

# Writing the Circle: Judicially Convened Sentencing Circles and the Textual Organization of Criminal Justice

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*Les juges de première instance qui travaillent dans des communautés autochtones éloignées du Grand Nord canadien utilisent des cercles de détermination de la peine, convoqués judiciairement, pour recueillir de l'information et des recommandations quant à la sentence dans des dossiers de violence intime. Les adeptes prétendent que ces cercles de détermination de la peine, convoqués judiciairement, constituent une pratique de justice réparatrice qui aide à rétablir l'harmonie entre la personne contrevenante, sa communauté ainsi que la victime de la violence. Les adeptes voient aussi dans les cercles de détermination de la peine un outil qui permette un résultat juste, tout en minimisant l'incarcération des hommes autochtones. La sociologue féministe Dorothy Smith a mis au point une méthodologie pour déterminer si les priorités institutionnelles que les tribunaux établissent et approuvent lors des cas de détermination de la peine protègent adéquatement les femmes autochtones, victimes de violence récurrente dans leurs communautés. Ayant établi que les expériences de violence des femmes sont largement exclues du champ d'intérêt institutionnel, nous suggérons que les cercles de détermination de la peine, convoqués judiciairement, présentent une solution d'une simplicité trompeuse au problème complexe et de longue date des rapports des autochtones avec l'appareil judiciaire. Il est donc important de répliquer au discours selon lequel ces cercles de détermination de la peine aident à rétablir l'harmonie dans les communautés. Le présent article contrecarre cet argument de deux manières : d'abord, en exposant le fait que les expériences et les connaissances des femmes sont exclues du forum judiciaire des communautés autochtones dans ces cas et ensuite, en réaffirmant que toute solution au problème de la violence intime doit être conçue dans un cadre plus vaste d'élimination de la pauvreté et des répercussions de la colonisation dans ces communautés.*

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*Trial court judges who work in remote northern Canadian Aboriginal communities use judicially convened sentencing circles to gather information and develop sentencing recommendations in some intimate violence cases. Proponents claim that judicially convened sentencing circles are a restorative justice practice that heals the offender, his community, and the survivor of the violence. Proponents also look to sentencing circles as a tool to find a just outcome that minimizes Aboriginal men's incarceration. We use a methodology developed by feminist sociologist Dorothy Smith to consider whether the*

*institutional priorities being established and approved by courts in sentencing circle cases provide adequate protection for Aboriginal women against recurrent intimate violence in their communities. Finding that Aboriginal women's experiences of violence are largely excluded from the realm of institutional concern, we suggest that judicially convened sentencing circles present a deceptively simple solution to the complex and longstanding problem of Aboriginal people's experience with the Canadian criminal justice system. It is therefore important to counter the discourses that claim that judicially convened sentencing circles have the potential to restore Aboriginal communities. This article counters that discourse in two ways: first, by identifying that Aboriginal women's experiences and knowledge are being excluded from the judicial construction of Aboriginal communities in these cases; and, second, by reasserting that any solution to the problem of intimate violence must be part of a broader effort to overcome poverty and the legacy of colonialism within Aboriginal communities.*

### **Introduction**

Using a feminist socio-legal methodology drawn from Canadian sociologist Dorothy Smith, this article examines judgments written in sentencing circle cases about intimate violence.<sup>1</sup> Sentencing circles function as a judicially constructed alternative to a conventional sentencing hearing. They are most often used by non-Aboriginal judges who work in northern Canadian Aboriginal communities. We consider all of the available decisions<sup>2</sup> (ten in total) in which a judicially convened sentencing circle was used as a step in the process of sentencing Aboriginal men for perpetrating intimate violence against their female partner or former partner. We find that Aboriginal

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This article is partly based on concepts and original research developed by Angela Cameron during her doctoral work.

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1. In this article, we 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. We 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 relationship of 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.
2. By "available," we mean that the decision is available through Quicklaw or Westlaw or is reported in a Canadian law report and that the decision refers to the use of a sentencing circle. A judge will invariably deliver sentencing remarks, but those remarks are not necessarily catalogued within Canadian legal databases.

women's voices and experiences are inadequately represented in the judgments written by trial court and appellate judges about the conduct of sentencing circles and the sentences they recommend. We suggest that this under-representation presents real challenges to the institutional construction of sentencing circles as a restorative practice that provides a more just means of sentencing Aboriginal offenders.

In the face of an occasionally overwhelming emphasis on discursive constructions of subject identity within criminal law, we retain a sense that the people who participate in criminal cases have a life outside the textual record of their time in court. Our goal is to find traces of this life within the textual record, to think about how the textual record is incomplete, and to explore what this incompleteness reflects about criminal courts' priorities. There are several methodological reasons to focus on the texts of sentencing circle decisions, even as partial and biased accounts of the sentencing circles they report. Since we began in our respective research projects to seek out materials within the "public" processes of the criminal law,<sup>3</sup> we each discovered that these materials were extremely hard to come by for various bureaucratic and legal reasons. We soon realized that texts of the type we sought were rare and valuable. When texts do exist, access to them is restricted (in the case of judgments) to an elite group of those, such as ourselves, whose institutional affiliations permit them to use the costly services that catalogue Canadian case law. In the case of other texts, such as transcripts, probation reports, medical records, and so on, obtaining access is always expensive, time consuming, and, frequently, simply impossible. Despite the fact that we are often unable to obtain access to these texts, they shape the criminal justice process in highly significant ways, not least by promoting certain institutional concerns to the exclusion of others.<sup>4</sup>

We have found it productive to add Smith's work on texts to the armoury of tools available to feminist legal scholars. Smith argues that texts are the technology that permits the coordination of governance, and her methodology—institutional ethnography—demonstrates how this process works in practice. This article first introduces some key aspects of Smith's theory and methodology, before describing the practice of judicially convened sentencing circles in more detail. We then turn to the texts of sentencing circle decisions. Guided by Smith, we suggest how we might read judgments written about sentencing circles in light of the institutional work that the texts perform.

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3. In Emma Cunliffe's work, transcripts and court records of court cases dealing with mothers accused of killing their children, and in Angela Cameron's work, statistics and records of restorative justice interventions in intimate violence cases.

4. This article is therefore written subject to the realization that, by the time a judge writes a judgment such as those we consider, the range of decisions open to the judge is constrained by a number of factors. We can identify some of these factors, such as the requirements of the *Criminal Code*, R.S.C. 1985, c. C-46 [*Criminal Code*]. Others, such as the case-specific information placed before the judge, are not necessarily wholly apparent from the decisions.

We conclude that a feminist legal practice of textuality informed by Smith's work has the potential to produce a more nuanced understanding of law's institutional hierarchy and of the infinitesimal mechanisms by which women's voices continue to be discredited within the law.

### *Texts and Feminism*

Feminist tradition has given socio-legal scholars a rich understanding of the need to record women's knowledge and to include this knowledge within elite discourses such as law.<sup>5</sup> We suspect, however, that we are not alone in feeling concerned that women's knowledge continues to be disendorsed within law despite the strides that have been made in understanding and disseminating women's perspectives. We share Smith's belief that the technology of textuality is central to the mechanisms by which these perspectives are excluded from the realm of law's institutional concern.

Smith's contribution is best understood by returning to a conversation that has engaged feminist legal theorists for many years. In 1992, Carol Smart published "The Woman of Legal Discourse" in the first issue of the journal *Social and Legal Studies*.<sup>6</sup> In this article, Smart argues that seeing law as discursively constitutive of gender identities allows us to grasp how law brings "into being both gendered subject positions as well as [more controversially?] subjectivities or identities to which the individual becomes tied or associated."<sup>7</sup> Smart considers that regarding law as a gendering terrain permits us to understand the apparent contradictions within law's engagement with women and might help feminists to contest law's more negative constructions of gender identities. Others have built on Smart's work, arguing that legal practices and discourses "give life to specific gendered selves that are subsequently disciplined and regulated through law."<sup>8</sup>

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5. For a spirited defence of this proposition, see Linda Kealey et al., "Teaching Canadian History in the 1990's: Whose 'National' History Are We Lamenting?" (1992) 27 *Journal of Canadian Studies* 129. Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Cambridge, MA: Harvard University Press, 1982), has had a significant influence on feminist socio-legal methodology. See, for example, Carol Smart, "Losing the Struggle for Another Voice: The Case of Family Law" (1995) 18 *Dalhousie Law Journal* 173; Carrie Menkel-Meadow, "Feminization of the Legal Profession: The Comparative Sociology of Women Lawyers," in Richard Abel and Phillip Lewis, eds., *Lawyers in Society: Comparative Theories*, volume 3 (Berkeley: University of California Press, 1989), 196. Gilligan also has some important feminist critics. See, for example, Isabel Marcus et al., "Feminist Discourse, Moral Values, and the Law: A Conversation," James McCormick Mitchell Lecture Series, State University of New York in Buffalo, October 1984 (1985) 34 *Buffalo Law Review* 11.
  6. Carol Smart, "The Woman of Legal Discourse" (1992) 1 *Social and Legal Studies* 29.
  7. *Ibid.* at 34.
  8. Dorothy E. Chunn and Dany Lacombe, "Introduction," in Dorothy E. Chunn and Dany Lacombe, eds., *Law as a Gendering Practice* (Oxford: Oxford University Press, 2000), 2 at 14.

Some feminists have reservations about embracing discourse theory. While acknowledging Smart's contributions, Shelley Gavigan suggests that Smart's woman of legal discourse "has neither experience nor agency: she has neither breath nor breadth."<sup>9</sup> In other words, by focusing on the discursive construction of "Woman" to the exclusion of the experiential realm, our understanding of women's lives has been "flattened" and rendered "unidimensional."<sup>10</sup> We share Gavigan's concerns, and part of our project is to acknowledge and find ways to understand the limitations of focusing solely on institutional texts as a means of understanding women's lives.

Susan B. Boyd acknowledges that the idea of discourse allows us to see "the ways in which power is much more dispersed and localized than we may previously have thought."<sup>11</sup> Despite this acknowledgment, she worries that "discourse analysis... does not give a clear sense of how discourses are constituted and reproduced, nor how some discourses come to be more powerful and privileged than others."<sup>12</sup> Boyd adopts Alan Hunt's conclusion that the notion of ideology contributes an understanding of how "the particularistic and localised powers and disciplinary techniques [identified by Foucault and Foucauldian scholars] coalesce or are aggregated at the level of institutions and of the state."<sup>13</sup> It is the notion of coalescence and aggregation that is our entry point for this discussion. While understanding law as ideological<sup>14</sup> enables us to see the extra-local consequences of particular discursive practices, it does not explain the techniques by which these consequences are secured. Similarly, while the idea that "woman" is a

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9. Shelley A.M. Gavigan, "Mothers, Other Mothers, and Others: The Legal Challenges and Contradictions of Lesbian Parents," in Chunn and Lacombe, eds., *supra* note 8, 100 at 105.

10. *Ibid.*

11. Susan B. Boyd, "Some Postmodernist Challenges to Feminist Analyses of Law, Family and State: Ideology and Discourse in Child Custody Law" (1991) 10 *Canadian Journal of Family Law* 79 at 84.

