Cambridge University Press, 1989).

44. Heather Strang and John Braithwaite. *Restorative Justice: From Philosophy to Practice* (Burlington: Ashgate, 2002).

45. Howard Zehr, *Changing Lenses: A New Focus for Crime and Justice* (Scottsdale, PA: Herald Press, 1990).

46. See, for example, John Borrows, “Indigenous Legal Traditions in Canada” (Ottawa: Law Commission of Canada, 2005); John Borrows, “Creating an Indigenous Legal Community” (2005) 50 McGill Law Journal 153; Craig Proulx, *Reclaiming Aboriginal Justice, Identity and Community* (Saskatoon: Purich, 2002); Kathleen Daly, “Restorative Justice: The Real Story” (2002) 4 Punishment and Society 55; and Chris

their political connection to Aboriginal self-determination. Aboriginal justice is not immune to criticism, and I am not asserting here that it is normatively better than Western restorative justice, only that it is different in important ways and must be evaluated on those terms.

Sentencing circles explicitly claim to bring a more “culturally appropriate” approach to sentencing at a number of levels. First, judges claim that the actual practice of sitting and speaking in a circle is drawn in large part from (pan)-Aboriginal, pre-colonial legal orders.⁴⁷ This is substantiated by the assertion that consensus building and “healing” is a more (pan)-Aboriginal way of doing justice than is offered in a conventional courtroom setting. Second, judges have used sentencing circles to meet the requirements of section 718.2(e) of the *Criminal Code*, which mandates that the circumstances of Aboriginal offenders be considered in sentencing. This reflects a move by the Federal government to recognize the impact of colonialism and to reshape the criminal justice system in ways that make it more acceptable to Aboriginal people.⁴⁸

In justifying the use of a circle in a given case, judges rely heavily on the notion that this practice fits more easily than the CJS within Aboriginal communities. In doing so, judges rely on several problematic understandings of culture and the role that Aboriginal culture plays in restorative justice. These understandings of culture eclipse important and subtle differences between restorative justice models and lead us to believe, erroneously, that the current practice of judicially convened sentencing circles in cases of intimate violence is supported by (pan)-Aboriginal “tradition.”

While judicially convened sentencing circles make cultural claims to Aboriginality as a means of legitimizing their use “sentencing circles are not an Aboriginal justice initiative or programme.”⁴⁹ Rather, they derive from a Western restorative justice model, nested securely within the CJS. They neither promote self-governance nor deliver new autonomously controlled resources or funding to the Aboriginal communities in which they function. As James Tully and others have noted, Aboriginal peoples are too often forced to express their own political, social, spiritual, and philosophical understandings and aspirations in the language of Western theoretical discourse:

Western political thought...is the language of both political self-understanding and self-reflection of [Western] societies and

Cunneen, “Thinking Critically about Restorative Justice,” in E. McLoughlin, ed., *Restorative Justice: Critical Issues* (California: Sage Publications, 2002).

47. See, for instance, Hamilton, *supra* note 37 at 297; and Moses, *supra* note 25 at 366.

48. Royal Commission on Aboriginal Peoples, *supra* note 2.

49. Jonathan Rudin, “Aboriginal Justice and Restorative Justice,” in E. Elliott and R. Gordon, eds., *New Directions in Restorative Justice: Issues, Practice, Evaluations* (Portland OR: Willan Publications, 2005), 89 at 99.

their non-Indigenous members. It is not the language of political self-understanding and self-reflection of Indigenous peoples, even though they are constrained to use it.⁵⁰

This constraint is a perpetuation of colonialism, subordinating Aboriginal world views to dominant Western discourses and possibly distorting meaning and nuance. While sentencing circles are an attempt to adapt the CJS to Aboriginal offenders, they are not an expression of Aboriginal justice, restorative or otherwise.⁵¹

Intersecting Oppressions: Theorizing Intimate Violence in the Context of Race and Culture

Intimate Violence as a Gendered Crime

Intimate violence is a gendered crime. Christine Boyle describes gendered crimes (or “gendered assault”) as “offences against women *as women* rather than against people who simply happen to be women.”⁵² A gender-neutral response to intimate violence ignores the fact that such crimes play a “major role in the subordination of women . . . [and that] . . . they are in the forefront of the means of oppression.”⁵³ Criminal justice responses to intimate violence, such as the judicially convened sentencing circle, must take this into consideration. For instance, dealing with gendered crimes will require different safeguards and different human, financial, and community resources than property crimes.

Intimate violence against women creates and perpetuates gender inequality in Canadian society. Abusers use violence to maintain emotional, physical, political, economic, and social domination over their female partners. Statistics on intimate abuse against women in Canada are sobering. A study by the Statistics Canada Centre for Justice Statistics indicates that 85 per cent of survivors of “family violence” in Canada are women and that for abuses

50. James Tully, “The Struggles of Indigenous Peoples for and of Freedom,” in A. Walkem and H. Bruce, eds., *Box of Treasures or Empty Box? Twenty Years of Section 35* (Vancouver: Theytus Books, 2003), 272 at 273. See also Dale Turner, “Perceiving the World Differently,” in C. Bell and D. Kahane, eds., *Intercultural Dispute Resolution in Aboriginal Contexts* (Vancouver: UBC Press, 2005) at 57–69; and G.R. Alfred, *Peace, Power, and Righteousness: An Indigenous Manifesto* (Oxford: Oxford University Press, 1999).

51. For instance in *Morris*, *supra* note 27, the British Columbia Court of Appeal noted that there was some evidence that the laws and legal orders of the Kasha nation (Dena Keh) would not have allowed the outcome that the circle produced (at para. 63).

52. Boyle, Bertrand, and Lacerte-Lamontagne, *supra* note 19 at 49.

53. *Ibid.*

such as kidnapping and sexual assault this rate climbs to 99 and 98 per cent respectively.⁵⁴ An earlier study by Holly Johnson indicates that 29 per cent of the Canadian women surveyed had experienced at least one episode of violence at the hands of their male partners in the last year,⁵⁵ while almost half of Canadian women had been assaulted by a spouse or male partner in their lives.⁵⁶ Although intimate abuse rates are very high in the general Canadian population, rates of violence against Aboriginal women are estimated to be three times as high.⁵⁷

Reported rates of intimate violence may also be artificially low because of barriers to reporting such violence to police.⁵⁸ Only about half (52 per cent) of British Columbia women who have experienced violence in intimate relationships contacted social service agencies for assistance.⁵⁹ Recidivism rates for male abusers are also a significant concern. Recidivism rates among men who assault their intimate partners vary from 30-70 per cent, with even the lowest estimate affecting one in three survivors.⁶⁰ There are particular safety risks for women who have been victimized by male partners when abusers are given non-incarceral sentences.

The primary reason for paying attention to, and, in some cases, prioritizing the concerns of, survivors of intimate violence is that there is so much at stake when their needs are marginalized or ignored.⁶¹ Women are being battered, sexually assaulted, and killed.⁶² Both the individual survivor and women as a marginalized group pay a unique price if restorative justice fails. At a more general level, Aboriginal communities also have much to lose. If Aboriginal women are revictimized in restorative justice initiatives, these initiatives will have failed even if the offender is ultimately rehabilitated or healed. As the Royal Commission on Aboriginal Peoples states, “[a] [restorative justice] system that fails to protect women and children is a

54. Statistics Canada, Centre for Justice Statistics, “Family Violence: A Statistical Profile” (Ottawa: Statistics Canada, 2002) at 12.

