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No Women at the Center: The Use of the Canadian Sentencing Circle in Domestic Violence Cases

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NO WOMEN AT THE CENTER: THE USE OF THE CANADIAN SENTENCING CIRCLE IN DOMESTIC VIOLENCE CASES

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* This article is dedicated to my family. In particular, my mother, Dr. Asha Goel, and my mother-in-law, the late Peggy Alper, have, through their strength and courage, each been an inspiration and an example. I wish also to thank my brother, Sanjay, and my husband, Michael, for their hands-on support during the writing process. Last, but by no means least, I am indebted to Professors William Acevez and Donna Coker for their review of, and thoughtful comments on, earlier versions.

INTRODUCTION

Imagine you lived in a world where eight out of ten women personally experienced family violence.[1] Undoubtedly, you would know someone who had been abused. Most likely, you would have witnessed abuse in your own family. Perhaps you would even be a victim yourself. For Canadian Aboriginal[2] women, this is not a world they need to imagine; it *is* their world. A report by the Ontario Native Women's Association reveals that eighty percent of the Aboriginal women surveyed had personally experienced family violence.[3] Eighty-five percent indicated that family violence occurred in their community.[4] Figures like these demonstrate that for most Aboriginal women family violence is a reality of their day to day life.

Statistics like these are no accident. They spring from generations of systematic oppression and marginalization from every side. The condition of Aboriginal women in Canada today is the legacy of colonialism and patriarchy. Though Aboriginal women in pre-contact[5] societies held powerful positions,[6] today Aboriginal women find themselves subordinated and abused. Ironically, while current Aboriginal justice initiatives emphasize a return to traditional, pre-contact values, these initiatives fail to restore Aboriginal women to their honored place. Contemporary Canadian sentencing circles exemplify

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1. ONTARIO NATIVE WOMEN'S ASSOCIATION, BREAKING FREE: A PROPOSAL FOR CHANGE TO ABORIGINAL FAMILY VIOLENCE 18-21 (1989).

2. I use the term Aboriginal to refer collectively to those persons in Canada who are of Indian, Inuit and Metis ancestry, regardless of their legal status. This term is more commonly accepted among the Indigenous people of Canada than the term common in the United States – Native Americans. While I prefer the connotations of the term First Nations for emphasis on historical and political status, "First Nations" is often used to connote only "Status Indians," and does not normally include Inuit and Metis people. The term Aboriginal is consistent with the wording of the CONSTITUTION ACT, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11. For reference, Statistics Canada defines Aboriginal to include "those who identified with one or more Aboriginal groups (North American Indian, Métis, or Inuit). Also included are those who did not identify with an Aboriginal group but who reported that they were Registered/Treaty Indians or Band/First Nation members. The 1996 Census also provides information on those who reported Aboriginal ethnic origin/ancestry." See Statistics Canada 1996 at www.statcan.ca/english/pgdh/People/Population/def/defdemo39a.htm (last visited December 19, 2000). Although sentencing circles are generally conducted in relation to those who live on reserves (i.e., Status Indians, and their families), their use has spread to Inuit and non-status communities.

3. ONTARIO NATIVE WOMEN'S ASSOCIATION, *supra* note 1, at 18-21.

4. *Id.*

5. The term pre-contact refers to the time prior to contact between Aboriginal peoples and Europeans. In contrast, the term pre-colonial refers to the pre-contact period and the period after contact but prior to European dominance in Canada.

6. *See* P.A. Monture-Okanee and M.E. Turpel, *Aboriginal Peoples and Canadian Criminal Law: Rethinking Justice,* 1992 U.B.C. L. REV.:SPECIAL ED. 239, 265 (1992); *see also,* Gloria Valencia-Weber & Christine P. Zuni, *Symposium: Women's Rights as International Human Rights: Domestic Violence and Tribal Protection of Indigenous Women in the United States,* 69 ST. JOHN'S L. REV. 69 (1995).

this problem. For the victims of domestic violence,[7] the need for such restoration could not be more critical.