12. *Ibid.* at 97. See also Gavigan, *supra* note 9; and Shelley A.M. Gavigan, "Paradise Lost, Paradox Revisited: The Implications of Familial Ideology for Feminist, Lesbian, and Gay Engagement to Law" (1993) 31 *Osgoode Hall Law Journal* 589.

13. Alan Hunt, "Marxism, Law, Legal Theory and Jurisprudence," in Peter Fitzpatrick, ed., *Dangerous Supplements: Resistance and Renewal in Jurisprudence* (Durham: Duke University Press, 1991), 102 at 107, cited in Boyd, *supra* note 11 at 99. See also Eileen Fegan, "'Ideology' after 'Discourse': A Reconceptualization for Feminist Analyses of Law" (1996) 23 *Journal of Law and Society* 173.

14. We use ideological here in two senses. First, law emerges from a field in which social values and norms are constantly asserted, debated, revised, and struggled over. Second, law is a bearer or carrier of ideological messages, which gain authority in part from their association with law's institutionalised legitimacy. These two senses come from Hunt, *supra* note 13 at 115. Smith uses the word differently—to describe a text or account that serves organizational interests. Dorothy E. Smith, *The Conceptual Practices of Power: A Feminist Sociology of Knowledge* (Toronto: University of Toronto Press, 1990) at 32–45. See also Marie Campbell and Frances Gregor, *Mapping Social Relations: A Primer in Doing Institutional Ethnography* (Aurora, ON: Garamond Press, 2002) at 38–40.

discursively constructed concept is propelled by a sense that it *matters* that women take certain identifiably patterned forms in law's discourse, it does not fully articulate the more subtle consequences of exclusion for women's lives outside the text. In our view, Smith's work provides us with important insights in relation to both of these questions.

Smith's key contribution, for our purposes, is the insight that texts are the technology by which an individual activity is connected to, and helps to shape, broader institutional practices.<sup>15</sup> In the present context, texts form the bridge between the individual experience of any one survivor with the criminal justice practice of sentencing circles and the institutional priorities and imperatives that shape this encounter. According to Smith, "[t]exts are key to institutional co-ordinating, regulating the concerting of people's work in institutional settings in the ways that they impose an accountability to the terms they establish."<sup>16</sup> Texts' ability to perform this institutional role relies on the highly effective technology of reproducibility and stability. These material properties permit the text to be distributed widely and read by different people for various purposes:

It is the materiality of the text itself that connects the local setting at the moment of reading into the non-local relations that it bears. Its technology, its system of distribution, and its economy are foundational to the peculiar property of abstraction that provides for forms of social relations that have no particular place or time in which they happen... [t]he text creates something like an escape hatch out of the actual and is foundational to any possibility of social forms of abstraction of whatever kind, including this one written here.<sup>17</sup>

For example, the text of a decision by one judge to use a sentencing circle in a single case might, if it is approved by a superior court or otherwise noticed by others, form the basis of a decision to adopt judicially convened sentencing circles as an appropriate method of doing justice in criminal cases that fit particular guidelines. This insight has two ramifications. First, it is the reproducibility and stability of texts that enable governance to happen on the scale and in the form that we experience today—texts actually enable institutional processes to occur in a coordinated manner.<sup>18</sup> A judge who writes

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15. Dorothy E. Smith, *Institutional Ethnography: A Sociology for People* (Lanham, MD: AltaMira Press, 2005) especially at Chapter 8. See also Campbell and Gregor, *supra* note 14 at 31–44.

16. Smith, *supra* note 15 at 118.

17. Dorothy E. Smith, *Writing the Social: Critique, Theory and Investigations* (Toronto: University of Toronto Press, 1999) at 39.

18. *Ibid.* at 170.

a judgment in a particular case has produced a material object that may be used in many different contexts, by many different people, for many different purposes. The judgment provides the basis on which the judge is accountable to an appellate court; it stipulates the actions that must be taken by those who are implicated within the decision and provides a foundation for redress if someone fails to do their part; it provides another judge faced with a similar question with a template for resolving the instant case; and it permits us to do the sort of analysis that we are undertaking in this article. In each example, the various actors are guided by copies of the same text, although they do different things with that text in the course of performing different institutional roles. None of these actions would be possible if some material record had not been created by the original judge. Second, the text is created by people performing their work in a particular physical and institutional context (in this example, by a judge sitting in a remote court in northern Canada or in an office further south), and it is activated by other people performing other work (probation officers, defendants, appellate court judges, graduate students, and so on).<sup>19</sup>

Texts are hierarchically organized. The simplest example for lawyers is that a relevant appellate court decision will govern the decisions of lower courts, but it is also true that an earlier decision must be negotiated by a judge deciding a later case. The hierarchy of texts is described by Smith as “a two-way street.”<sup>20</sup> Texts provide a basis for accountability—lower court judges are accountable through decisions and transcripts to appellate courts. At the same time, authoritative texts provide the concepts and categories used within subordinate texts. Thus, the language and logical structure of lower court decisions are determined, to a significant extent, by superior court precedent, statutory requirements, and so on. A notion of the interplay between higher and lower court decisions meshes well with common law understandings of precedent. Beyond this superficial harmony with traditional notions of legal method, however, Smith’s reminder about the hierarchical nature of inter-textuality allows us to glimpse the *process* by which ideologies are constituted and perpetuated within legal institutions. The establishment of institutional priorities and realms of concern within texts, coupled inevitably with institutional actors’ actions in response to these texts, is the process of constituting and perpetuating ideologies within the criminal justice system. By directing lower courts to privilege certain concerns and knowledges above others, superior court decisions help to construct the institutional reality of the Canadian criminal justice system. In turn, this constructed reality has tangible effects on the lives of those who become involved in the criminal

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19. *Ibid.* at 177.

20. *Ibid.* at 186.

justice system by virtue of their status as defendants, complainants, and witnesses.

Smith's method also reminds us that texts are connected in ways that our training as lawyers might not otherwise reveal. For example, by seeing texts as a product of embodied work practices rather than solely in terms of their nomenclature ("judgment," "article," "form"), we have begun to question whether it matters that one of the judges who wrote several of the decisions we discuss has also written articles and a book promoting the merits of judicially convened sentencing circles.<sup>21</sup> The importance of this observation does not necessarily stem from an argument that such an activity is right or wrong. Rather, it arises because seeing the texts in these terms reminds us that judges are also people and that this judge *might* have a vested interest in demonstrating the success of any sentencing circle that he has convened. In other words, texts are created by people who have lives outside the texts they create, and they help to govern the lives and actions of others whose subjectivity is unlikely to be fully captured within the textual record. In each case, of course, we must recall that the actions of the judge are, in turn, constrained by the institutional requirements imposed on this judge. Smith's concept of the text therefore helps us to understand how people contribute to ruling relations in their daily work<sup>22</sup> and how people's actions are guided by those ruling relations.

For feminists, this explicit connection between the texts people create and the work they and others do helps to explain the importance of inserting women's experiences into the textual record. The objectified knowledge<sup>23</sup> created by texts will thereby have a better chance of including women's knowledge. Smith, therefore, takes the ethical stance that people should be regarded as being experts in their own lives and links it to the inevitable selectivity of institutional realities that are constituted, in large part, through text. Smith's work accordingly helps us to understand why the effects of marginalizing a particular woman's experience within a text ramify beyond the consequences of marginalization for that woman. The textually constituted institutional reality will thereby exclude certain experiences from

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21. 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 Kay Pranis, Barry Stuart, and Mark Wedge, *Peacemaking Circles: From Crime to Community* (St. Paul, MN: Living Justice Press, 2003).
  22. Smith defines "ruling relations" as the objectification of consciousness and energy. Smith, *supra* note 15 at 184. "Objectification" means, in this case, the cancellation of the subjectivity of the knower so that knowledge "moves to an abstract conceptual plane." Marie Campbell, "Dorothy Smith and Knowing the World We Live In" (2003) 30(1) *Journal of Sociology and Social Welfare* 3 at 8.
  23. "Objectified" has a meaning that corresponds with the definition of "objectification" given in the previous footnote.

the realm of institutional concern.<sup>24</sup> We return to these themes later in our analysis of the texts of judgments that describe judicially convened sentencing circles.

Before we turn to the set of decisions we have chosen to explore in this article, we must explain some ways in which our work departs from the work of Smith or at least the ways in which it is a partial representation of Smith's method. Smith calls her method "institutional ethnography," which she has most recently described as incorporating the following elements:

Working from people's experience of their own doings, knitting different perspectives and positions together, and exploring the text-based forms of organization provide means of constructing representation of how things work . . . [The theme that brings all these elements together is] the dimensions of power.<sup>25</sup>

The task with which we are engaged in this article is *not* a full institutional ethnography. Rather, we have chosen to conduct a detailed examination of one of the elements described by Smith—the text-based organization of judicially convened sentencing circles—and its relation to power. Although our focus is on a single aspect of institutional ethnography, this aspect might be better understood if we briefly describe the other elements of Smith's method.

Throughout her career, and the many refinements and restatements of her method, Smith has primarily been concerned with developing "a method of social analysis that is reflexive to the material contours of people's lives."<sup>26</sup> In one of her earliest published descriptions of the method, Smith explained her goals in the following terms:

[T]he aim is to explicate the actual social processes and practices organizing people's everyday experience. This means a sociology in which we do not transform people into objects, but preserve their presence as subjects. It means taking seriously the notion of a sociology concerned with how the phenomena known to sociology express the actual activities of actual individuals.<sup>27</sup>

Smith resists the scholarly practice of "forgetting" that knowing begins and ends with an actual, embodied, situated person.<sup>28</sup> Instead, institutional ethnography begins with particular knowledges—the knowledge of the

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24. Smith, *supra* note 15 at 188.

25. *Ibid.* at 183.

26. Campbell, *supra* note 22 at 4.

27. Dorothy E. Smith, "Institutional Ethnography: A Feminist Method" (1986) 15 *Resources for Feminist Research* 6 at 6.

28. Smith, *supra* note 17 at 4–5.

woman who calls 911 after being assaulted by her partner, the knowledge of the telephone operator who takes the call and decides what information she must record, the knowledge of the police officer who attends the call, and the knowledge of the women's shelter worker who might be called to speak with the complainant.<sup>29</sup>

The 911 example leads to the second element of institutional ethnography—knitting different perspectives and positions together. Smith begins from the belief that people are a good source of information about the work they do and the institutional constraints within which they do it. Moreover, in going about our daily business, “we know how to do, how to go about things, and what we can get done . . . we know as a matter of doing.”<sup>30</sup> What we do not necessarily know is how our local activities connect to those of others. Alex Wilson and Ellen Pence put this well when they write that “[n]o one calls 911 to report ‘I’m the victim of an *in progress misdemeanour, physical, no weapon, violation of a protection order.*’”<sup>31</sup> Yet the telephone operator who takes a 911 call must translate what she is being told into these terms. By knitting together the perspective of the woman who calls 911 with that of the telephone operator, police, service providers, and others, we can begin to glimpse how institutional categories operate to exclude certain types of experience from institutional realities. Texts play a key role here. When the telephone operator takes a call, she is required to follow a script that runs on a computer screen. Her ability to record the information she is given is limited to the fields contained within the script. The bodily experience of being assaulted is transformed at this point into objectified (textual) knowledge about “an incident.” In the process, depending upon the institutional concerns that are reflected in the text, important information might be lost.