55. Holly Johnson, *Dangerous Domains: Violence against Women in Canada* (Toronto: Nelson, 1996) at 136.

56. *Ibid.*

57. McGillivray and Comaskey, *supra* note 5 at 13.

58. Johnson, *supra* note 56; and Statistics Canada, *Violence against Women Survey* (Ottawa: Micro data File, 1994). These barriers include a sense that the violence is “normal,” shame, a close relationship with her abuser, or a desire to avoid the criminal justice system.

59. *Family Violence in Canada: A Statistical Profile 2001* (Ottawa: Statistics Canada, 2001).

60. Donald G. Dutton, *The Domestic Assault of Women: Psychological and Criminal Justice Perspectives* (Vancouver: UBC Press, 1995); and L. Kevin Hamberger and Elaine Hastings, “Court Mandated Treatment of Men Who Assault Their Partner: Issues, Controversies and Outcomes,” in Zoe Hilton, ed., *Legal Responses to Wife Assault: Current Trends and Evaluations* (Newbury Park: Sage Publications, 1993), 188.

61. Ruth Busch, “Who Pays If We Get It Wrong?” in Braithwaite and Strang, *supra* note 4, 223.

62. See, for instance, Pauktuutit Inuit Women’s Association, “Report on the Death of Deidre Michelin,” in Pauktuutit, *Inuit Women and Justice: Progress Report Number One* (Ottawa: Pauktuutit, 1994), 32.

system that fails.”⁶³ Not only do such failures impede the realization of healthy Aboriginal culture and communities but they also undermine important Aboriginal self-government projects, to which control over criminal justice systems is closely tied.

Intimate Violence: Gendered Crime at the Intersection of Culture and Race

I argue that while the cultural focus of judicially convened sentencing circles constitutes an incomplete analysis, the same must be said of a feminist analysis that privileges experiences of sexism over intersecting oppressions such as race, sexual orientation, or class.⁶⁴ Theories of intersectionality have been used extensively by feminists to negotiate the complex interactions of multiple oppressions in an effort to ensure that the diverse experiences of women are accurately reflected in legal analysis and engagement.⁶⁵ I rely on a several central insights of intersectionality in my analysis of judicially convened sentencing circles.

While intersectionality has been defined and applied by numerous scholars, I will rely here on a definition by Claire Renzetti, which is particularly useful in the context of intimate violence:

The goal is not to fit “others” into the dominant mold, but rather to come to a better understanding of the diversity of domestic violence experiences, the significance and meaning this violence has in the lives of different groups of people, and how this intersectionality affects outcomes, particularly institutional responses to domestic violence.⁶⁶

63. Royal Commission on Aboriginal Peoples, *supra* note 2 at 269.

64. See Marlee Kline, “Race, Racism and Feminist Legal Theory” (1989) 12 *Harvard Women’s Law Journal* 115; and “Women’s Oppression and Racism: Critique of the Feminist Standpoint,” in Jesse Vorst et al., *Race, Class, Gender: Bonds and Barriers* (Toronto: Society for Socialist Studies/Garamond Press, 1991), 39.

65. See, for instance, Tina Grillo, “Anti-Essentialism and Intersectionality: Tools to Dismantle the Masters House” (1995) 10 *Berkeley Women’s Law Journal* 16; Kimberle Crenshaw, “Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Colour” (1991) 43 *Stanford Law Review* 1241; Kathleen Daly and L. Maher, “Crossroads and Intersections: Building from Feminist Critique,” in Kathleen Daly and L. Maher, eds., *Criminology at the Crossroads: Feminist Readings in Crime and Justice* (New York: Oxford University Press, 1998). Sherene Razack describes a similar theory to Patricia Hill Collins that she names “interlocking oppressions.”

66. Claire Renzetti, “Violence and Abuse in Lesbian Relationships: Theoretical and Empirical Issues,” in Raquel Bergen, ed., *Issues in Intimate Violence* (Thousand Oaks, CA: Sage, 1998), 291, as cited in Janice Ristock, *No More Secrets: Violence in Lesbian Relationships* (New York: Routledge, 2002) at 17.

One important insight of intersectionality theory is that we must examine the experiences of marginalized women in a way that also shines a spotlight on those whose relative privilege perpetuates and interacts with this oppression

[This] approach emphasizes the importance of paying as much attention to the ways in which women are privileged as to the ways that they are disadvantaged. That is, one needs to examine not simply black women, but also black men, white men, and white women in order to understand how various patterns of oppression, resistance and benefits combine to hold these systems of disadvantage in place.⁶⁷

Sherene Razack reminds us that even white feminists like myself, who make anti-racism and anti-violence action a part of our personal and professional lives, are complicit in the creation and maintenance of colonial cultures. “Without the ongoing genocide of Aboriginal peoples, non-aboriginal North and South Americans would quite literally have no land from which to pursue freedom of choice.”⁶⁸ This analysis also applies *within* Aboriginal communities where markers of relative oppression, such as gender, class, disability, sexual orientation, and “on- or off-reserve” status highlight power relations within these communities that are often viewed as homogeneously defined by race or culture.

In the context of judicially convened sentencing circles, intersectionality demands that we examine not only the relationships of power between the colonial, patriarchal Canadian state and Aboriginal offenders but also the power dynamics between Aboriginal men and Aboriginal women. While the experiences of colonialism may be shared by many Aboriginal people, regardless of their gender, Aboriginal women’s experiences of colonialism may be different in important ways from that of their male counterparts.⁶⁹ These experiences are maintained by unequal gender relations within Aboriginal communities.⁷⁰ In order to effectively address intimate violence

67. Rebecca Johnson, *Taxing Choices: The Intersection of Class, Gender, Parenthood and the Law* (Vancouver: UBC Press, 2002) at 57–9; and see Razack, *supra* note 42 at 13–14.

68. Razack, *supra* note 42 at 31.

69. See, for instance, Sharon McIvor and Teresa A. Nahanee, “Aboriginal Women: Invisible Victims of Violence,” in Kevin D. Bonnycastle and George Rigakos, eds., *Unsettling Truths: Battered Women, Policy, Politics and Contemporary Research in Canada* (Vancouver: Collective Press, 1998), 63; Stewart, Huntley, and Blaney, *supra* note 10; and MacDonald, *supra* note 10.

70. Unequal gender relations within Aboriginal communities are consistently attributed to the colonial practices of stripping Aboriginal women of legal, social, and political rights, leading to internalized sexism. Notably commentators point out that sexist practices were forced upon Aboriginal communities through the *Indian Act*. See, for instance, Patricia Monture-Angus, “Thinking about Aboriginal Justice: Myths and Revolution,” in Gosse and Youngblood Henderson, eds., *supra* note 27 at 222; Mary Ellen Turpel-Lafond, “Patriarchy and Paternalism: The Legacy of the Canadian State for First Nations Women,” in Caroline Andrew and Sanda Rogers, *Women and the Canadian*

within Aboriginal communities, judicially convened sentencing circles must deal with these gender-based inequalities, as well as those informed by race and culture. To draw on Sherene Razack's terminology, the judiciary must apply a less impoverished notion of culture when interpreting section 718.2 (e) of the *Criminal Code*. While the legacy of colonialism for Aboriginal men is their over-representation in the criminal justice system,⁷¹ the legacy of colonialism for Aboriginal women is the violence they and their children experience in their homes and within their communities.