Sentencing circles are sentencing hearings conducted in a circle format, based upon the Aboriginal tradition of the healing circle. Traditional healing circles addressed disputes among community members with an eye to restoring harmony within the community. Contemporary sentencing circles also seek to restore harmony.[8] While it has gained the favor of the Canadian judiciary, and even an acknowledgment in the Canadian Criminal Code,[9] the modern day sentencing circle fails to restore harmony for domestic violence victims. Aboriginal women leave the circle without any of the traditional gains in healing, reconciliation, or respect. Pre-colonial healing circles were never envisioned to address the colonially induced domestic violence now afflicting Aboriginal communities. While current rates of domestic violence are largely consequent to the dismantling of traditional Aboriginal social structures,[10] the problem cannot be solved simply by reverting to practices that reintroduce certain "traditional" or "Aboriginal" mechanisms for dispute resolution. In fact, the use of sentencing circles in domestic violence cases further injures victims in several respects.[11] I argue therefore, that modern day sen-

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7. While family violence does involve victims of both sexes, statistics continue to show that male against female violence is the overwhelming majority. For the purposes of this paper, "victims of domestic violence" shall refer to female victims unless otherwise stated.

8. They generally involve the judge, defense and Crown counsel (representing the state), the victim and offender, the probation officer, and several community members. Participants confer in an attempt to agree on an appropriate sentence for the offender. ROSS GORDON GREEN, JUSTICE IN ABORIGINAL COMMUNITIES: SENTENCING ALTERNATIVES 67 (1998). Sentencing circle operation will be discussed in greater detail in Part II of this paper.

9. R.S.C., ch. C-46, § 718.2(e) (1985) (Can).

10. This subject is something discussed in greater detail in Part I of this paper.

11. Admittedly, my assertions are not based on a large scale study. There remain several research hurdles that prevent such and approach. In particular, there are five significant challenges to completing research in sentencing circle cases:

1. Determining sample size: Many sentencing circle cases remain unreported (being fairly routine matters) making it difficult to determine how many cases involving domestic violence have gone on to sentencing circles.
2. Transcripts: It is currently almost impossible to obtain transcripts of sentencing circle proceedings. Elders have characterized the sentencing circle as a spiritual ceremony, and as such, recording is inappropriate. To record the Circle proceedings goes against the First Nations dogma of "what comes in the circle, stays in the circle." However, this value is in direct conflict with the Western values of open court and court of record (especially for the purposes of precedence). In general, the proceedings are being recorded, but as a measure of compromise, most courts have instructed that transcripts (or video or audio tapes as the case may be) not be distributed without the participants' permission. Even where distribution is authorized, the cost of transcripts can be prohibitive given the duration of the Circles. Of course, judges may quote participants in their final judgments, but this raises its own problems. Generally, summaries are prepared and filed by the judge.

tencing circles are unacceptable for use in domestic violence cases. If sentencing circles are to function successfully in such cases, some modification in focus and operation is necessary to correct the tremendous imbalance between men and women that is produced by colonial policies.

Part I of this paper links family violence in Aboriginal communities to the colonial policies responsible. Part II outlines the dynamics of the modern sentencing circle, hailed as a return to traditional precontact values. Part III focuses on the experience of Aboriginal victims of domestic violence within the circle. This includes a discussion of the intersectional experience of Aboriginal women and the oppression they experience as a result of forces both internal and external to their communities. Finally, after concluding that the currently constructed sentencing circle is inappropriate for battered women, part IV explores the problematic impact of omitting domestic violence cases from sentencing circle consideration. Part V includes possibilities for sentencing circle modification, and a brief discussion of the implications of this study for the broader question of culturally specific adjudication.[12] Finally, Part VI restates my findings.

PART I: THE COLONIAL LEGACY – POLICIES RESPONSIBLE FOR ABORIGINAL DOMESTIC VIOLENCE

Stark statistics reveal the current plight of Canadian Aboriginal peoples. The Report of the Royal Commission on Aboriginal Peoples

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3. Small sample size: Sentencing circles are very costly because they are so time consuming, taking anywhere from four hours to several days. Current judicial practice is to use the sentencing circle sparingly. Overall, the number of sentencing circle cases is very small in comparison with the number of Aboriginal offenders who reach the courts. There are, of course, difficulties with using such a small statistical sample.
4. Remote centers: Personal interviews and observation have also been attempted, but do not resolve the issues. Most sentencing circles still take place in fairly remote centers (where isolation creates a true community), limiting access to Circle participants.
5. Shy participants: Finally, when victims are met personally, they generally decline to talk about the experience.