In order to perform a full institutional ethnography of sentencing circles, we would therefore need to go well beyond the texts that we discuss in this article. Our work would include interviewing the various participants and knitting their knowledge together. We would need to go beyond speculating about how the institutional order being established within the texts of sentencing circle decisions excludes certain concerns and conduct an empirical investigation of what concerns are being excluded and by what means. Such a task is beyond the ambit of this article.<sup>32</sup> For now, we have contented ourselves with considering how an ideology—the belief that judicially convened sentencing

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29. This is an example that has been worked and re-worked within the institutional ethnography literature. See, for example, Smith, *supra* note 15 at 170–3 and 188; and Ellen L. Pence and Melanie F. Shepard, *Coordinating Community Responses to Domestic Violence: Lessons from Duluth and Beyond* (Thousand Oaks, CA: Sage, 1999).

30. Dorothy E. Smith, “Comment on Hekman’s ‘Truth and Method: Feminist Standpoint Theory Revisited’” (1997) 22 *Signs* 392 at 394–5.

31. Pence and Wilson quoted by Smith, *supra* note 15 at 188 [emphasis in original].

32. Angela Cameron’s Ph.D. project undertakes a true institutional ethnography of restorative justice practices.

circles lead to more just outcomes in cases of intimate violence within remote Aboriginal communities—has been constructed and perpetuated within the Canadian criminal justice system through the texts of sentencing circle decisions. In pursuing this question, we have paid close attention to the chronological and hierarchical relationships between the texts we have considered. Our research does not allow us to do more than speculate about the material effects of this ideology on gender relations within Aboriginal communities. Nonetheless, we believe that reading the corpus of judicially convened sentencing circles with Smith's work in mind leads to some revealing insights about how the judicial system helps to establish and perpetuate certain ideologies while marginalizing others.

### *The Practice: Judicially Convened Sentencing Circles*

Sentencing circles are one of a number of alternative sentencing models currently in use in Canada. While several restorative justice models employ a talking or healing circle format, our focus is on judicially convened sentencing circles. This model is most often used in Aboriginal communities by non-Aboriginal judges in the disposition of criminal sentences where a finding or admission of guilt has already been entered.<sup>33</sup> The consistent use of sentencing circles arose in Canada in the 1990s,<sup>34</sup> when non-Aboriginal, activist judges sought alternatives to the conventional sentencing process.<sup>35</sup> This search for alternatives was driven by frustration with the over-incarceration of Aboriginal offenders from remote Northern communities. The primary aim was to avoid sending recidivist Aboriginal offenders to prison in southern Canada. Judicially convened sentencing circles have been adopted in many courtrooms across Canada and have, in particular, been used in a number of cases involving intimate violence against Aboriginal women.<sup>36</sup>

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33. Recently, non-Aboriginal offenders have requested the use of sentencing circles. See Les Perreux, "Victim Rejects Native Justice for Ex-Officers: Sentencing Circle: Man Left in Cold Asks for \$200,000 as Show of Remorse," *National Post* (National edition) (1 December 2001) at A8; and Heather Sokoloff, "Sentencing Circles Gain Judges' Approval: 'It's a Way of Healing When You Have a Crime That Cuts across an Entire Community,'" *National Post* (National edition) (15 May 2002) at A3.

34. Judge Cunliffe Barnett recounts having used restorative justice methods as early as 1978. Cunliffe Barnett, "Circle Sentencing/Alternative Sentencing" (1995) *Canadian Native Law Reporter* 1 at 1-2.

35. Dorothy Harley Eber, *Images of Justice* (Montreal: McGill-Queen's University Press, 1997); Stuart, *supra* note 21 at 193; Claude Fafard, "On Being a Northern Judge," in Richard Gosse, James Youngblood Henderson, and Roger Carter, eds., *Continuing Poundmaker and Riel's Quest: Presentations Made at a Conference on Aboriginal Peoples and Justice. Proceedings of a Conference Held September 1993* (Saskatoon: Purich, 1994), 403; and the Honorable A.C. Hamilton, *A Feather Not a Gavel: Working towards Aboriginal Justice* (Winnipeg: Great Plains, 2001).

36. See *R. v. Morris* (2004), B.C.C.A. 305, 186 C.C.C. (3d) 549 [*Morris*, cited to C.C.C.]; *R. v. Naappaluk*, [1994] 2 C.N.L.R. 143 (Q.C. (Crim. Div.)) [*Naappaluk*]; *R. v. Bennett*, [1992] Y.J.

The practice follows a fairly consistent format. Participants, sitting in a circle rather than the conventional courtroom layout, are invited to give information to the court on the community, the offender, and other relevant circumstances and are asked to suggest a sentencing outcome. Both the decision to use a circle in a given case and the ultimate sentencing outcome rest solely with the presiding judge. Initially, circles were conducted under the judge's common law sentencing powers. Following changes to the sentencing provisions in the *Criminal Code* in 1996, judges now most often use sentencing circles to satisfy the requirements of section 718.2(e), which calls on courts to consider alternatives to incarceration for Aboriginal offenders in reasonable circumstances.<sup>37</sup>

The literature discussing the basis, practice, and theory of restorative justice generally is vast,<sup>38</sup> and we will not attempt to summarize the debates in this article. The Law Commission of Canada has suggested that it is "a response to conflict that brings survivors, wrongdoers and the community together to collectively repair harm that has been done in a manner that satisfies their conceptions of justice."<sup>39</sup> For our purposes, it is sufficient to say that the literature on the benefits of restorative justice ranges from extravagant claims of transformative properties based on anecdotal evidence<sup>40</sup> to much more

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No. 192 (Y. Terr. Ct.) (QL) [*Bennett*]; *R. v. Charleyboy*, [1993] B.C.J. No. 2854 (B.C. Prov. Ct. (Crim Div.)) (QL) [*Charleyboy*]; *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) [*H.K.C.*]; *R. v. J.J.* (2004) N.L.C.A. 81, 192 C.C.C. (3d) 30 [*J.J.*, cited to C.C.C.]; and *R. v. W.B.T.*, [1995] 132 Sask. R. 221 (*sub nom. R. v. Taylor*), 3 C.N.L.R. No. 167 (Sask. Q.B.) (QL) [*Taylor* trial, cited to Sask. R.]. Two Saskatchewan Court of Appeal decisions relate to separate phases of the same case. Milliken J. held a judicially convened sentencing circle in the case of *Taylor* (this trial decision is cited above as *Taylor*). At the conclusion of this circle, Milliken J. deferred sentencing until a period of banishment had been completed by the offender. The Crown appealed the decision to defer sentencing. The decision in this first appeal is reported in *R. v. Taylor*, [1996] 132 D.L.R. (4th) 323 (*sub nom. R. v. W.B.T.*), 3 W.W.R. 88 (Sask. C.A.). The trial judge was ordered by the Saskatchewan Court of Appeal to proceed to sentencing. The sentence itself was then appealed by the Crown. The second court of appeal decision in this case is reported at *R. v. W.B.T.*, [1998] 7 W.W.R. 704 (*sub nom. R. v. Taylor*), 122 C.C.C. (3d) 376 (Sask. C.A.) [*Taylor* appeal, cited to W.W.R.].

37. Other sentencing provisions call upon courts to consider intimate violence as an aggravating circumstance. *Criminal Code*, *supra* note 4 at s. 718.2(a)(ii).
38. See, for instance, Herman H. Bianchi, *Justice as Sanctuary: Toward a New System of Crime Control* (Bloomington: Indiana University Press, 1994); John Braithwaite and Philip Pettit, *Not Just Deserts: A Republican Theory of Criminal Justice* (Oxford: Clarendon Press, 1990); Jim Considine, *Restorative Justice: Healing the Effects of Crime* (Lyttleton, New Zealand: Ploughshare, 1995); Howard Zehr, *Changing Lenses: A New Focus for Crime and Justice* (Waterloo, ON: Herald Press, 1990); and Daniel Van Ness and Karen Heetderks Strong, *Restoring Justice* (Cincinnati, OH: Anderson Publishing, 1997).
39. Dennis Cooley, *From Restorative Justice to Transformative Justice: A Discussion Paper* (Ottawa: Law Commission of Canada, 1999) at 25.
40. See Annalise Acorn, *Compulsory Compassion: A Critique of Restorative Justice* (Vancouver: UBC Press, 2004) at Chapter 4, for a detailed analysis and critique of these claims.

modest statements backed by empirical research.<sup>41</sup> In essence, not all restorative justice practice or theory is created equal.

The proponents of judicially convened sentencing circles clearly frame these circles as a form of restorative justice.<sup>42</sup> Practitioners claim that, unlike the criminal justice system's more standard sentencing processes, judicially convened sentencing circles can heal 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 just the offence and the offender and often include the following matters... What must be done to help heal the offender, the victim and the community.<sup>43</sup>

For the purposes of this article, we resist the claims that judicially convened sentencing circles are a truly restorative approach to crimes of intimate violence.<sup>44</sup> The texts we discuss in the following sections demonstrate two striking ways in which judicially convened sentencing circles fail to meet restorative objectives. First, the sentencing decisions tend to displace the burden of "healing" the offender onto his community and his family, without providing any resources to either group to help them with the task of rehabilitating the offender.<sup>45</sup> Second, rather than facing and seeking to heal the harm done to the survivors of intimate violence, judicially convened sentencing circles, as they are represented in the judgments, seem to minimize and deny this harm. These material effects are reflected in, and, to some extent, created by, the textual organization of judicially convened sentencing circles.

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41. See, for instance, Joan Pennell and Gale Burford, "Feminist Praxis: Making Family Group Conferencing Work," in John Braithwaite and Heather Strang, eds., *Restorative Justice and Family Violence* (Cambridge: Cambridge University Press, 2002), 108.
  42. See, for instance, Territorial 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) [unpublished]; Stuart, *supra* note 21 at 193; and Cooley, *supra* note 39 at 24.
  43. Lilles, *supra* note 42. See also Judge Bria Huculak, "From the Power to Punish to the Power to Heal," in Wanda D. McCaslin, ed., *Justice as Healing: Indigenous Ways* (St. Paul, MN: Living Justice Press, 2005), 161; and Judge Steven Point, "Alternative Justice: Testing the Waters" in McCaslin, at 206.
  44. While there are more general critiques of the discourses of restorative justice, these are beyond the scope of this article.
  45. For example, the orders made by the trial judge in *Taylor* trial, *supra* note 36 at para. 27, included a provision that a community member must permit the offender to use his house during the offender's period of banishment, and others were required to spend up to \$250 per month on food for the offender. In *Naappaluk*, *supra* note 36 at 15-16, the trial judge referred to the cost savings that might ensue from judicially convened sentencing circles as one of the benefits of the practice.