The Needs of Survivors of Intimate Violence

There is very little Canadian research into the experiences of survivors of intimate violence with restorative justice⁷² and no empirical study of the impact of judicially convened sentencing circles in such circumstances.⁷³ There are, however, two recent feminist studies on the needs of survivors of intimate violence generally, with a focus on their interactions with the criminal justice system. Both *Black Eyes All of the Time* by Anne McGillivray and Brenda Comasky⁷⁴ and "Evaluating Criminal Justice Responses to Intimate Abuse through the Lens of Women's Needs" by Joanne Minaker⁷⁵ provide well-documented information gathered in a series of interviews. McGillivray and Comasky deal exclusively with Aboriginal women, while Minaker's sample includes a significant number of Aboriginal women.⁷⁶

State (Kingston and Montreal: McGill-Queen's University Press, 1997) at 68; and Royal Commission on Aboriginal Peoples, *supra* note 2 at 273. There is a debate within Aboriginal women's scholarship as to whether violence against women or other forms of sexism pre-dated colonial contact. See MacDonald, *supra* note 10 at 15; and Stewart, Huntley, and Blaney, *supra* note 10 at 35 and 38. See John Borrows, *supra* note 46 at 3, for commentary on the ways in which Aboriginal laws and legal orders can and have been used to address law breaking.

71. As it is for Aboriginal women. See McGillivray and Comasky, *supra* note 5 at 115; and E. Adelburg, "Aboriginal Women and Prison Reform," in E. Adelburg and C. Currie, eds., *In Conflict with the Law: Women and the Canadian Justice System* (Vancouver: Press Gang, 1993) at 76.

72. Examples of what little work has been done include Joan Pennell and Gale Burford, "Family Group Decision-Making and Family Violence," in Gale Burford and Joe Hudson, eds., *Family Group Conferencing: New Directions in Community-Centred Child and Family Practice* (New York: Walter de Gruyter, 2000); and Pamela Rubin, "Restorative Justice in Nova Scotia: Women's Experience and Recommendations for Positive policy Development and Implementation" (Halifax: Management Committee of Restorative Justice in Nova Scotia, March 2003).

73. Coates et al., *supra* note 14.

74. McGillivray and Comasky, *supra* note 5.

75. Minaker, *supra* note 16.

76. It is worth noting here that, although both studies represent ground-breaking work, neither study represents a large sample of women, indicating the need for more research in the area. Joanne Minaker's study consisted of fifteen women, six of whom were Aboriginal,

Both studies are attentive to the interactions of race and gender in the lives of their Aboriginal participants, and both have focused on these issues in their analyses.

When participants were questioned on whether restorative justice should be used in cases of intimate violence, the results were contradictory. In McGillivray and Comasky's study, participants were supportive of punishment (incarceration) and treatment for the offender. The study concludes:

Alternatives to the criminal justice system will not be acceptable to survivors of intimate violence unless diversion can do what jail is now seen as doing, however unsuccessfully—*punish*, visibly, actually and symbolically, and *protect*, at least long enough for survivors to get their lives back on track. Alternatives will not be acceptable without reliable indications of successful treatment for abusers in programs that also guarantee survivors' safety for the duration of treatment.⁷⁷

Minaker notes, however, that “[i]n contrast to the findings of Anne McGillivray and Brenda Comasky, the Aboriginal women in this study did not view treatment and jail as most effective.”⁷⁸ Despite contradictory findings in relation to the use of restorative justice, both studies reveal that those who would endorse the use of restorative justice would do so only as long as the alternative was safe and met the primary needs of the women involved. In discussing sentencing circles in the following section, I analyze selected aspects of the circles to demonstrate how they have failed either to ensure the safety of Aboriginal women or to meet their primary needs as articulated in these studies.

Judicially Convened Sentencing Circles and the Needs of Survivors of Intimate Violence

A Word on the Case Law

The following section analyzes a number of reported judicially convened sentencing circle cases.⁷⁹ These cases were reported and relatively easy to find.

while Brenda Comasky and Anne McGillivray's study represented twenty-six Aboriginal women.

77. McGillivray and Comasky, *supra* note 5 at 131.

78. Minaker *supra* note 16 at 100.

79. My intention here is not to “privilege” legal discourse in discussing intimate violence (see Susan Boyd, *Child Custody, Law and Women's Work* (Toronto: Oxford Press, 2003)

Most were accessible on Quicklaw.⁸⁰ However, overall there are very few publicly accessible records of restorative justice interventions, which is one of the main reasons that I chose judicially convened sentencing circles as the focus for this article. Forms of restorative justice, such as alternative measures and sentencing circles convened under an optional protocol, are extrajudicial by nature and, therefore, do not generate records that are easily accessible to the public.⁸¹

Reported decisions generated from judicially convened sentencing circles have a number of unique features. The first is that in almost every case the presiding judge takes some time to explain his or her understanding of restorative justice, its theories, and its principles. This explanation is often characterized by attempts at persuasion—to convince or instruct the reader on the advantages of judicially convened sentencing circles. This is particularly true of early cases, such as *Moses*. Second, these decisions tend to rely less on the discussion of legal principles, rules, and precedent and more on a narrative, or prosaic, description of the circumstances that led the presiding judge to convene a circle as opposed to a conventional sentencing hearing. In this way, the decisions read much like a “story” of the lives and problems of the participants. In the cases described in the following section, the main character is the offender, while the survivor appears either not at all or as a peripheral character in this judicial narrative.

As with all reported cases generated by the CJS, these judicial narratives have their fallibilities and strengths. Case law is an incomplete and selective record,⁸² and the cases discussed in this article are no exception. There are clearly more coherent ways of capturing what occurs in a given restorative justice intervention,⁸³ and obviously none of these publicly accessible documents record fully what went on before the circle or whether the abuse ended because of the intervention. This does not mean, however, that the textual accounts of these events have

at 3), but rather to rise to the challenge of specificity in analysis as Julie Stubbs (see note 10 in this article).

80. These cases represent almost all of the records that I was able to find that involved intimate violence and judicially convened sentencing circles. However, there are certainly numerous circles that have not been reported. At a speaking engagement at the University of British Columbia Faculty of Law, Territorial Court Justice Barry Stuart stated that sentencing circles had been used in over 400 criminal matters since 1991. Justice Barry Stuart, “Sentencing Circles” (Faculty of Law, University of British Columbia, 9 June 2000).

81. Problems with accountability, transparency, and record keeping in Canadian restorative justice initiatives, while beyond the scope of this article, warrant further research.

82. For instance, in one of the cases discussed later in this article it is unclear from the trial court record if the survivor was present during the circle. However, the court of appeal decision reveals that she did indeed participate.