See Crnkovich, *supra* note 113, at 22, 25.

12. I use the term "culturally specific adjudication" to refer to those modes of adjudication which are dependent upon or influenced by, the disputant's cultural heritage. Some particular examples include, Navajo Nation Peacemaking Circles, and other applications of traditional Navajo Common Law for Navajo disputants, and cultural defense cases (where the defendant's culture is proffered as an explanation of why his conduct is not blameworthy). For more information regarding Navajo Peacemaking, *see* Phil Bluehouse, *Navajo Tradition and Peacemaking Courts,* NATIONAL CONFERENCE ON TRADITIONAL PEACEMAKING AND MODERN TRIBAL JUSTICE SYSTEMS (sponsored by the Indian Law Support Center and the Native American Bar Association) (1992); The Honorable Robert Yazzie, *"Life Comes From It": Navajo Justice Concepts,* 24 N.M. L. REV. 175 (1994). For an intelligent canvass of the cultural defense and its permutations in Asian communities, see, Daina C. Chiu, *The Cultural Defense: Beyond Exclusion, Assimilation and Guilty Liberalism,* 82 CAL. L. REV. 1053 (1994).

(RCAP),[13] while raising awareness, paints a bleak portrait. Based upon 1981 data, the number of suicides among all Canadians per 100,000 was 14.[14] Based on 1998 data, rates of suicide among Aboriginal communities are at least two to four times higher than they are among the general Canadian population and rates among Aboriginal youth in British Columbia are five times the national average.[15] The number of suicides among Status Indians[16] per 100,000, was 43, more than three times the figure for Canadians overall. Similarly, the unemployment rate among non-aboriginals in 1991 was 9.9%, while for on reserve Aboriginals,[17] it was 30.1%.[18] In 1991, over 12% of Aboriginal peoples lived in homes without central heating and over 9% lived in dwellings without piped water.[19]

Statistics with respect to Aboriginal peoples' involvement in the criminal justice system are even more startling. Although they make up only 2.8% of the general Canadian population,[20] Aboriginal peoples comprise more than 10% of the Canadian prison population, on average. Figures for the prairie provinces[21] and the Yukon and North-

13. This report was released in November 1996, after more than five years in the making. REPORT OF THE ROYAL COMMISSION ON ABORIGINAL PEOPLES, VOLS. 1-5 (Ottawa: Minister of Supply and Services, 1996) [hereinafter RCAP FINAL REPORT].

14. UNFINISHED BUSINESS: AN AGENDA FOR ALL CANADIANS IN THE 1990'S - SECOND REPORT OF THE STANDING COMMITTEE ON ABORIGINAL AFFAIRS, MARCH 1990 (As cited in Susan Zimmerman, *"The Revolving Door of Despair": Aboriginal Involvement in the Criminal Justice System,* UBC L. REV. 360, 413 (1992).

15. *See* http://www.cpa-apc.org/subscriptions/archives/1998/Oct/kirmayer.html. Consult also in general RCAP Choosing Life: Special Report on Suicide Among Aboriginal Peoples. (Ottawa Minister of Supply & Services, 1995).

16. Status Indians are descendants of Indians who were registered with the federal government after the Indian Act of 1876, or who currently qualify for official registration under the terms of the Indian Act based on marriage and descent. Status Indians are the special responsibility of the federal government and they usually occupy land held in trust for their use. These are reserves. There are 606 Indian bands living on 2,364 reserves. Status Indians have special rights to income tax exclusion, other tax free land held in trust, health care, housing and education in exchange for land surrendered to the federal government in the past. In most cases, this is based on treaty arrangements. Status Indians not on reserves receive some housing and educational assistance.

17. Note that only Status Indians and their families are permitted on live on reserves. Therefore, this figure will include Status Indians, and their spouses, who may not be Status Indians. Biological children of Status Indians qualify for status, but like all Status Indians, they must be registered and receive a number to come under the term. Therefore, "on reserve Aboriginals" refers to Status Indians and their families, whether Status or not, living on reserves.

18. RCAP FINAL REPORT, PARTICIPATION AND UNEMPLOYMENT RATES, ABORIGINAL AND NON-ABORIGINAL POPULATIONS, 1981 AND 1991, Table 3.11 (1996).