It is clear that, even by standards set by some other restorative justice advocates, sentencing circles fall short in a variety of ways.<sup>46</sup> Despite these shortcomings, sentencing circles have been embraced by numerous lower court judges,<sup>47</sup> various Canadian governments,<sup>48</sup> and almost every court of appeal<sup>49</sup> as a *bona fide* model of restorative justice. This endorsement is risky because categorizing judicially convened sentencing circles as restorative justice acts as a frame by which the circle practice is interpreted as helping to secure restorative objectives, regardless of the fact that circles actually operate more ambivalently. The categorization also accords the practice legitimacy within the Canadian criminal justice system. As restorative justice practice grows internationally, and Canada is regarded as a leader in using restorative justice to deal with intimate violence, it is important to avoiding using the label “restorative justice” as a substitute for careful consideration of the possibilities and limitations of specific models or practices.<sup>50</sup>

### *The Texts of Judicially Convened Sentencing Circle Judgments*

As Smith would predict, we know about judicially convened sentencing circles largely through their textual representation—most importantly, in the form of judgments written by trial court and appellate court judges. Another side of these reported cases is, of course, the actual embodied experiences of

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46. Jonathan Rudin, “Aboriginal Justice and Restorative Justice,” in Elizabeth Elliott and Robert M. Gordon, eds., *New Directions in Restorative Justice: Issues, Practice, Evaluation. Proceedings of International Conference on Restorative Justice Held 2003* (Cullompton, UK: Willan Publications, 2005), 89; and Jane Dickson-Gilmore and Carol LaPrairie, *Will the Circle Be Unbroken? Aboriginal Communities, Restorative Justice and the Challenges of Conflict and Change* (Toronto: University of Toronto Press, 2005).
  47. See, for instance, Pranis, Stuart, and Wedge, *supra* note 21; Eber, *supra* note 35; Stuart, *supra* note 21 at 193; Fafard, *supra* note 35; and Hamilton, *supra* note 35.
  48. British Columbia, for instance, has 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, “Reforms to Spousal Assault Policy” (2003) 61 *The Advocate* 589 at 590. Alternative measures, which include sentencing circles, are used in these circumstances.
  49. See, for instance, *R. v. B.L.* (2002), A.B.C.A. 44, [2002] 6 W.W.R. 602; *R. v. Williams*, [1998] M.J. No. 482 (QL); *R. v. Johns*, [1996] 1 C.N.L.R. 172 (Y.K.C.A.); *Morris*, *supra* note 36; *R. v. Morin*, [1995] 101 C.C.C. (3d) 124 (Sask. C.A.) [*Morin*]; *J.J.*, *supra* note 36; *R. v. Nunner*, [1976] 30 C.C.C. (2d) 199 (Ont. CA); *R. v. Hudson*, (1982) O.C.A. Oral Judgment, 7 January [copy on file with the authors]; *R. v. Muise*, [1994] 94 C.C.C. (3d) 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. Leave to appeal was denied in *R. v. Joyea* (2004), S.K.C.A. 17, 241 Sask. R. 178, leave to appeal to S.C.C. refused, [2004] S.C.C.A. No. 130 (QL). For a brief Supreme Court of Canada commentary on sentencing circles, see *R. v. Gladue*, [1999] 1 S.C.R. 688 at para. 74.
  50. In the therapeutic context, a similar point is made by Alan Jenkins, “Shame, Realisation and Restitution: The Ethics of Restorative Practice” (2006) 27(3) *Australian and New Zealand Journal of Family Therapy* 153 at 153. Jenkins argues that, when we speak of restoration, we must ask: “To restore what? For whom? For what purpose? And, in whose interests?”

women who participated in the circles by virtue of their role as the survivor of the defendant's violence. These experiences cannot be accessed through an examination of the judgments we discuss in this article. The chief problem with which we are concerned is therefore not so much that we cannot see what was actually performed, embodied, or understood by the women participants but, rather, that the textual account judges are *claiming* to write an authentic and complete account of the circle when, in fact, this account clearly omits these women's experiences. Most troubling is the fact that critics of judicially convened sentencing circles, including Aboriginal women's groups, have suggested that survivors of violence are not protected and supported in the circle.<sup>51</sup> This risk is given sparse attention in the judgments that we have read.

Smith believes that institutionally authorized, textual accounts such as sentencing circle decisions function to create a hierarchy of accounts. The experiences of those who participate in the circle itself are subordinated to the written account of the judge: "Such practices render organisational judgment... into objectified textual rather than subjective processes."<sup>52</sup> The process of objectification helps to obscure the fact that these authoritative texts are themselves socially constructed,<sup>53</sup> and yet the process is integral to the coordination and functioning of what Smith refers to as ruling apparatuses.<sup>54</sup> Smith asks us to call into question *how* and *why* a particular version becomes authorized<sup>55</sup> and how this process of authorization can "be seen as organising a course of concerted social action."<sup>56</sup> Therefore, it is not our aim to insert the woman back into the circle. Instead, we wish to examine what social actions or institutional concerns are privileged in the authoritative, objectified accounts of sentencing circles. We wish to examine how "the institutional account, that is, the sequence of action described in a properly mandated form, embeds and subsumes the observational mode."<sup>57</sup>

We are concerned with the fact that the institutional accounts produced by judges about judicially convened sentencing circles marginalize and, at times, exclude Aboriginal women's perspectives on intimate violence. We point to the relative absence of women from the texts created by trial judges and consider

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51. Mary Crnkovich, "A Sentencing Circle" (1996) 36 *Journal of Legal Pluralism and Unofficial Law* 159; and Wendy Stewart, Audrey 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 Action Network, 2001). See also *Morris*, *supra* note 36.

52. Dorothy E. Smith, *Texts, Facts and Femininity: Exploring the Relations of Ruling* (London: Routledge, 1990) at 214.

53. *Ibid.* at 210.

54. "The ruling apparatuses are those institutions of administration, management, and professional authority, and of intellectual and cultural discourses, which organise, regulate, lead and direct, contemporary capitalist societies." *Ibid.* at 2.

55. *Ibid.* at 24-6.

56. *Ibid.* at 121.

57. *Ibid.* at 153.

the shape women take when they do appear in the judgments. In many of the cases, it is not clear if the complainant was present or, when she was noted as being present, if she said anything at all. In other cases, the judge portrays the survivor's role as being more active and supportive of the process than others perceive.<sup>58</sup> With the backing of institutional discourse and power, trial judges are willing and able to claim that they have captured the "truth" of the sentencing, thereby further obscuring the silencing of women and the gaps in representation. The use of restorative justice discourse acts to bolster these truth claims. By repeatedly *writing* within the institutionally authorized account that they are engaged in a healing process, it becomes possible for judges to subordinate the actual experiences of the participants to the textual account of the circle. While, in this article, we cannot hear and interpret the voices of these women, we *can* analyze the institutional "truth" reflected in the text of these judgments and consider how this truth is both created and perpetuated by text-based institutional practices.<sup>59</sup>

While restorative justice is used to deal with cases of intimate violence in Canada,<sup>60</sup> it rarely generates either publicly accessible processes or records. Since most restorative justice models are by nature extra-judicial, any records that are kept are not publicly accessible. We turned to the ten sentencing circle decisions we discuss in this article because they represented a coherent body of law, which extended over more than a decade, and because (not insignificantly) we were actually able to find and read them.<sup>61</sup> Furthermore, they represent a key reference source regarding the practice of judicially convened sentencing circles—not just for us but also for criminal law practitioners, judges, and others who might be interested in understanding the state of Canadian Aboriginal criminal justice practice.

Three aspects of the texts suggest that the decisions construct and perpetuate a particular institutional ideology. First, the claims being made by trial judges who adopted judicially convened sentencing circles are couched in different language from that which we are accustomed to reading in judgments. Second, we were troubled by the relative absence of the female complainants from trial judges' accounts of sentencing circles. Third, when the complainants do appear in these texts, we were interested to see how they, and

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58. Compare Crnkovich, *supra* note 51, with the judgment in *Naappaluk*, *supra* note 36. This point is discussed further later in this article, in the text accompanying notes 85–8.

59. We are suspicious of "Truth" but not of "small-t truths." This inquiry is conducted in the spirit of epistemological modesty described by Valverde: "The opposite of 'lies' is not Truth, but rather 'truths.'" Mariana Valverde, *Law's Dream of a Common Knowledge* (Princeton: Princeton University Press, 2003) at 8–9.

60. Angela Cameron, "Stopping the Violence: Canadian Feminist Debates on Restorative Justice and Intimate Violence" (2006) 10 *Theoretical Criminology* 49.

61. The cases listed in note 36 were reported and relatively easy to find, given our access to the appropriate online resources. Most were accessible on Quicklaw, with some searching. These represent almost all of the reported sentencing circle cases available involving intimate violence.

their role in the proceedings, were characterized. Appellate court judges counter the trial judges' tendency to obscure the episodes of intimate violence that engaged the judicial system by making this violence reappear in the texts of appellate judgments. That said, while the appellate decisions accord institutional importance to the over-incarceration of Aboriginal offenders, they do not give adequate consideration to the need to protect the survivor from further harm. This relative lack of institutional attention to the survivor's welfare has implicitly authorized trial courts to continue ignoring Aboriginal women's concerns about the effects of judicially convened sentencing circles on survivors of intimate violence.

### *Legitimizing Judicially Convened Sentencing Circles*

The cases discussed in this section represent all of the judicially convened sentencing circle decisions involving intimate violence in Canadian Aboriginal communities that were available to us.<sup>62</sup> While the chronology is ragged, the cases fall into two broad phases. These phases trace the history of the introduction of judicially convened sentencing circles into the field of intimate violent cases. Several trial judgments record the first use of judicially convened sentencing circles in this field during the early 1990s.<sup>63</sup> A phase of consolidation then occurred during the mid- to late 1990s when appellate courts began to hear and decide appeals from sentencing circle decisions in cases of intimate violence in Aboriginal communities.<sup>64</sup> The early trial decisions contain few citations to case law or authority, aside from several references to *R. v. Moses*.<sup>65</sup> In *Moses*, Justice Barry Stuart set out guidelines to help trial judges decide whether a given case is one in which a sentencing circle should be used and explained the process to be followed when conducting a sentencing circle. *Moses* was a case involving theft, carrying a weapon with the purpose of assaulting a police officer, and breach of probation. Stuart J. did not suggest whether the *Moses* guidelines applied to intimate violence. The first few sentencing circles reported in the context of intimate violence, however, use the guidelines and process set out in *Moses*. The texts of these early decisions in intimate violence cases show that the trial judges apply the *Moses* process without explicitly considering whether a process established in the context of theft and threatened assault of a police officer translates well to cases involving intimate violence against a spouse or former partner.<sup>66</sup>

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62. By "available," we mean either officially reported in law reports or included on the Quicklaw or Westlaw database of decisions until 1 September 2006.

63. The first use of a judicially convened sentencing circle in an intimate violence case involving spousal assault was in 1996 and is reported in *Bennett*, *supra* note 36.