83. For instance, compare the accounts of the same sentencing circle as recounted by Mary Crnkovich, *supra* note 8, and the presiding judge in *R. v. Naapaluk*, [1994] 2 C.N.L.R. 143 (C.Q. (Crim. & Pen. Div.) [*Naapaluk*]).

nothing to offer.⁸⁴ In fact, some of the needs expressed by survivors, such as being taken seriously and having their experiences validated, might best be met by having their accounts become part of an institutionally recognized text. According to feminist sociologist Dorothy Smith, texts help us to understand the ways that power works within institutions such as the CJS at several important levels and how these power relations map onto people's everyday lives.⁸⁵

Texts are a "technology" that connects the local activity of individual actors across time and space to larger institutional functions. Their reproducibility and stability allow them to act as an authority that stretches beyond the work of any given individual. At the most basic level, reported sentencing circle cases act as an authority for judges and other actors in the CJS to use and endorse these practices. At a more complex level, the daily work of multiple actors within the CJS is governed, in large part, by texts. They regulate and inform the ways in which we understand and interact with other people, such as survivors and offenders. In an institution such as the common law, where texts play such a vital role in how we organize our daily work and thinking, the impact of a text or a body of texts on our understandings is undeniable. Consider, for example, the authority and importance of trial transcripts, reported cases, and forms used by police, parole and probation officers, prison officials, and 911 operators. The presence or absence of women's experiences in a given text has effects beyond a particular case. The authoritative, textually constituted institutional reality excludes these experiences, while underlining others, from the broader set of institutional concerns.⁸⁶

Physical Safety and Survivor Participation

Standards by which sentencing circles are judged in this article are drawn partly from claims made by restorative justice advocates and practitioners themselves. A central claim is that, unlike the CJS, restorative justice can heal

84. This section on textuality is partly the result of an as-yet unpublished collaboration with fellow Ph.D. candidate Emma Cunliffe. I thank her for her insights and note that any errors or omissions are my own.

85. See Dorothy Smith, *Texts, Facts and Femininity: Exploring the Relations of Ruling* (London and New York: Routledge, 1990); Dorothy Smith, *Institutional Ethnography: A Sociology for People* (New York: Altamira Press, 2005); and Dorothy Smith, *The Everyday World as Problematic: A Feminist Methodology* (Toronto: University of Toronto Press, 1987).

86. Alex Wilson and Ellen Pence describe this process slightly differently: "[C]ategories [employed by an institutional or within a given text] operate in selective fashions that don't necessarily represent what had occurred, but what of institutional concern had occurred." Alex Wilson and Ellen Pence, cited by Dorothy E. Smith, *Institutional Ethnography: A Sociology for People* (Lanham, NY: Altamira Press, 2005) at 188 [emphasis added].

the offender, the survivor, and the community while ensuring that anti-social behaviour (such as intimate violence) is controlled: “Unlike the formal court-based sentencing, the discussions focus on more than the just offence and the offender and often include the following matters: . . . what must be done to help heal the offender, the victim and the community.”⁸⁷

One of the aims of any criminal justice intervention in circumstances of intimate violence is to stop the abuse. Women turn to criminal justice systems for protection and safety—what Joanne Minaker calls a “reprieve.”⁸⁸ Research on intimate violence indicates that *threats* to personal safety, as well as actual breaches of personal safety, can have an adverse effect on a survivor’s ability to report further violence or to speak up for herself in a mediation-type intervention, such as a circle.⁸⁹ A survivor’s willingness to report further violence following a community intervention may be similarly compromised. The silencing effect of physical violence (or its threat) underlines the dynamics of the gendered power imbalance that supports intimate violence. In order to ensure the full and equal participation of survivors of intimate violence in sentencing circles, the circumstances must be *seen* to be safe by the survivor as well as actually being safe.

In a number of sentencing circle cases, circumstances before, during, or after the circle proceedings left women in situations that were dangerous.

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87. Lilles, *supra* note 35. See also Judge Bria Huculak, “From the Power to Punish to the Power to Heal,” in Wanda McCaslin, ed., *Justice as Healing: Indigenous Ways* (St. Paul, MN: Living Justice Press, 2005), 163; and Judge Steven Point, “Alternative Justice: Testing the Waters,” also in McCaslin (at 207).
88. Minaker, *supra* note 16 at 84; and McGillivray and Comasky, *supra* note 5 at 144.
89. Despite the fact that mediation in family law matters and restorative justice are not identical processes, in cases of intimate violence the dynamics are remarkably similar. In both cases, an abused woman is placed in a situation where she must fight for her own interests, in a private forum, against a man who has abused or assaulted her. Busch and Hooper, *supra* note 10; Hilary Astor, “Swimming against the Tide: Keeping Violent Men out of Mediation,” in Julie Stubbs, ed., *Women, Male Violence and the Law* (Sydney: Federation Press, 1994), 148; Maria Volpe, “Mediation in the Criminal Justice System: Process, Promises and Problems,” in H. Pepinsky and R. Quinney, eds., *Criminology as Peacemaking* (Indiana: Indiana University Press, 1991), 195 at 201; Sandra Goundry et al., *Family Mediation in Canada: Implications for Women’s Equality. A Review of the Literature and Analysis of Data from Four Publicly Funded Canadian Mediation Programs* (Ottawa: Status of Women Canada, 1998); Nova Scotia Association of Transition Houses, “Abused Women in Family Mediation: A Nova Scotia Snapshot” (Halifax: Transition House Association of Nova Scotia, 2000); Ruth Busch, Neville Robertson, and Hilary Lapsley, “The Gap: Battered Women’s Experience of Justice System in New Zealand” (1995) 8 *Canadian Journal of Women and the Law* 190 at 209; Barbara Hart, “Gentle Jeopardy: The Further Endangerment of Battered Women and Children in Custody Mediation” (1990) 7 *Mediation Quarterly* 317; Linda Perry, “Mediation and Wife Abuse: A Review of the Literature” (1994) 4 *Mediation Quarterly* 313; and Martha Shaffer, “The Battered Women Syndrome Revisited” (1994) 47 *University of Toronto Law Journal* 1. There is also overlap in the theory and practices used within Western restorative justice and mediation (also known as alternative dispute resolution (ADR)) and in some academic circles Western restorative justice is considered a subset of ADR.

These circumstances not only left women open to being physically abused but they also created a dynamic that may have silenced them in the circle itself. *R. v. Bennett*,⁹⁰ *R. v. Charleyboy*,⁹¹ *R. v. Green*,⁹² *R. v. H.K.C.*,⁹³ *R. v. Taylor*⁹⁴ *R. v. Naappaluk*,⁹⁵ and *R. v. J.J.*⁹⁶ all deal with charges of assault against a spouse,⁹⁷ which were preceded by from one to sixteen previous charges for similar offences. In each case, except *Taylor*, the survivor had been subjected to intimate violence at the hands of her partner and the accused had been charged and convicted and had repeated the offence. In *Taylor*, the accused had been convicted of serious assaults against two previous common law spouses. It should also be noted that in *Taylor* and in *J.J.* the offender pleaded not guilty to the initial charge, forcing the survivor to go through a full trial before conviction and a sentencing circle. Although several commentators have suggested that a guilty plea be a prerequisite to a sentencing circle,⁹⁸ the Saskatchewan Court of Appeal did not take this position in *Taylor*. The court held that although it was necessary for “[t]he offender to demonstrate his remorse, sincerity and acceptance of responsibility” a guilty plea was not required.⁹⁹

In *Charleyboy*, *Naappaluk*, *J.J.*, and *Bennett*, the offenders, by assaulting their partners, breached probation conditions from previous intimate abuse convictions involving the same survivor. The accused in *H.K.C.* was under a no-contact order prior to the sentencing circle itself, which he breached by contacting the survivor directly. In *Green* and *J.J.*, the accused was under conditions from a *previous* sentencing circle for a similar crime against the same survivor when the subsequent assault occurred. The offender in *Naappaluk*, who had been staying at some distance from the sentencing venue, stayed in the home of the survivor the night before the circle due to a shortage of accommodations in the remote Northern village where the circle took place.¹⁰⁰ Such circumstances, combined with the likelihood of

90. *R. v. Bennett*, [1992] Y.J. No. 192 (Y. Terr. Ct.) (QL).