19. RCAP FINAL REPORT, SELECTED HOUSING INDICATORS, ABORIGINAL AND TOTAL POPULATIONS, 1981 and 1991, Table 3.12 (1996).

20. *See* Statistics Canada, Population by Aboriginal Group, 1996 Census, available at http://www.statcan.ca/english/pgdh/People/Population/demo39a.htm (last visited December 19, 2000).

21. The prairie provinces are commonly understood to be Alberta, Saskatchewan and Manitoba.

west Territories reveal an even greater disproportion to general population incarceration rates.[22]

By the most conservative studies, Aboriginal women experience domestic violence at a rate three times higher than that for the general population.[23] In a 1991 Indigenous Women's Collective survey, conducted for the Aboriginal Justice Inquiry of Manitoba,[24] 53% of respondents reported experiencing physical abuse.[25] According to the Ontario Native Women's Association 1989 survey, 80% of respondents had personally experienced family violence at some point in their lives.[26] In a pilot project study by the British Columbia-based Helping Hand Spirit Lodge, 86% of respondents experienced or witnessed family violence.[27]

Despite the shocking statistics, domestic violence within Aboriginal communities receives much less legal scrutiny than other issues affecting Aboriginal peoples.[28] As legal scholar Jennifer Koshan points out, it is becoming well recognized that a pervasive feature of life in Aboriginal communities is violence directed at women:

> The Law Reform Commission of Canada's report on Aboriginal justice devotes one line in its conclusion to the need to study how the criminal justice system has "fail[ed] Aboriginal women who have been victims." . . . Only the Aboriginal Justice Inquiry of Manitoba Report and RCAP (Royal Commission on Aboriginal Peoples) speak directly to the needs and concerns of Aboriginal women, citing violence against Aboriginal women as a priority for Aboriginal communities and justice systems. . . . Still, both reports contain serious gaps

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22. Carol La Prairie, *The Role of Sentencing in the Over-Representation of Aboriginal Peoples in Correctional Institutions*, 32 CAN. J. OF CRIMINOLOGY AND CORRECTIONS, 429, 429 (1990). The 1989-90 rates for prison admission show Aboriginal Peoples comprising 66% of the provincial prison population and 54% of the federal prison population in Saskatchewan, where Aboriginal Peoples are only 10-15% of the population. Most alarming are the rates for the Northwest Territories, which demonstrate a shocking 82% of the territorial prison population and 75% of the federal prison population to be of Aboriginal ancestry.

23. SHARON KARSEY, NATIONAL REPORT ON FAMILY VIOLENCE IN ABORIGINAL COMMUNITIES 5 (1991). A study, reviewed by the Aboriginal Justice Inquiry of Manitoba, found that one out of three Aboriginal women is abused by her spouse as opposed to the national average of one in eight to one in ten for other Canadian women.

24. *Aboriginal Women's Perspective of the Justice System in Manitoba*, ABORIGINAL JUSTICE INQUIRY, 25 (1990).

25. *Id. See also* Jennifer Koshan, *Aboriginal Women, Justice and the Charter: Bridging the Divide?*, 32 U.B.C. LAW. REV. 23, n.5 (1998).

26. ONTARIO NATIVE WOMEN'S ASSOCIATION, *supra* note 1, at 17.

27. KARSEY, *supra* note 23, at 6.

28. The crime of domestic violence is "muted by euphemisms" and has generally not been treated seriously by the courts. Karla Fischer et al, *The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 46 S.M.U. L. REV. 2117 n. 64, n. 73 (1993). *See also* Judith Armatta, *Getting Beyond the Law's Complicity in Intimate Violence Against Women*, 33 WILLAMETTE L. REV. 774 (1997). Specifically however, little attention is paid to the individual rights of Aboriginal women. *See* Margaret A. Jackson, *Aboriginal Women and Self Government*, *in* ABORIGINAL SELF-GOVERNMENT IN CANADA: CURRENT TRENDS AND ISSUES 180-198, 189 (John H. Hylton ed., 1994).