64. The first relevant court of appeal decision is *R. v. Johnson*, [1995] 2 C.N.L.R. 158 (Y.K. C.A.).

65. *R. v. Moses*, [1992] 71 C.C.C. (3d.) 347 [*Moses*].

66. See *Bennett*, *Green*, *Charleyboy*, and *Naappaluk*, all cited *supra* note 36.

The second phase represented in the case law is one in which appellate courts are asked to decide whether judicially convened sentencing circles may be legitimately employed in cases of intimate violence. In their decisions, the appellate courts begin to set out the criteria for deciding whether a circle should be used. As we discuss later in this article, the appellate courts tend to direct trial courts to modify their practice in this phase, but they ultimately approve sentencing circles as an appropriate form of sentencing practice in intimate violence cases arising in remote Aboriginal communities. What is of most concern is the fact that appellate courts have evinced a weak commitment to making the willing and voluntary participation of the survivor a precondition to conducting a sentencing circle or to requiring other measures that might ensure that Aboriginal women's perspectives are given adequate space within the circle.

One of the most striking characteristics of the decisions written by trial judges who adopt judicially convened sentencing circles is the colourful language used to justify the place of the circle within the criminal justice process. While judicial decisions are characteristically dry and somewhat modest in their language, the trial judgments that constitute the first phase of this case law are emotive, at times verging on religious, in tone. For example, in *R. v. Naappaluk*, the judge describes how "the 'consultation circle' gradually became a 'healing circle,' that is, a session in which an attempt is made to solve certain problems through discussion."<sup>67</sup> In most cases, the judge focuses on the transformative effect of the circle on the life and outlook of the offender:

I heard some moving statements last night. And I was also told that things really have changed in recent months.<sup>68</sup>

[T]he sentence of the Court today is a sentence which tries to get behind you and help you with this initiative, this first step you have taken to try to change your life.<sup>69</sup>

On other occasions, the judgment focuses on the gains made by the community and the Canadian justice system from the experience of participating in a judicially convened sentencing circle:

Well, this is the day, Michael, we cut fish. This is the day we end this process. This process has heightened on [sic] awareness within the community that they have the best tools to deal with their community problems, and equally this process has heightened the awareness within the justice system that we need to listen to the community.<sup>70</sup>

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67. *Naappaluk*, *supra* note 36 at 11.

68. *Charleyboy*, *supra* note 36 at para. 14.

69. *Bennett*, *supra* note 36.

70. *Green*, *supra* note 36.

The circle of healing, and the potential for transformation ostensibly offered by judicially convened sentencing circles, is being extended to include the offender, his community, and the Canadian criminal justice system. Notably, as we discuss later, the immediate survivor's particular needs for healing are mostly omitted from this realm of concern or, at best, are assumed to follow as a natural consequence of the offender's healing. When we consider these judgments more closely, it will also become apparent that the offender's "community" is defined in a way that excludes Aboriginal women and their concerns about physical safety in general.<sup>71</sup>

Given that we have not spoken to the trial judges who wrote these texts, we can only speculate about why they have abandoned the more usual style of legal writing in these decisions. Our best guess is that this language reflects a genuine conviction that judicially convened sentencing circles have the potential to accomplish more positive change within Aboriginal communities than traditional sentencing practices. The abandonment of the detached legal style seems to reflect a commitment on the part of the judges to becoming a part of the healing process instead of perpetuating the harms caused by the incarceration of Aboriginal Canadians. These judges are apparently combining their institutional authority with a personal search for a better way of doing justice. The commitment is reflected in the somewhat unconvincing claim that the sentencing circle is a place where the participants meet as equals, leaving social hierarchy behind:

All participants in the session sit in a circle, with neither table nor desk in the centre, so that they all appear on an equal footing: nobody dominates anybody else by seeming to preside at a table, and nobody is in the background. Everyone looks at everyone else and dialogue is easier. Participants remain sitting while they speak, they speak in their own language as long as they wish and they are not interrupted by translation, which takes place only at the end of each contribution to the discussion.<sup>72</sup>

It is possibly necessary for the judges to make these claims in order to legitimize the place of judicially convened sentencing circles within the Canadian criminal justice system.

The second phase appellate decisions manifest a very different tone from that of the trial decisions. For the most part, these appeal decisions are more typically "legal" in style. In many cases, the appellate court finds that the trial judge had erred, either in approaching the task of deciding whether to hold a

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71. For more discussion on the perils of defining community, see Carol LaPrairie, "The 'New' Justice: Some Implications for Aboriginal Communities" (1998) 40 *Canadian Journal of Criminology* 61; and Acorn, *supra* note 40.

72. *Naappaluk*, *supra* note 36 at 6.

sentencing circle<sup>73</sup> or in the sentence that was ultimately handed down.<sup>74</sup> While the appellate courts tinker with the trial judges' practice, they share trial judges' concern at the over-incarceration of Aboriginal offenders and implicitly approve their belief that judicially convened sentencing circles offer an opportunity to ameliorate the effects of criminal justice on remote Aboriginal communities.<sup>75</sup> In a series of judgments since 1994, appellate courts have legitimized the practice of judicially convened sentencing circles as a means of seeking alternative forms of justice for Aboriginal offenders and have accepted trial judges' claims that circles constitute a form of restorative justice. Particularly given the more neutral tone that is adopted in the appellate judgments, this acceptance of sentencing circle practice has served to objectify the practice in Smith's sense. In other words, the appellate judgments accord the claims made by trial judges about the positive potential of judicially convened sentencing circles a legitimate, depersonalized status within the Canadian criminal justice system. As might be expected, however, appellate courts continue to emphasize the trial judge's obligation to exercise an overriding discretion to impose a sentence that accords with the sentencing principles contained in the *Criminal Code*.

The appellate courts do seem uncomfortable with some of the more sweeping claims made by trial judges, particularly the judges' claim to understand the needs of Aboriginal communities:

It is also, in my respectful view, mistaken to impose a sentence with the hope that it will somehow bring a community together, when the appropriateness of such a sentence is a significant source of division within that community. This approach forces the community to react to the sentence, rather than responding appropriately to the needs, capacities and understandings of the particular community.<sup>76</sup>

Notwithstanding these compunctions, appellate courts tend to permit the sentencing decision made by a trial judge after conducting a sentencing circle to stand, even where they would have reached a different result.<sup>77</sup> In particular, appellate courts have refused to set sentencing circles aside in

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73. *Morin*, *supra* note 49, *R. v. Cheeknew*, [1993] 80 C.C.C. (3d) 143 (Sask. Q.B.), and *Taylor* appeal, *supra* note 36, which set out the criteria that should be used in determining whether a sentencing circle is appropriate for the particular case. These criteria are usefully collected and summarized in Rowe J.A.'s decision in *J.J.*, *supra* note 36 at para. 34.

74. For example, *Morris*, *supra* note 36. In *J.J.*, *supra* note 36, the court of appeal did not consider the fitness of the sentence because the accused seemed to have "turned around his life" (at para. 77). The appellate decision, however, seems to indicate that the court would likely have found the sentence inadequate.

75. See, for example, *Morris*, *supra* note 36 at para. 52.

76. *Ibid.* at para. 66.

77. See, for example, *Taylor* appeal, *supra* note 36 at para. 83-4, and *J.J.*, *supra* note 36 at para. 76.

cases where it is clear that the survivor was reluctant to participate.<sup>78</sup> The net effect is that judicially convened sentencing circles now form a legitimate mode of acquiring pre-sentencing information in certain cases that involve Aboriginal offenders from remote northern communities.

### *Textual Absence: The Survivor (within) the Trial Judgment*

Claims made within the trial judgments about the transformative effects of the circle rarely extend to the survivor of intimate violence. In fact, little attention is paid in trial decisions to the effect of the violence, the circle, and the sentencing decision on the survivor. In this section, we suggest that survivors can be read as being absent from the texts of trial judgments in three ways. First and most simply, in two of the trial decisions, the judge makes no reference whatsoever to the presence or absence of the survivor in the sentencing circles. Second, in several decisions, the trial judge records that the survivor was present when the sentencing circle occurred but fails to describe the nature and extent of her participation or to record her words. Finally, the trial decisions overwhelmingly disregard the need to ensure that the sentencing circle is conducted in a way that reassures the survivor of the community's concern for her safety and emotional well-being. This disregard occurs even when research about the needs of survivors of intimate violence is placed before the court by women's groups or other concerned third parties. This most complex form of absence is also the most insidious. Women's lived experience of violence is being silenced within these decisions, and women's expertise about their own needs is being denied.

It is unclear from the trial decision in *R. v. Bennett* whether the survivor was present at the sentencing circle.<sup>79</sup> The only mention of the survivor is a reference to the fact that she was assaulted. No custodial sentence was imposed by Stuart J. in this case, despite the fact that this was the offender's third assault against the same spouse. In his oral reasons for judgment, Stuart J. explained that no custodial sentence would be imposed because "you can keep your word, and . . . you are not someone who in the past has been bad, and

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78. For example, *Taylor* appeal and *J.J.*, both *supra* note 36. In *Taylor* appeal, the majority of the Saskatchewan Court of Appeal held that, while the survivor's original unwillingness to participate in the circle may have constituted a procedural irregularity, the fact that (in the majority's opinion) the survivor became a willing participant in the circle after the circle was commenced cured that irregularity. See *Taylor* appeal, at para. 66. The Newfoundland and Labrador Court of Appeal decision in *J.J.* is ambiguous, but the court stipulated that "the willingness of the victim (freely given)" (at para. 34) is a criterion to be considered in deciding whether to hold a sentencing circle. In this case, the court concluded that the survivor did not freely consent to the circle and that the trial judge did not have regard to this or other relevant criteria. Nonetheless, the court refused to set the sentence aside because the offender "has stopped drinking. He has not reoffended. He is taking care of his children. He appears to have turned around his life" (at para. 77).

79. *Bennett*, *supra* note 36.

since the community seems to respect you.”<sup>80</sup> In this case, previous episodes of intimate violence evidently do not qualify as past bad behaviour. Since the judgment does not record any information about the survivor, we cannot know from the text how she felt about this construction or about the sentence that was imposed upon the offender.

The decision in *R. v. Taylor* is a second judgment that fails to state whether the survivor participated in the circle, although the judge does note that she did not want to do so.<sup>81</sup> Justice Robert Milliken also cryptically reports that “[t]he Crown and certain individuals opposed the holding of the circle.”<sup>82</sup> Milliken J.’s omission is clarified by the majority of the Saskatchewan Court of Appeal in the *Taylor* appeal, which noted that

the victim at first did not want to participate in the circle proceedings. She participated only because she felt she had to. After she learned that she was not compellable, however, she continued to participate. Significantly, she appeared on the date to which the proceedings were adjourned, 29 May, and again participated. At this point she clearly became a willing participant.<sup>83</sup>

The majority of the Court of Appeal also notes in its decision that the survivor stated: “I felt I had to come. I felt like I was forced to come.”<sup>84</sup> We return to this aspect of the Saskatchewan Court of Appeal’s reasoning later in this article.