91. *R. v. Charleyboy*, [1993] B.C.J. No. 2854 (B.C. Prov. Ct. (Crim Div.)) (QL) [*Charleyboy*].

92. *Green*, *supra* note 27.

93. *R. v. H.K.C.*, [1997] S.J. No. 577 (Sask. C.A.) (QL) [*H.K.C.*].

94. *R. v. Taylor* [1995] 3 C.N.L.R. 167, 104 C.C.C. (3d) 346 (Sask. C.A.) [*Taylor*].

95. In *Naappaluk*, *supra* note 84.

96. *R. v. J.J.*, [2004] 192 C.C.C. (3d) 30 [*J.J.*].

97. The term used by the court in each of these cases except *Taylor*, *supra* note 95.

98. “Prerequisites common to all communities, include an acceptance of responsibility by the offender, a plea of guilty.” Barry Stuart, “Circle Sentencing: Turning Swords into Ploughshares,” in Joe Hudson and Burt Galaway, eds., *Restorative Justice: International Perspectives* (Monsey, NY: Criminal Justice Abstracts and Press, 1996), 193.

99. *Taylor*, *supra* note 95 at 401. For commentary on the value and importance of a guilty plea in restorative justice interventions, see *Green*, *supra* note 27 at 77; Royal Commission on Aboriginal Peoples, *supra* note 2; and Couture et al., *supra* note 4.

100. See M. Crnkovich, “A Sentencing Circle” (1996) 36 *Journal of Legal Pluralism* 159 at 168.

previous unreported abuse,¹⁰¹ could create an apprehension of harm for survivors of intimate violence. The *threat* of impending violence, coupled with previous futile criminal justice interventions, could prevent the full participation of a survivor in an open forum that included her abuser: “[R]emaining silent about abuse and/or accommodation to their abusers may be important survival strategies.”¹⁰²

Physical proximity to the survivor during the duration of a non-incarceral sentence also creates particular concerns regarding the physical safety of the survivor and other members of the community. With the exception of *Taylor* (where the accused was ordered to undergo six months isolation on a remote island), all offenders remained in the community under some kind of community-based supervision. In all of these cases, the abusers had violated no contact orders in committing the crimes that led up to the convening of the circle, casting serious doubt on their willingness or ability to refrain from harassing or abusing their estranged partners, even under the shadow of legal sanctions. In several cases, the accused remained in the community under the supervision of those who had “turned a blind eye” to the abuse previously or had engaged in survivor-blaming behaviour.¹⁰³

Meaningful, Uncoerced Participation

The participants in Minaker’s study expressed a need for “understanding” or “the need to be believed, get recognition and have their experiences validated . . . This need for validation and feedback is indicative of a concern with having their experiences recognized as abusive and as being worthy of attention.”¹⁰⁴ While silencing is a pervasive theme, there are also clear indications that those survivors who did participate were not recorded by the presiding judges and that any contributions that *may* have been made were not given weight or importance, as reflected in their absence from the reasons for judgment. In many cases, the survivor “disappeared” completely from the official record or became only a peripheral character in the recorded judicial narrative that focused on the words, life, experiences, and treatment of the offender. This is particularly troubling in light of claims that sentencing circles can “break down barriers to participation,”¹⁰⁵ allowing

101. For instance, in *Naapaluk*, *supra* note 84, the offender said before the court: “I’ve been accused only three or four times, but I have probably beaten my wife more than fifty times” (at 3).

102. Stubbs, *supra* note 10 at 44.

103. See, for instance, *Naapaluk*, *supra* note 84.

104. Minaker, *supra* note 16 at 84.

105. *Moses*, *supra* note 25 at 362. *Moses* is often cited in the cases discussed in this article as an important authority.

for voices that are usually silenced in the CJS and that “circles are held in informal settings that give everyone an opportunity to speak.”¹⁰⁶

Territorial Court Justice Barry Stuart in *Bennett* fails to mention the survivor at all, except to say that she was assaulted. It is unclear from the reported case whether the survivor participated in the circle. Stuart J., in *Green*, briefly mentions the survivor, indicating that she did, in fact, participate but fails to record her words, her level of comfort, or her participation. Emphasis instead was placed on the problems suffered by the offender and his history of colonial oppression and abuse. Similarly in *R. v. Morris*, Justice Dennis Schmidt notes that the survivor participated but does not record her contribution in any way.¹⁰⁷ Justice Jean-Luc Dutil in *R. v. Naapaluk* notes the presence of the survivor and the fact that she spoke several times. One feminist who observed this sentencing circle, however, feels that survivor silencing did take place. She writes: “[I]t is interesting to note how little the survivor spoke. When she did speak she said very little.”¹⁰⁸ In commenting on the prerequisites needed to use a sentencing circle in cases of intimate violence, Justice Bria Huculak notes that “[t]he victim must also be willing to participate—and without coercion or pressure to do so.”¹⁰⁹ Despite this assertion, however, it is clear that many of the survivors in the cases discussed in this article were pressured or coerced into participating, that the trial judges were aware of this, and that they proceeded with the circle despite these concerns.¹¹⁰

Milliken J. of the Court of Queen’s Bench in *Taylor* makes it clear that the participation of the survivor (and, therefore, her healing) is optional and that the primary purpose of the circle is to heal the offender—a view that is at odds with the claim that circles can heal the survivor, the offender, and the community.¹¹¹ While noting that the survivor did not wish to attend the circle, Milliken J. states that “[a] circle may be held even if the survivor is opposed to it... the primary purpose of the circle is to help an accused change lifestyles. The presence of the survivor is not crucial.”¹¹² Statements such as these, which dismiss the contribution and participation of the survivor, combined with the ordeal of cross examination during a full trial, would create pressures to be silent in even the most resilient and strong

106. Huculak, *supra* note 88 at 163.

107. In overturning the trial-level decision, the British Columbia Court of Appeal notes that the survivor was “feeling apprehensive about the circle and spoke about feelings of anxiety and fear” when consulted prior to participating. *Morris*, *supra* note 27 at para. 29 (per Finch J.).

108. *Naapaluk*, *supra* note 84. Crnkovich, *supra* note 8 at 166.