> in their coverage of Aboriginal women and justice. Neither report contains a detailed examination of the impact of the dominant criminal justice system on Aboriginal women who engage with the system as survivors of violence.[29]

The recent justice reports focus on Aboriginal offenders rather than Aboriginal victims of violence.[30] Reports that address victims' issues do so in primarily gender neutral terms, thus obscuring the particular harm suffered by Aboriginal women as victims of domestic violence.[31] Similarly, reports detailing new Aboriginal justice initiatives provide little information concerning how these initiatives might respond to the issues and concerns of Aboriginal women.[32] Most initiatives ignore women's position as victims.[33]

As with other Aboriginal issues, domestic violence within Aboriginal communities is generally attributable to colonialism and its effects.[34] The racial, cultural, and political domination of Aboriginal

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29. Koshan, *supra* note 25, at 24.

30. NOVA SCOTIA, FINDINGS AND RECOMMENDATIONS OF THE ROYAL COMMISSION ON THE DONALD MARSHALL, JR. PROSECUTION, vol 1. (1989); LAW REFORM COMMISSION OF CANADA, ABORIGINAL PEOPLES AND CRIMINAL JUSTICE, Report No. 34 (1991); PUBLIC INQUIRY INTO THE ADMINISTRATION OF JUSTICE AND ABORIGINAL PEOPLE, REPORT OF THE ABORIGINAL JUSTICE INQUIRY OF MANITOBA, vol. 1 (1991); JUSTICE ON TRIAL: REPORT OF THE TASK FORCE ON THE CRIMINAL JUSTICE SYSTEM AND ITS IMPACT ON THE INDIAN AND MÉTIS PEOPLE OF ALBERTA, vol. 1 (1991); REPORT OF THE SASKATCHEWAN INDIAN JUSTICE REVIEW COMMITTEE (1992); REPORT OF THE SASKATCHEWAN MÉTIS INDIAN JUSTICE REVIEW COMMITTEE (1992); REPORT OF THE CARIBOO-CHILCOTIN JUSTICE INQUIRY (1993). For a summary of the reports, *see* C. Blackburn, *Aboriginal Justice Inquiries, Task Forces and Commissions: An Update, in* RCAP, ABORIGINAL PEOPLES AND THE JUSTICE SYSTEM: REPORT OF THE NATIONAL ROUND TABLE ON ABORIGINAL JUSTICE ISSUES 15-41 (1992).

31. As Margaret Jackson emphasizes: "Whatever the plight of the Aboriginal Peoples generally, the fate of Aboriginal women is even worse. In times of economic and social oppression, Aboriginal women rank among the most severely disadvantaged in Canada. (Fleras and Elliott 1992). Their social problems are worse because of poor housing, substance abuse, inadequate child rearing conditions, and, most especially, because of physical and sexual abuse. These conditions result in 'high rates of suicide, alcohol dependency and neglect of children' (Fleras and Elliott 1992)," Jackson, *supra* note 28, at n.5. Koshan reports "The Alberta, Saskatchewan and British Columbia reports all make some recommendations regarding family violence and victim services but do so in a gender neutral way which fails to recognize the level of violence and oppression against Aboriginal women," Koshan, *supra* note 25, at n.3.

32. *See for example, Community Justice Pilot Projects, in* REPORT OF THE NATIONAL ROUND TABLE ON ABORIGINAL JUSTICE ISSUES, RCAP: ABORIGINAL PEOPLES AND THE JUSTICE SYSTEM 396-404 (1992) which surveys new Justice Initiatives among Aboriginal communities but makes no mention of the needs of Aboriginal women in particular.

33. Koshan, *supra* note 25, at n.3.

34. ONTARIO NATIVE WOMEN'S ASSOCIATION, *supra* note 1, at 23. The report emphasizes that understanding male dominance within Aboriginal communities requires an understanding of how white domination of Aboriginal communities has contributed to male violence. *See also,* WAYNE WARRY, UNFINISHED DREAMS: COMMUNITY HEALING AND THE REALITY OF ABORIGINAL SELF-GOVERNMENT 133 (1998): "As previously noted, Aboriginal peoples' explanations of individual and family dysfunction also emphasize the influence of colonial history and the impact of state domination on indi-

peoples under the colonial enterprise has produced the economic and social stresses Aboriginal peoples now face.[35]

According to the oral traditions of Aboriginal elders, family violence rarely occurred in pre-contact days.[36] Social problems associated with substance abuse (including alcoholism) and violence did not exist.[37] While this assertion may be controversial, most Aboriginal peoples accept it as true.[38] Many Aboriginal peoples stress that family violence is not traditional or inherent to Aboriginal society.[39]