In several instances, the trial judgments record that the survivor did participate in the sentencing circle. In these cases, however, women’s participation seems to have had a minimal impact on the institutional account of the circle. Survivors’ voices are barely afforded space in the written account, and their opinions and concerns seem to be given little weight in the final sentencing decision. The absence of survivors’ voices is particularly notable as judges often use verbatim quotations from the circle process in these decisions or paraphrase the participants’ words. Despite the claims made by trial judges that everyone is an equal participant within a sentencing circle, the relative or complete absence of the woman survivor from many of the trial decisions suggests one or both of two conclusions. First, it is possible that the complainants’ contributions are not fully recorded or not given weight by the trial judge. Second, it is possible that women feel constrained from participating actively in the circle because of fear for their personal safety.

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80. *Ibid.* at 1.

81. *Taylor* trial, *supra* note 36.

82. *Ibid.* at para. 1.

83. *Taylor* appeal, *supra* note 36 at para. 66.

84. *Ibid.* at para. 17.

The judges in *R. v. Green*, *Naappaluk*, and *R. v. Morris*<sup>85</sup> note the presence of the survivor in the circle but only peripherally record her experiences, her words, or her concerns. In *Naappaluk*, Justice Jean Dutil writes that “[t]he accused himself spoke several times, as did the victim, his wife.”<sup>86</sup> However, an observer of the circle process and the steps leading up to it suggests that the survivor was silenced through intimidation and fear. The observer, Mary Crnkovich, writes: “[I]t is interesting to note how seldom the victim spoke. When she did speak she said very little.”<sup>87</sup> In *R. v. Charleyboy*, Justice Cunliffe Barnett notes that the survivor participated in the circle, but the only remark attributed to her in the written judgment assigns her partial blame for this second prosecuted assault by her husband: “I was told that Lena had said that she would never allow it to happen again.”<sup>88</sup>

In the final set of cases, the trial judgments record that the survivor actively participated in the sentencing circle. There are, however, two troubling aspects to the ways in which women participated. First, in cases such as *R. v. H.K.C.*, *Taylor*, and *R. v. J.J.*,<sup>89</sup> the appellate courts identify the likelihood of survivor coercion, noting that pressure was brought to bear on women who did not wish to become members of the circle. The survivor’s concerns about participating are rendered invisible by proceeding without her consent, and her appearance in the text must be read in light of her participation under duress. Justice Bria Huculak, a sentencing circle advocate, notes that “(t)he victim must also be willing to participate—and without any coercion or pressure to do so.”<sup>90</sup> Despite such expressions of “best practices” in the literature, survivors in these cases were pressured or coerced into participating in the circle. Research on intimate violence indicates that the circumstances leading up to the circle, and in the circle itself, may have silenced the survivors.<sup>91</sup> There are suggestions within some of the cases that Aboriginal

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85. *Green*, *Naappaluk*, and *Morris*, all *supra* note 36.

86. *Naappaluk*, *supra* note 36 at 8.

87. Crnkovich, *supra* note 51 at 166.

88. *Charleyboy*, *supra* note 36 at para. 9.

89. *H.K.C.*, *Taylor*, and *J.J.*, all *supra* note 36.

90. Huculak, *supra* note 43 at 163.

91. Research shows that survivors frequently use silence as a survival strategy when interacting with abusers and sometimes as a coping strategy when dealing with authority figures. Stephen Hooper and Ruth Busch, “Domestic Violence and the Restorative Justice Initiatives: the Risks of a New Panacea” (1996) 4 *Waikato Law Review* 101; Hilary Astor, “Swimming against the Tide: Keeping Violent Men out of Mediation,” in Julie Stubbs, ed., *Women, Male Violence and the Law* (Sydney: Institute of Criminology, Sydney University Law School, 1994) 147; Maria R. Volpe, “Mediation in the Criminal Justice System: Process, Promises and Problems,” in Harold E. Pepinsky and Richard Quinney, eds., *Criminology as Peacemaking* (Bloomington: Indiana University Press, 1991), 194 at 201; Sandra A. 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) at 7; Barbara J. Hart, “Gentle Jeopardy: The Further

women's groups have raised related concerns or presented similar research before trial judges when opposing a proposal to convene a sentencing circle.<sup>92</sup> In each case, having identified when such opposition has been made, the trial judge has proceeded with the circle without making any special accommodation to alleviate the survivor's concerns. Threats to personal safety, as well as actual violence, affect a survivor's ability and willingness to speak up during a sentencing circle or to report violence following the imposition of conditions in a circle. Before survivors are asked to participate in sentencing circles and the sentences that result from them, sentencing circles, and the circumstances surrounding them, must be seen by survivors to be safe as well as actually being safe for the survivors.

In *H.K.C.*, the Saskatchewan Court of Appeal notes:

The defence applied for a sentencing circle to which the Crown objected on the basis of *R v. Morin* . . . and also because the victim was in a cycle of violence which might have precluded her from meaningful participation . . . Contrary to his undertaking, the respondent did contact the victim and the victim ultimately indicated to the Court that she did not wish to participate in or to have a sentencing circle take place. The Court elected to proceed with a sentencing circle, but during the course of it, concluded it was no longer appropriate to carry it on as a judicial proceeding.<sup>93</sup>

The court held that the lenient sentence imposed by the trial judge should be set aside, but it did not in this case provide any direction to trial courts about whether a sentencing circle should take place when a survivor is not a willing participant in the process.

The need (or otherwise) for the consensual and full participation of the survivor is discussed at length in the decision in *Taylor*, with Milliken J. ruling that the willing participation of the survivor is optional. The trial decision states that the sole purpose of the circle is to address the needs of the offender: "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.

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Endangerment of Battered Women and Children in Custody Mediation" (1990) 7 *Mediation Quarterly* 317; and Linda Perry, "Mediation and Wife Abuse: A Review of the Literature" (1994) 11 *Mediation Quarterly* 313.

92. For example, *Morris*, *supra* note 36 at para. 27; and *W.B.T.* (per Cameron J.A.) *supra* note 36.

93. *H.K.C.*, *supra* note 36 at para. 2. The court of appeal goes on to note that despite cancelling the circle, the trial judge went on to hand down a "lenient" sentence and speculates that the trial judge did so due to the community having "abandoned a local justice committee," resulting in the accused losing the probable advantages provided by such a committee (at para. 3).

The presence of the [survivor] is not crucial.”<sup>94</sup> This position is at odds with the claims made by proponents that sentencing circles heal the survivor, the offender, and the community. On appeal, the majority of the Saskatchewan Court of Appeal concluded that, while proceeding without the survivor’s consent constituted an irregularity, this irregularity was cured by the fact that, in the majority’s opinion, the victim eventually became a willing participant in the circle.<sup>95</sup> Justice Stuart Cameron, in dissent, disagreed, stating that Milliken J. “should have [aborted the circle] on learning that [the survivor] was unwilling to participate.”<sup>96</sup>

In several cases, the dynamics leading up to, during, or following the sentencing circle left women in situations that were both potentially and actually dangerous. While these dynamics left women unprotected from violence, they also created circumstances that may have compromised their ability and willingness to speak up in the circle. In *Bennett, Charleyboy, Green, H.K.C., Naappaluk, Taylor, and J.J.*,<sup>97</sup> the charges of intimate violence in the case at hand were preceded or accompanied by at least one, and up to sixteen, other charges for similar offences. In each of these cases, aside from *Taylor*, the survivor had been subjected to intimate violence at the hands of her partner, the offender had been charged and convicted, and the offender had repeated the offence. In the case of *Taylor*, the accused had been convicted of two serious assaults against a previous common law spouse and once against her child.

In *H.K.C.*, the offender was under a no-contact order prior to the sentencing circle itself, which he breached by contacting the survivor directly. In the cases of *Green* and *J.J.*, the offenders were under conditions from a previous sentencing circle for a similar crime against the same survivor. In *Naappaluk*, the offender stayed in the home of the survivor the night before the circle.<sup>98</sup> In most of these cases,<sup>99</sup> abusers remained in the (often small and/or remote) community with the survivor, increasing the likelihood of contact as well as the opportunity to assault her. In several cases, the accused remained in the community under the supervision of those in the community who had “turned a blind eye” on the abuse previously or had engaged in survivor-blaming behaviour.<sup>100</sup>

In *Taylor* and *J.J.*, the offender pled not guilty to charges that included violent sexual offences, forcing the survivor to testify and endure a full trial.

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94. *Taylor* trial, *supra* note 36. While the survivor submitted a victim impact statement in *Morris*, *supra* note 36, she did not participate in the sentencing process.

95. *Taylor* appeal, *supra* note 36 at para. 66.

96. *Ibid.* at para. 158.

97. Full citation for each of these cases is supplied in note 36.

98. See Crnkovich, *supra* note 51 at 168.

99. With the exception of the *Taylor* trial, *supra* note 36, where the accused was banished to a remote island.

100. See, for instance, *Naappaluk*, *supra* note 36.

In these cases, the sentencing circle was ordered by the judge after the offender was found guilty. It has been suggested by several pro-circle commentators that a guilty plea be a prerequisite to a sentencing circle.<sup>101</sup> This proposition was rejected by the Saskatchewan Court of Appeal in the *Taylor* appeal. The court of appeal held that although it was necessary for “the offender to demonstrate his remorse, sincerity and acceptance of responsibility . . . a guilty plea was not necessary.”<sup>102</sup> The court of appeal’s endorsement of the use of sentencing circles in cases in which a survivor has testified against the offender creates a strong impression that the realm of institutional concern in these cases excludes women’s knowledge. In their rush to heal the offender, Canadian courts are constructing a discourse that reserves no clear place for hearing, and finds no clear ways to accommodate, Aboriginal women’s concerns about safety.

All of these circumstances, combined with the likelihood of previous, unrecorded abuse,<sup>103</sup> would create an apprehension of harm for survivors of intimate violence. Research on intimate violence shows that for survivors “remaining silent about abuse and/or accommodation to their abusers may be important survival strategies.”<sup>104</sup> The trial judgments that we have read provide no hint that trial judges are aware of these survival strategies or that trial judges took particular care to avoid placing survivors in positions where they may have been faced with recurrent violence. To the contrary, it would seem that, at times, trial judges go to great lengths to keep offenders in their communities, even when those offenders have a history of repeated violence and apparent disregard for judicial sanctions.

### *Textual Presence: Finding the Body, Losing the Mind*

Having identified the ways in which the survivor is absent from many of the trial judgments, it is important to identify that the complainant occasionally appears in both trial and appellate judgments. These textual appearances come in forms that are familiar to us because they draw on enduring tropes of women’s selflessness, feminine dependence, and the

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101. “Prerequisites common to all communities, include an acceptance of responsibility by the offender, a plea of guilty.” Stuart, *supra* note 21 at 193.

102. *Taylor* appeal, *supra* note 36 at para. 50. For commentary on the value and importance of a guilty plea in restorative justice interventions, see Ross Gordon Green, *Justice in Aboriginal Communities: Sentencing Alternatives* (Saskatoon: Purich, 1998).