109. Hucaluk, *supra* note 89 at 163.

110. See, for example, *Taylor*, *supra* note 95 at 158; and *H.K.C.*, *supra* note 94 at paras. 2 and 28.

111. See, for instance, Point, *supra* note 88 at 207.

112. *Taylor*, *supra* note 95 at 1. While the survivor submitted a victim impact statement in *Morris*, *supra* note 27, she did not participate in the sentencing process.

survivor. It is unclear from the lower court whether the survivor actually participated in the circle. The majority of the Saskatchewan Court of Appeal, however, clarifies this omission by noting that “although the survivor at first did not want to participate in the circle proceedings, she continued to participate after she learned that she was not compellable, and became a willing participant.”¹¹³ Cameron J.A., in dissent, however, disagrees, stating that “[Judge Milliken] should have aborted [the circle] on learning that the survivor was unwilling to participate.”¹¹⁴ There is also clear evidence of survivor coercion in *Naapaluk*,¹¹⁵ *H.K.C.*,¹¹⁶ *J.J.*,¹¹⁷ and *Taylor*. For example, the Saskatchewan Court of Appeal in *Taylor* notes that the victim stated: “I felt I had to come. I felt like I was forced to come.”¹¹⁸

Resources

Ending intimate violence is a complex and multi-faceted undertaking and one that requires a full set of support and treatment services for offenders and survivors. This requires “a highly intentional three-dimensional focus that must give consideration to the roles and needs of each stakeholder.”¹¹⁹ Sentencing circles, as a model of social control that claims to go beyond mere punishment, must be supported by sufficient resources. This is particularly true given that survivors rely on these resources rather than on incarceration to protect them from further physical harm. Intimate abuse in Aboriginal communities is a contemporary manifestation of colonialism and requires specialized resources that address this legacy. Undertaking non-incarceral community treatment for men who repeatedly abuse their partners, without sufficient attention to resources, is an unacceptable gamble with the safety and lives of the women who have endured the abuse.

In Minaker’s study, participants asked for advocacy and support in any criminal justice model¹²⁰ and emphasized the need for resources within the community such as women’s shelters.¹²¹ Those who participated in Comasky’s and McGillivray’s study wished to ensure “that the survivor has a strong voice, independent advocacy and support, and continued control over

113. *Ibid.* at 2.

114. *Ibid.* at 3.

115. *Naapaluk*, *supra* note 84; and Crnkovich, *supra* note 8.

116. *H.K.C.*, *supra* note 94 at para. 2.

117. *J.J.*, *supra* note 97 at para. 25.

118. *Taylor*, *supra* note 95 at para. 17.

119. Stuart, *supra* note 99, cited in Gordon Bazemore and Twila Hugley Earle, “Challenging Restorative Justice Principles,” in Braithwaite and Strang, *supra* note 4, 153 at 173.

120. Minaker *supra* note 16 at 88.

121. *Ibid.* at 87.

her situation and that the circle, tribunal or committee is thoroughly educated in the dynamics of abuse and control.”¹²² Huculak J. notes that “[t]he court should try to determine beforehand, as best it can, if the victim is subject to battered women’s syndrome. If she is, then she should have counselling, and be accompanied by a support team in the circle.”¹²³

In order to meet these needs, restorative justice require survivor’s advocates well versed in identifying the power dynamics of intimate abuse. Sentencing circles where advocates feel the survivor is unprepared or unable to defend her own interests should be postponed or terminated. Treatment and counselling programs for *survivors alone* must also be available before, during, and after interventions to ensure uncoerced participation and clinical assistance in healing the emotional scars of abuse. Participants in both the Minaker and McGillivray and Comaskey studies identified personal counselling as a vital need.¹²⁴

Even in ideal circumstances survivors of intimate violence may have difficulty speaking to their needs and interests in the presence of their abuser.¹²⁵ When there are threats of or actual physical violence, as described earlier, the need for advocates to speak on behalf of women becomes even more apparent. In *Naappaluk*, the survivor was supported in the circle by members of her family, including her sister who spoke quite frequently.¹²⁶ These same family members, however, had been aware of the ongoing violence against their family member and had failed to intervene successfully prior to the circle, and they also participated in constructing a problematic response to the abuse. Mary Crnkovich, a feminist lawyer who observed the circle, also notes that the survivor was seated next to the offender, with no support person physically close to her, leaving her vulnerable to being silenced.¹²⁷ A family violence worker “raised the need of the survivor to have her own support services should her husband begin assaulting

122. McGillivray and Comaskey, *supra* note 5 at 144.

123. Huculak, *supra* note 88 at 163.

124. This is difficult to implement in circles that are not convened under an optional protocol, where the community has control over the timing of the sentencing. Both the Alberta Court of Appeal in *R. v. A.B.C.* (1991), 120 A.R. 106 (Alta.C.A.), and the Saskatchewan Court of Appeal in *Taylor*, *supra* note 95, ruled that delays in sentencing for preparation and counselling (of offenders) were not permissible. See Ross Gordon Green, *Justice in Aboriginal Communities: Sentencing Alternatives* (Saskatchewan: Purich, 1998) at 81.

125. Hilary Astor, “Swimming against the Tide: Keeping Violent Men out of Mediation,” in Julie Stubbs, ed., *Women, Male Violence and the Law* (Sydney: Federation Press, 1994), 147.

126. Crnkovich, *supra* note 101 at 166.

127. A participant in a recent Nova Scotia study on family mediation describes the effect of her abuser’s physical proximity on her ability to speak to her concerns: “No one knows him like I do, what he’s capable of. And I never crossed him before. He banged his fingers on the table. That brought back too much...I broke down.” Transition House Association of Nova Scotia, “Abused Women in Family Mediation: A Nova Scotia Snapshot” (Halifax: Transition House Association of Nova Scotia, 2000) at 7.

her again.”¹²⁸ This recommendation was ignored, however, in favour of having both spouses attend the post-circle counselling sessions together.

Survivor support and advocacy seemed to be missing as well from the circles conducted in *Bennett*, *Green*, and *Charleyboy*. In *Green*, Justice Barry Stuart mentions numerous participants in the circle who were involved with the offender’s treatment and support leading up to the sentencing. Each of these people spoke to his needs and capabilities. The survivor, while scarcely mentioned, appeared to have no support person in the group. Similarly in *Bennett*, the survivor herself is marginal to the decision, and no advocate appears on her behalf. Justice Cunliffe Barnett in *Charleyboy* lists the participants of the circle, including the survivor and her children. Although several Elders and other community members are listed as attending, none are designated as family or support persons for the survivor, although there is a “family representative” present for the offender.

The ad hoc nature of sentencing circles makes gathering a cross-section of community members a potentially difficult endeavour.¹²⁹ In order to meet the needs of survivors, judges should ensure, however, that at least one support person chosen by the survivor is present and seated physically close to her. The circle should also include a member of the community who is trained in the dynamics of abusive relationships, whose recommendations regarding the safety and autonomy of the survivor are given serious weight.