Furthermore, elders assert that prior to contact with European explorers, Aboriginal society was largely matriarchal or egalitarian, where men and women shared power equally.[40] For example, the his-

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vidual and community cultural identity." Others also assert that current inequalities are a "federally created problem." W. Moss, *Indigenous Self-Government in Canada and Sexual Equality under the Indian Act*, 15 QUEEN'S LAW JOURNAL 279, 287 (1990). *See also* GREEN, *supra* note 8, at 83 where Green relates his interview with Judge Sinclair: "He felt the problem [of domestic violence] arose, in part, from the oppressive practices of governments and other external systems, which had contributed to the inability of Aboriginal communities to shape appropriate social conduct for their members."

35. WARRY, *supra* note 34, at 207 ("First and foremost, people need to 'end the denial' about the problems that exist in their communities and that, to a great extent, are the product of colonial history.").

36. Patricia Monture Okanee, *Thinking about Aboriginal Justice, Myths and Revolution, in* CONTINUING POUNDMAKER AND RIEL'S QUEST: PRESENTATIONS MADE AT A CONFERENCE ON ABORIGINAL PEOPLES AND JUSTICE 222, 227 (R. Gosse, J. Youngblood Henderson, and R. Carter, comp. 1994).

37. However, others say the golden age wasn't really that way. Rather, there was an eye for an eye mentality. Emma La Roque, *Re-examining Culturally Appropriate Models in Criminal Justice Applications, in* ABORIGINAL AND TREATY RIGHTS IN CANADA: ESSAYS ON LAW, EQUALITY AND RESPECT FOR DIFFERENCE 75, 83 (Michael Asch ed., 1997).

38. Lilianne E. Krosenbrink-Gelissen, *Sexual Equality as an Aboriginal Right: Canada's Aboriginal Women in the Constitutional Process on Aboriginal Matters, 1982-1987*, 8 LAW & ANTHROPOLOGY 147, 153 (1997) where the author writes, "Sexual equality is perceived as a condition that existed in authentic aboriginal cultures before the imposition of the Indian Act and its consequences for the socio-legal position of Indian women." *See also* WARRY, *supra* note 34, at 232, (". . . the conceptualization of traditional politics is full of difficult twists and turns, many of them related to the simplistic desire to return to an 'imagined golden age associated with traditional life.'").

39. Karsey, *supra* note 23, at 7.

40. As Margaret Jackson questions: ". . . would it involve the equality of power between Aboriginal men and women that existed earlier but was distorted by the imposition of European patriarchal law and practices?" Jackson, *supra* note 28, at 193; *see also*, Interview with Janice Acoose, *Aboriginal activist of the Salteaux Nation* (March 22, 1991). "In so called primitive systems, power and authority are spread throughout the community as a whole," Elsie B. Redbird, *Honouring Native Women: The Backbone of Native Sovereignty, in* POPULAR JUSTICE AND COMMUNITY REGENERATION: PATHWAYS OF INDIGENOUS REFORM 122, 127 (Kayleen M. Hazlehurst ed., 1995). I acknowledge that such an assertion is controversial. Such assertions reflect a strong belief, not necessarily an accurate reflection of history. However, in this circumstance, I would argue that the *construction* of this history by Aboriginal peoples is at least as important as the actual history. The belief in a pre-contact golden age provides support for those fundamental values used in sentencing circles, and it is not necessary that the belief be grounded in fact to shore up the importance of those values vital to the circle.

torical power of women within the Six Nations Confederacy[41] is well documented.[42] Women retained the power to appoint and remove chiefs should they decide the chief was not acting according to the Great Law. Both men and women held positions in the popular councils.[43] Similarly, in Tlingit society, while men occupied the five council seats, it was the women who appointed them to these positions.[44] Women held prominent positions in spiritual practices and within the family.[45] In this Golden Age of pre-contact Aboriginal civilization, women were not victimized, but honored and recognized for the special powers they possessed.[46] A violation of these norms was considered a harm against the entire community and such offenses, on the rare occasions they did occur, were dealt with harshly. Gender crimes against women were often treated more harshly than those against men.[47]

If we accept Aboriginal oral history,[48] current social ills are largely a product of colonial policies.[49] To comprehend the depth of the problem, it is important to understand which governmental policies have created, compounded and perpetuated the pervasive presence of domestic violence in Aboriginal communities. Moreover, it

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41. Six Nations is the English designation for this confederacy, which consists of the Mohawk, Oneida, Onondaga, Seneca, Cayuga and Tuscarora nations. With a population of approximately 100,000, living in seventeen communities located on both sides of the Canada-U.S. border, the confederacy has some 250,000 acres under its control, as of 1983.