103. For instance, in the *Naappaluk* case, 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.” *Naappaluk*, *supra* note 36 at 4.

104. Julie Stubbs, “Domestic Violence and Women’s Safety: Feminist Challenges to Restorative Justice,” in Braithwaite and Strang, *supra* note 41, 42 at 44.

disorder presented by racialized women's bodies.<sup>105</sup> In these constructions of the survivor, judges are, perhaps unconsciously, perpetuating dominant ideologies by selectively valuing certain discourses about Aboriginal womanhood.<sup>106</sup> In addition, when one turns from the trial judgments to the texts of appellate judgments, a shift becomes apparent. In many cases, the appellate courts counter the trial judge's construction of the case by making violence against women reappear in the official discourse. None of these characterizations is unproblematic. Unlike the male accused, the female survivor almost never appears in the judgments as a complex, living, breathing person.

An example of the survivor as a disorderly "squaw" is provided by the Newfoundland and Labrador Court of Appeal's decision in *J.J.* Speaking for the court, Justice Malcolm Rowe describes the circumstances leading up to the sexual assault in the following terms:

Both [the survivor] and J.J. chronically abused alcohol.

On Friday, September 25, they drank throughout the day and into the night. Just before daylight on Saturday, September 26, [the survivor] went into J.J.'s bedroom and passed out on one of the two beds there.<sup>107</sup>

It is hard to see why the survivor's alcohol use or the fact that she slept in J.J.'s room on the night of the assault is relevant to the decision. This appeal was brought by the Crown against the sentence imposed by the trial judge, and the facts found by the trial judge do not appear to have been at issue at this stage. Collectively, the references to the survivor's alcohol use and the fact that she passed out in J.J.'s room seem to construct a story of this survivor as a woman who, at the very least, failed to protect herself from J.J.'s violence. This story resonates unpleasantly with narratives that construct rape victims, particularly indigenous rape victims, as having "asked for it" by their conduct or the company they keep.<sup>108</sup> Correspondingly, the significance of the violence against J.J. is diminished in this account. The "facts" recited by the court also overlook

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105. See Sherene Razack, *Looking White People in the Eye: Gender, Race, and Culture in Courtrooms and Classrooms* (Toronto: University of Toronto Press, 2001); and Lisa Sarmas, "Storytelling and the Law: A Case Study of *Louth v. Diprose*" (1994) 19 *Melbourne University Law Review* 701.

106. Boyd, *supra* note 11 at 98.

107. *J.J.*, *supra* note 36 at paras. 4-5.

108. Sherene H. Razack, "Gendered Racial Violence and Spatialized Justice: The Murder of Pamela George," in Sherene H. Razack, ed., *Race, Space, and the Law: Unmapping a White Settler Society* (Toronto: Between the Lines, 2002), 121; Emma LaRocque, "Re-examining Culturally Appropriate Models in Criminal Justice Applications," in Michael Asch, ed., *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality and Respect for Difference* (Vancouver: UBC Press, 1997), 75; and David Schneiderman, ed., *Conversations among Friends: Entre Amies: Women and Constitutional Reform. Proceedings of An Interdisciplinary Conference on Women and Constitutional Reform* (Edmonton: Centre for Constitutional Studies, 1991).

the possibility that the survivor uses alcohol as a means of coping with the racism, poverty, and violence that is the quotidian experience of many Aboriginal Canadians. This possibility is hinted at in the survivor's victim impact statement, which is quoted elsewhere in the court's judgment. The survivor is reported as having said: "When I'm drinking, I'm not so scared."<sup>109</sup> Notwithstanding this explanation, the Newfoundland and Labrador Court of Appeal's recitation of the "facts" decontextualizes the survivor's alcoholism from its causes.

The forgiving, nurturing woman is a stock character in the texts of sentencing circle decisions. In *Naappaluk*, Dutil J. places considerable emphasis on the survivor's willingness to have her partner return to the family home and orders that a committee be set up to assist the couple. This approach suggests that the judge considers ending the abuse to be the couple's responsibility and not a problem that the man must face and overcome.<sup>110</sup> Similarly, in *Charleyboy*, Barnett J. refers to the survivor's preparedness to attend "the Nenqayni Treatment Centre for 6 weeks" together with her abuser and her children.<sup>111</sup> On the strength of the offender's preparedness to seek treatment, together with evidence that the offender had changed his behaviour, the trial judge decided not to sentence the accused to a sentence of incarceration, despite the fact that this assault was committed while the accused was on probation for a similar assault against the same survivor.

In *Green*, the survivor is praised for being willing to work with her partner to help him overcome his difficulties, and Stuart J. observes that "I would not be serving the best interests of the immediate [survivor] of this offence by imposing a gaol sentence."<sup>112</sup> This statement is interesting because it is one of the few examples in which a trial judge pays explicit attention to the survivor's needs. Even when the judge expresses concern for the survivor's needs, it appears that they are being constructed in somewhat restricted ways. The survivor's well-being is presumed to follow from the welfare of the offender, and no regard is paid to the survivor's need for community support and assistance in her own right. The possibility that the survivor would resist this judicial construction of what she needs is somewhat speculative, although it is supported by anecdotal evidence. For example, in *Morris*, an accused who was assessed as having a high risk of re-offending was returned by the trial judge to his community despite the fact that the Kaska women feared that the sentencing circle would only serve to isolate and further oppress women in the relevant community.<sup>113</sup> Similarly, in *Taylor*, the trial judge's decision to proceed with a sentencing circle was approved by the majority of the

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109. *J.J.*, *supra* note 36 at para. 22.

110. *Naappaluk*, *supra* note 36 at 11.

111. *Charleyboy*, *supra* note 36 at para. 12.

112. *Green*, *supra* note 36.

113. *Morris*, *supra* note 36 at para. 27.

Saskatchewan Court of Appeal despite the fact that the Family Service Centre and the Kikinahk Friendship Centre wrote to the trial judge suggesting that holding the circle in this case would undermine “the continuing struggle of Aboriginal women to have violence against them taken more seriously.”<sup>114</sup> The court of appeal’s refusal to engage with Aboriginal women’s fears about the effects of judicially convened sentencing circles suggests that women’s experience of intimate violence is, paradoxically, being excluded from the circles that are being convened to heal violence within their communities.

An example of an appellate court’s re-insertion of details about the violence done to the complainant also comes from *J.J.*<sup>115</sup> In the Newfoundland and Labrador Court of Appeal’s decision, the accused man’s female partner is described in the graphic terms of the assault with which the accused was charged. The following quote is distressing, but we have decided to use it because it demonstrates the gravity of the offence and the extraordinary logic being developed within sentencing circles:

J.J. . . . was convicted of assaulting [his partner] by forcing a beer bottle into her vagina while she was sleeping. This was the seventeenth assault by J.J. against [the survivor].<sup>116</sup>

The court of appeals’s judgment states that the woman suffered physical injury to her cervix but that she recovered. Despite the fact that her physical injuries were presumably documented by doctors, Rowe J.A. comments that “[b]ased largely on [the complainant’s testimony], J.J. was convicted of sexual assault with a weapon.”<sup>117</sup> This remark implicitly casts doubt on the strength of the conviction and certainly downplays the distressing effect of the incident on the survivor. In this case, the court of appeal found that A.M.P., the survivor, was pressured by her children and her community to participate in the sentencing circle. The court of appeal decision proceeds as follows: “In the light of this, was [the survivor’s] willingness to participate freely given?” In the view of the trial judge it was. He states in his sentencing decision:

There was no evidence whatsoever that there was any coercion or pressure or any subtle influence of any party against any other party in the [sentencing] circle.

Strictly speaking, that is true. The pressure applied to [the survivor] was not in the sentencing circle, it was in the steps leading up to it.<sup>118</sup>

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114. *Taylor*, *supra* note 36 at para. 106.

115. *J.J.*, *supra* note 36.

116. *Ibid.* at para. 1.

117. *Ibid.* at para. 7.

118. *Ibid.* at paras. 66–7.

Rowe J.A. then proceeds to consider the next issue that was raised in the appeal. The presumably ironic statement at the end of the quoted passage leaves us uncertain about whether the court of appeal considers the type of pressure that was applied to the survivor in this case to be a reason to avoid using sentencing circles. In the result, Rowe J.A. held that the trial judge failed to consider factors that were relevant to the question of whether a sentencing circle should be held, but he refused to rule that a sentencing circle should not have been held. In light of the good behaviour of the offender since sentencing, the court of appeal decided not to sentence him to a term of imprisonment. The graphic description of the violence perpetrated against the survivor, coupled with Rowe J.A.'s almost joking reference to the coercion brought to bear on the survivor, combine to dehumanize her and, in particular, to obscure the psychological effects on the survivor of a relationship in which she had been physically assaulted at least seventeen times.

The *Morris* case also provides a striking example of both the disappearance of the violence against the survivor at trial level and the BC Court of Appeal's pre-occupation with the physical, rather than the mental or emotional, effects of the violence. In this case, the BC Court of Appeal overturned the trial decision, which had imposed a suspended sentence and probation on the offender after he was convicted of uttering threats, assault, and unlawful confinement. The sentence was imposed in consultation with a sentencing circle. The court of appeal opened its decision by making the physical violence against the survivor re-appear as being an important, aggravating factor to be considered in sentencing.<sup>119</sup> In particular, the court focused on the ongoing physical effects of the assault on the survivor:

E.D. spent three days in hospital recovering from her injuries. At the time of sentencing at the end of February 2004, almost eight months after the assault, she continued to suffer ongoing difficulties, such as occasional blurring of her vision.<sup>120</sup>

*J.J.* and *Morris* are very different from the trial court decisions that we read insofar as they document the injuries suffered by the survivor as well as the events that led up to the sentencing circle. However, even in *J.J.*, the gravity of the assault is diminished by the statement that the survivor has recovered from her injuries. In both *J.J.* and *Morris*, the courts focus only on the physical effects of the violence. In these cases, the female survivors are depicted almost exclusively as the sites of violence and are plainly denied the agency and psychological dignity that is the ostensible ambition of restorative justice practices. In stark contrast with the trial judges' concern for the psychological

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119. *Morris*, *supra* note 36 at paras. 9–13.

120. *Ibid.* at para. 13.

healing of the offender and his community, the psychological effects of intimate violence on the survivor are repeatedly denied in both trial and appellate judgments. The survivor's role in these cases is limited, even when she plays some role. She is a body to be abused—a source of support for the offender while he is mending his ways—her actions courted the violence against her. Her presence accords the circle an implicit legitimacy, however reluctant this presence may be. She is, however, rarely a person with needs and fears and her own right to be healed.