Barnett J. of the British Columbia Provincial Court relies heavily on the presence of counselling and therapy for the entire family in his decision in *Charleyboy*. Residential treatment and counselling for “family violence” was available for the offender, his partner, and their children in a local Aboriginal treatment centre prior to their participation in the circle. Barnett J. writes:

An offence such as this normally attracts severe punishment. I said last night that a gaol term of 6 or more months would be perfectly proper. But I heard some moving statements last night. And I was also told that things really have changed in recent months. I was told that Raymond really did participate and learn while at Nenqayni, and that all members of the family are much happier since their stay there.¹³⁰

128. Crnkovich, *supra* note 101 at 167.

129. Methods of ensuring participation vary. For instance, in *Naappaluk*, *supra* note 84, Dutil J. relied on the mayor of the town in question to assemble community members that he thought would be valuable to the process (Crnkovich, *supra* note 101 at 164.)

130. *Charleyboy*, *supra* note 92 at paras. 13 and 14.

Culturally appropriate counselling and treatment for the survivor, the offender, and their immediate family seems a step in the right direction.¹³¹ Although certainly not a panacea, some of the needs of survivors of intimate violence would seem to be met by a residential facility that can monitor safety and provide services to all involved. It was unclear from the judgment whether these same services or supports were made available to the family following the disposition of the circle, given that the accused in *Charleyboy* remained in the community under a probation order.¹³² The accused was ordered to receive counselling for assaultive males as part of his probation term.

The treatment needs of offenders¹³³ are in the forefront in *Green*, *Taylor*, and *Bennett*. Stuart J. ordered in *Bennett* that the offender receive alcohol treatment, anger management, and other courses aimed at upgrading his life skills. Any steps that were taken towards healing the survivor are not recorded in the judgment. In *Green*, Stuart J. notes the survivor's support of the offender's healing. "The victim recognizes you have long-standing personal problems that need to be addressed. She has stated that healing is the best thing for you, not punishment."¹³⁴ The accused was ordered to start a support and monitoring group for his treatment with willing community members, attend alcohol counselling and a course for assaultive men. There is no mention of support or treatment services for the survivor.

In *Naappaluk*, treatment of the offender and survivor takes centre stage, both in the written judgment and in the commentary by Mary Crnkovich, a feminist lawyer who observed the proceedings. Prior to the circle, the survivor received no preparation or counselling. In his decision, Justice Jean-Luc Dutil emphasized that the community was coming together to "settle a problem that distresses a family and consequently an entire community."¹³⁵ Mary Crnkovich observed the workings of the circle and the final outcome regarding treatment from a different perspective. She focused specifically on the needs of the survivor throughout, revealing that "[v]ery little was said

131. In both studies, Aboriginal women identified culturally appropriate services as a pressing need.

132. Keeping in mind that he had previously ignored a probation order and assaulted his partner, bringing him before the court in this case.

133. In both studies, survivors of intimate violence insisted that treatment for the offender be a priority in all criminal justice models. Minaker, *supra* note 16 at 89; and McGillivray and Comasky, *supra* note 5 at 131. Each community that participates in a sentencing circle will have different resources available to them, however counselling and support services for the offender and the survivor should be established at a minimum. The availability of treatment programs for the abuser are absolutely necessary both as a clinical aid to ending violent behaviour and as a supervision mechanism. These programs are only half of what is needed, however, in order to heal both the offender and the survivor.

134. *Green*, *supra* note 27 at 4.

135. *Naappaluk*, *supra* note 84 at 12.

about the survivor during the session.”¹³⁶ However when discussion turned to the offender’s assaultive behavior the members of the circle began to include the survivor as part of this problem. “The activities and lifestyle of the accused were discussed initially as ‘his problem.’ As the proceedings progressed some members of the circle started talking about ‘their problem.’ This shift in focus implied that some degree of blame or responsibility for the abuse was being placed on the survivor.”¹³⁷ This shift from “his problem” to “their problem” precipitated the treatment model that was recommended by the circle and accepted by Dutil J. Both the accused and the offender were ordered to attend counselling sessions together, which were to be conducted by untrained laypersons from the community. In fact, several of these would be “counsellors” participated in the circle itself and contributed to the rhetoric of survivor blaming.

There are several issues that arise out of these cases regarding the accessibility and type of resources available. The first is an overall scarcity of human and financial resources including those willing and able to supervise the offender and provide counselling and therapy or drug and alcohol treatment. The British Columbia Court of Appeal in *Morris*, in overturning the decision of the lower court, notes that a scarcity of appropriate resources was a serious problem in implementing an effectively restorative response.¹³⁸ In *Morris*, the offender was uncertain as to what tasks he was to perform and failed to keep a record of what he did accomplish. The British Columbia Court of Appeal also notes that the Laird Aboriginal Women’s Association, a local woman’s anti-violence organization that publicly denounced the lower court decision, were ordered to supervise the offender in completing his community service. They publicly refused to do so.¹³⁹

The second concern is the very nature of layperson participation in small, closed communities where violence may be normalized. Community resources *are* invaluable assets in sentencing circles. In fact, they are one of the cornerstones of the restorative justice movement.¹⁴⁰ Participation of laypersons in treatment and support roles is necessary in community-based

136. Crnkovich, *supra* note 101 at 167.

137. *Ibid.* at 167.

138. *Morris*, *supra* note 27 at para. 40, 65, and 66.

139. *Ibid.* at 42.

140. There is a debate within the literature on defining and constituting “community.” For instance, in the *Taylor* case, the Saskatchewan Court of Appeal notes with concern that the trail judge initially failed to consult the whole community before proceeding, as two women’s anti-violence groups had opposed the use of a circle. See also Carol LaPrairie, “Altering Course: New Directions in Criminal Justice” (1995) 28 *Australia and New Zealand Journal of Criminology* 1995; Robert C. Depew, “Popular Justice and Aboriginal Communities: Some Preliminary Considerations” (1996) 36 *Journal of Legal Pluralism* 52; and Kelly MacDonald, *Literature Review: Implications of Restorative Justice in Cases of Violence against Aboriginal Women and Children* (Vancouver: Aboriginal Women’s Action Network, 2001).

initiatives with few resources. However, across Canada, intimate violence has not been unanimously recognized as anti-social behaviour.¹⁴¹ Entrenched in “community” standards are survivor blaming and the normalization or minimizing of violence.¹⁴² In dealing with crimes of intimate violence, some trained personnel must be involved to establish and maintain community norms that protect and support the survivor or circles should not be conducted.

Conclusion

If sentencing circles as they are currently practised are not adequate responses to intimate violence, what then are the components of a more rich and complex theory and practice of restorative justice? The answer lies partly in perspective. Forms of restorative justice, whatever their shortcomings, do not exist alone in the Canadian criminal justice landscape. Restorative justice was created as an alternative to the CJS, partly to address the ways in which this system revictimizes women and other marginalized groups. Voicing a constructive critique of restorative justice should not, therefore, be read as supporting a law and order agenda, nor should it be interpreted as a refutation of the shortcomings of the CJS. Many feminists have a deep understanding of the oppression faced by the marginalized and racialized that are accused within this system, particularly Aboriginal men.¹⁴³ Feminist critiques that attempt to address multiple sites of oppression help to inform a more rich and complex theory of restorative justice and of criminal justice responses to intimate violence generally. Those who advocate for restorative justice, and feminists who provide constructive critiques of

141. McGillivray and Comasky, *supra* note 5 at 143, note that study participants expressed concern that “offenders [who] may ‘stack’ the process with friends and supporters and avoid responsibility for their actions.”

142. Kelly Macdonald, *supra* note 10 at 36, notes that such normalization may result “in a lack of seriousness being attributed to crimes of violence which in turn is a major impediment to addressing the social consequences of violence in Aboriginal communities.” Levels of acceptability regarding intimate violence between generations is also a potential problem in community projects involving Elders. See Royal Commission on Aboriginal Peoples, *supra* note 2 at 272. For more discussion of community standards and normalized violence, see Busch and Hooper, *supra* note 10 at 189; McGillivray and Comasky, *supra* note 5 at 8; Proulx and Perrault, *supra* note 23 at 122; and Teresa Nahanee, “Gorilla in Our Midst: Aboriginal Women and the Inhumanity of the Canadian Criminal Justice System” (L.M. thesis, Queens University, Kingston, 1995) at 63.

143. See, for instance, Fay Honey Knopp, “Community Solutions to Sexual Violence: Feminist/Abolitionist Perspectives,” in Harold Pepinsky, “Peacemaking in Criminology and Criminal Justice,” in Pepinsky and Quinney, eds., *Criminology as Peacemaking* (Indiana: Indiana University Press, 1991), 181; Lakeman, *supra* note 10 at 24; and Kathleen Daly, “Sexual Assault and Restorative Justice,” in Braithwaite and Strang, *supra* note 4, 62.

restorative justice, are working towards the same elusive, difficult goal—to ensure that Canadian criminal justice systems provide safety and dignity for survivors of violence, while, at the same time, ensuring that the accused, especially those from marginalized groups, are treated fairly and without racism. This goal is what Kathleen Daly calls the “‘unsolvable justice problem’: [h]ow do we treat [gendered] harms as serious without engaging in harsh forms of punishment or hyper-criminalisation”?¹⁴⁴ Feminist scholarship contributes to solving this problem by fostering a more complete theory of oppression—one that includes an analysis of how gender, culture, race, and violence interact in the lives of women. This is accomplished in part by focusing on the needs, interests, and specific experiences of the survivors of intimate violence *as much as* those of the offenders.

Several feminist commentators assert that simply by virtue of their superiority to the CJS, restorative justice approaches will be able to address the gender inequalities experienced by survivors of intimate violence.¹⁴⁵ Whether the approach is “restorative” or not is irrelevant if both systems are premised on ideologies and practices that perpetuate women’s oppression.¹⁴⁶ In the final analysis, restorative justice models, for a number of complex reasons, *may* have more room for *some* of the needs of *some* women to be met.¹⁴⁷ The question is not whether sentencing circles do a better or worse job than the CJS but, rather, whether judicially convened sentencing circles themselves meet the needs of survivors of intimate violence as these women have articulated them?

In challenging feminists to engage with intersectionality, Marlee Kline urged a consideration of how to “confront the complexity of the issue without trying to reduce the interaction between racism and sexism to a theoretical emphasis on male supremacy.”¹⁴⁸ This is a complex challenge in examining intimate violence in Aboriginal communities. For Aboriginal people, restorative justice approaches purport to provide a much-needed culturally appropriate, traditional response to crime and a way of starting the healing following decades of racist colonialism.¹⁴⁹ When faced with high rates of intimate violence within Aboriginal communities, however, an analysis of racism does not seem to go far enough in honouring the survivors of

144. Daly, *supra* note 46 at 62.

145. See, for instance, Dianne Martin, “Retribution Revisited: A Reconsideration of Feminist Criminal Law Reform Strategies” (1998) 36 *Osgoode Hall Law Journal* 151; and Allison Morris and Gabrielle Maxwell, “The Practice of Family Group Conferencing in New Zealand: Assessing the Place, Potential and Pitfalls of Restorative Justice,” in Adam Crawford and Jo Goodey, eds., *Integrating a Victim Perspective within Criminal Justice: International Debates* (Aldershot: Ashgate Publishing, 2000) at 207.

146. Lakeman, *supra* note 10.

147. See Morris and Hudson, *supra* note 13, regarding the paucity of empirical data on intimate violence and restorative justice.

148. Kline, *supra* note 65 at 138.

149. See generally Royal Commission on Aboriginal Peoples, *supra* note 2 at chapter 2.

this violence. As Razack speculates, “[o]ne wonders if there are in fact any narratives upon which to draw to explain both [sexual] violence and colonial violence when they occur simultaneously on the same bodies.”¹⁵⁰ The judicial narratives of sentencing circles explored in this article have not come very far in explaining these complex mappings of gendered and colonial violence on the bodies of Aboriginal women. While functional suggestions such as those that I have offered above may aid in improving judicially convened sentencing circles, more fundamental social changes are required to truly meet the needs of Aboriginal survivors of intimate violence. While a specific and focused critique of particular criminal justice models is extremely useful, we must not overestimate the potential for any criminal justice system to facilitate fundamental social change alone or to act as a tool for ending (intersecting) oppressions.

A Possible Way Forward?

When faced with the inherent inadequacies of the criminal justice system to bring about fundamental social change, one is often tempted to turn away completely from the law in search of other solutions. One of the many ways forward that I tentatively offer has application in both the legal and non-legal spheres. It may comprise one small step in the much larger, complex project of solving Daly’s “unsolvable justice problem.”

Many Aboriginal women in the studies discussed in this article have expressed the need for culturally appropriate services for themselves, their families, and their communities and for Aboriginal women to hold the leadership positions that they once occupied in their pre-colonial communities.¹⁵¹ In the context of criminal justice, they have been presented with judicially convened sentencing circles as a way of addressing the need for culturally appropriate services. Perhaps a more culturally appropriate approach would be to place Aboriginal women in positions of leadership and decision making, designing the criminal justice processes rather than being subjects of them. In the context of justice initiatives, both Patricia Monture-Okanee and Mary Ellen Turpel argue that women must fulfil their traditional roles as teachers and leaders and, in particular, that they must include men in this healing.¹⁵² There is an emphasis on the importance of women’s roles in building, administering, and running justice initiatives:

150. Razack, *supra* note 42 at 65.

151. See Jo-Anne Fiske and Evelyn George, *Seeking Alternatives to Bill C-31: From Cultural Trauma to Cultural Revitalisation through Customary Law* (Ottawa: Status of Women Canada, 2006) at 25.

152. Monture-Okanee and Turpel, *supra* note 2 at 240.

Women's involvement in justice work is not just a measure or standard of the success of justice initiatives, the Aboriginal women's role is much more central and essential . . . When talks occur Among political leaders about the administration of justice or constitutional rights for self-government, you are not talking to the right people because you are not talking to the women. It was the women who had a fundamental role in making laws in our communities.¹⁵³

This way forward, while it may manifest itself inside an Aboriginal or non-Aboriginal legal order, is not only a proposition designed to function within the law. At the level of practice within Aboriginal communities, it may also meet the need for culturally appropriate practices and services at two levels. By placing Aboriginal women in the positions of respect and importance that they were once accorded, they may be better able to respond to Sherene Razack's call for a richer understanding of culture both through their own practices of gendered "traditional" leadership, and by bringing gendered perspectives to contemporary problems such as intimate violence.

153. Monture-Angus, *supra* note 72 at 230. See also Royal Commission on Aboriginal Peoples, *supra* note 2 at 269.