### *A Different Voice: Hearing and Endorsing Some of Women's Concerns about Sentencing Circles*

One decision provides a significant exception to the appellate courts' routine endorsement of trial courts' marginalization of women's concerns from sentencing circles. This decision is written by Justice Stuart Cameron in dissent in the *Taylor* appeal. In this case, the offender had broken into his ex-partner's house. He punched and kicked her severely in the chest and groin before having forced intercourse with her. He then threatened to kill the survivor if she told the police.<sup>121</sup> The offender pleaded not guilty, and, accordingly, the complainant testified and was cross-examined at trial. After a sentencing circle was held against the survivor's wishes, the trial judge sentenced the offender to ninety days imprisonment and three years of probation. One condition of probation was that the offender spend six months in isolation. The Crown's appeal from the sentencing decision was dismissed by a majority of the Saskatchewan Court of Appeal. Cameron J.A. wrote a dissenting judgment, in which he indicated that a proper sentence for such an offence would ordinarily be four years' imprisonment, less time served.<sup>122</sup> Cameron J.A. described the relationship between the offender and the survivor in some detail, explaining that the offender "was a binge drinker, thought [the survivor] lazy and irresponsible, and was often abusive."<sup>123</sup> The dissent goes on to describe the offender's previous convictions for violence against women and to conclude that

[t]hese are grave offences, grave because they constituted offenses against the person; grave because they inflicted immense physical and emotional suffering, degradation, and torment upon their victim.

W.B.T. was to be taken as...acting upon a set of lawless, self-regarding, and brutish attitudes, misogynistic even, given

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121. *Taylor* appeal, *supra* note 36 at paras. 3–4 (per Bayda J.A.) and para. 96–8 (Cameron J.A.).

122. *Ibid.* at para. 95.

123. *Ibid.* at para. 96.

the contemptuous views and physical abuse he reserved for both Ms. C. and the woman with whom he had earlier lived.<sup>124</sup>

Cameron J.A.'s judgment rejects the validity of those misogynist views. Furthermore, Cameron J.A. does not confine his consideration of women's experiences to that of the survivor in this case. He places considerable emphasis on the fact that both the Family Service Centre and the Kikinahk Friendship Centre wrote to the trial judge requesting that no sentencing circle take place in the absence of a willingness by the complainant to participate:

The Centre was also of the view that the events would be treated too lightly by a sentencing circle, undermining the continuing struggle of Aboriginal women to have violence against them taken more seriously. Saying that Ms. C. had already been traumatized by the assaults upon her, Ms. Sanderson went on to say she feared that Ms. C. would suffer further traumatization, should she have to participate in a sentencing circle and that the community did not have adequate professional support to deal effectively with a case such as this.<sup>125</sup>

Cameron J.A.'s judgment recognises expertise within the women's groups in the community and suggests that any true community-based justice initiative concerning intimate violence must begin from that expertise. In doing so, it demonstrates the extent to which Aboriginal women's experience and expertise is excluded from the other judgments we discuss in this article. While Cameron J.A.'s judgment draws attention to the exclusion of women's voices from sentencing circles, we believe that it does not provide a template for a truly restorative approach to sentencing Aboriginal men for intimate violence. Some of the criteria by which such an approach should be judged are described in the conclusion.

### ***Conclusion***

Using Dorothy Smith's conception of texts as a technology that directs people's everyday work<sup>126</sup> has helped us to move beyond the question of whether or not judicially convened sentencing circles deserve the label "restorative justice" and into a more productive examination of whose interests are being advanced, and whose interests obscured, by the institutionally authorized practice of sentencing circles. In the push and pull over when and how to conduct sentencing circles that is taking place in the texts written by appellate and trial judges, institutional priorities are being set.

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124. *Ibid.* at paras. 176-7.

125. *Ibid.* at para. 106.

126. Smith, *supra* note 15; and Smith, *supra* note 17.

These priorities begin from the position, constituted within appellate court judgments, that judicially convened sentencing circles can be an appropriate means of proceeding with cases of intimate violence in remote Aboriginal communities. The priorities established within the texts have a direct effect on the practice of sentencing circles. For example, the appellate courts' weak commitment to ensuring that survivors are voluntary participants in a sentencing circle process seems to have further enabled trial judges to disregard women's physical and emotional safety when convening sentencing circles. Cameron J.A.'s dissent in the *Taylor* appeal highlights the virtually total exclusion of women's perspectives from most of the judgments that are written about judicially convened sentencing circles. Thinking about these cases as establishing patterns of governance permits us to see how the appellate courts' ambivalence about the role of survivors allows trial judges in later cases to hold sentencing circles in circumstances that may be inappropriate.

The selectivity evident in the judicial discourse about judicially convened sentencing circles is perhaps a necessary consequence of any "top-down" solution to the difficulties inherent in the encounter between Aboriginal Canadians and the criminal justice system. Judicial commitment to restorative justice motivates a selection of narrative strands that confirm the "healing" properties of restorative justice. It also enables the omission of these narratives, particularly the survivors' actual experiences of safety and feelings about participation that might reflect poorly on sentencing circles. The judges' disavowal of the power differentials between judges and the Aboriginal people who come before them do little to alter the reality that these circles are convened by non-Aboriginal judges wielding institutional authority. A key difficulty is that sentencing circles are being used in communities that are already replete with deprivation and inequality. The exclusion of women's concerns from the circle mirrors the disempowerment of Aboriginal women within many communities.<sup>127</sup> It is important to resist the characterization of judicially convened sentencing circles as a form of restorative justice because this characterization re-victimizes Aboriginal women.

Smith's methodology helps us to read the texts of sentencing circle decisions with an eye to the institutional consequences of factors such as the appellate courts' ambivalence about whether the survivor must willingly participate in a sentencing circle. First and most importantly, these judgments demonstrate that judicially convened sentencing circles now claim a legitimate place in the armoury of sentencing practices available to Canadian trial judges. The continued use of these circles by trial judges in a number of northern Canadian

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127. See Angela Cameron, "Sentencing Circles and Intimate Violence: A Canadian Feminist Perspective" (2007) 18 *Canadian Journal of Women and the Law* [forthcoming], for a more detailed consideration of this point. Non-Aboriginal society in Canada is also characterized by gendered inequality, including intimate violence.

jurisdictions is a consequence of the authorization given to their use in texts created by the appellate courts.

The judicial discourse that appears within the cases is different from the narratives created extra-judicially by proponents of judicially convened sentencing circles. Judicial commentators describe idealized models that follow “best practices” in advocating for sentencing circles, with particular reference to protecting and empowering the victims of crime.<sup>128</sup> Both real concern for the survivors of these violent crimes and adherence to the “best practices” described in the literature are immeasurably compromised within judicial narratives in the cases discussed earlier in this article. These differences reflect the institutional imperatives of the criminal justice system since those imperatives are interpreted by judges. When considering the effect of judicially convened sentencing circles on Aboriginal experiences of criminal justice, it is therefore important to look at the practice as it is constituted through the judgments rather than focusing solely on the rhetoric employed by the circle’s proponents. Returning to Hunt’s notion of ideology as a coalescence of discourse at the level of the state,<sup>129</sup> we can discern from these judgments that the apparently neutral restorative justice discourse operates to shield judicially convened sentencing circles from critical appraisal. One particularly disquieting effect of this institutional ideology is that Aboriginal women and those who are concerned with Aboriginal women’s safety have been disciplined to accept the practice of doing justice through sentencing circles because the alternative is to risk being constructed as being insensitive to the over-incarceration of Aboriginal men. By constructing the discourse in this way, the trial and appellate courts have neatly obscured the implications of poverty, racism, and gender inequality in the continuing experience of violence within Aboriginal communities.<sup>130</sup>

Perhaps the clearest way to demonstrate the extent to which the women survivors in the cases we have discussed are excluded from the realm of institutional concern is to point to ways of approaching cases of intimate violence within a restorative justice context that take a more balanced approach. As discussed earlier,<sup>131</sup> Cameron J.A. incorporates into his dissent in the *Taylor* appeal some of the otherwise erased knowledges and experience of Aboriginal women, but he is restricted by the court record. While this explicitly anti-misogynist dissent goes a significant distance within the context of sentencing practices inside the criminal justice system, it does not, in our opinion, move into the realm of restorative justice.

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128. See, for instance, Lilles, *supra* note 42; Huculak, *supra* note 43; Point, *supra* note 43 at 207; and Stuart, *supra* note 21.

129. Hunt, *supra* note 13.

130. See Elizabeth Adjin-Tetty, “Sentencing Aboriginal Offenders: Balancing Offenders’ Needs, Victims and Society’s Interests and Decolonization of Aboriginal Peoples” in this volume.

131. See text accompanying notes 121–5 in this article.

At a minimum, restorative justice in the context of intimate violence would reflect the needs, experiences, and knowledges of the survivors of these crimes. It would also bring *new* financial and human resources to the community<sup>132</sup> rather than relying on the already taxed resources of communities in crisis. It would carry real consequences for offenders who repeatedly break conditions set by the community, and it would also be based in a feminist praxis of empowerment and social and economic justice for Aboriginal women and their communities.<sup>133</sup>

The patterns of violence against Aboriginal women are absent from the texts of judicially convened sentencing circle decisions in favour of an institutional focus on the possibility of ameliorating the rate of incarceration of Aboriginal men. The realm of institutional concern being established in these cases thereby re-victimizes the Aboriginal survivors of intimate violence, excluding Aboriginal women from the “community” that is empowered to decide the proper way to deal with Aboriginal offenders.<sup>134</sup> There are serious dangers inherent in assuming that the multi-layered difficulties faced by Aboriginal peoples in Canada can be easily, or cheaply, solved. Reading the texts of judgments written about Aboriginal intimate violence, it becomes possible to see how Canadian judicial practices mask these multi-layered difficulties rather than seeking wholeheartedly to address them. In this example, it seems that Aboriginal women are being placed at risk by a practice that is textually constructed as helping Aboriginal communities. The violence against Aboriginal women has been minimized within, or erased from, these texts, thereby permitting judges to proclaim the healing effects of sentencing circle practices. Solving the systemic problem of intimate violence in Aboriginal communities, as in wider Canadian society, will require much more extensive economic, human, social, and cultural resources than are evident in this criminal justice model.

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132. There are several examples of such restorative justice practice. See, for example, Therese Lajeunesse, *Community Holistic Circle Healing in Hollow Water Manitoba: An Evaluation* (Ottawa: Solicitor General, 1996); Therese Lajeunesse, *Community Holistic Circle Healing: Hollow Water First Nation* (Ottawa: Solicitor General, 1993); and Pennell and Burford, “Family Group Decision-Making,” *infra* note 133 (all cited works).

133. Perhaps the best example of restorative justice in cases of intimate violence in Canada has been rooted in child welfare, where the focus is first on the needs of the most vulnerable members of the family, accompanied by a holistic approach that sees solutions in healing the whole family. See Pennell and Burford, “Feminist Praxis,” *supra* note 41; 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: Aldine de Gruyter, 2000), 171; Joan Pennell and Gale Burford, “Family Group Decision Making: Protecting Children and Women” (2000) 79 *Child Welfare* 131; and Joan Pennell and Gale Burford, *Family Group Decision Making Project: Implementation Report Summary* (St. John’s, NF: Memorial University of Newfoundland, 1995).

134. To observe that women’s interests are being marginalized in these cases is not to downplay the seriousness of the problem of Aboriginal incarceration, nor do we necessarily endorse current Canadian incarceration practices as an appropriate response.

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