42. Resources on the history of the Six Nations abound, in large part because they were the first communities to make contact with the Europeans, and thus they have the longest written history in the context of American settlement. *See for example,* BRUCE JOHANSEN, FORGOTTEN FOUNDERS: BENJAMIN FRANKLIN, THE IROQUOIS AND THE RATIONALE FOR THE AMERICAN REVOLUTION (1982), for a discussion of government within the confederacy.

43. Darlene M. Johnston, *Self Determination for the Six Nations Confederacy,* 44:1 UNIVERSITY OF TORONTO FACULTY OF LAW REVIEW 1, 9 (1996).

44. DAVID KEENAN, TESLIN TLINGIT JUSTICE COUNCIL, ROYAL COMMISSION ON ABORIGINAL PEOPLES, ABORIGINAL PEOPLES AND THE JUSTICE SYSTEM: REPORT OF THE NATIONAL ROUNDTABLE ON ABORIGINAL JUSTICE ISSUES 397, 398 (1992).

45. It was not uncommon for women to be the keepers of medicine bags and spiritual knowledge. Recognition of female power is evident in taboos against the participation in rituals by menstruating women because their life force was considered to be overpowering at such times.

46. Sharon Venne, *Understanding Treaty 6: An Indigenous Perspective, in* ABORIGINAL AND TREATY RIGHTS IN CANADA: ESSAYS ON LAW, EQUALITY AND RESPECT FOR DIFFERENCE 173, 191 (Michael Asch ed., 1997).

47. Koshan, *supra* note 25, at 30.

48. As noted above, the accuracy of these claims may be somewhat controversial. However, it is worth noting we have no evidence of such large scale social problems within Aboriginal nations prior to contact.

49. *See, for example,* Monture-Okanee, *Reclaiming Justice, supra* note 36, at 260; ONTARIO NATIVE WOMEN'S ASSOCIATION, *supra* note 1, at 7-8; La Roque, *Violence in Aboriginal Communities, in* ROYAL COMMISSION ON ABORIGINAL PEOPLES, THE PATH TO HEALING: REPORT OF THE NATIONAL ROUND TABLE ON ABORIGINAL HEALTH AND SOCIAL ISSUES 72, 75 (1994).

may assist in formulating social policies directed at eliminating domestic violence, as well as in critically evaluating existing measures, including sentencing circles.

In broad terms, policies which permitted and promoted family violence may be divided into three categories. First, those policies aimed at assimilating Aboriginal peoples. Second, policies that upset the flow of traditional values and teachings from one generation to the next by separating and dislocating each generation. Third, policies designed to diminish the status and power of women or to establish and entrench male dominance. Together, these policies created an environment that effectively sanctioned violence against Aboriginal women.

A. *Policies to Assimilate Aboriginal Peoples*

Policies aimed at assimilating Aboriginal peoples were a critical component of the colonial enterprise, especially in Canada, where English and French settlement was permitted primarily through treaty.[50] From the perspective of the colonial powers, Aboriginal peoples hindered what would otherwise be unfettered expansion. The treaties gave the Crown power to legislate and police for the protection of Aboriginal peoples.[51] While concomitant obligations on the Crown were also the subject of these treaties, these duties were virtually ignored in a flood of legislation designed to populate the New World with loyal subjects and taxpayers. The Crown established a system of reservations to assist in "civilizing" the Indians.[52] As with most colonial endeavors, the Catholic Church was a driving force in this en-

50. It is far beyond the scope of this paper to exhaustively examine all legislation comprising the legal legitimatization of the colonial enterprise in Canada. Rather, the objective is simply to outline broadly the general import, intent and effect of Canadian policy and legislation for Aboriginal peoples. For an in depth examination of the history of Aboriginal peoples in Canada under colonial rule, *see* J.R. MILLER, SKYSCRAPERS HIDE THE HEAVENS: A HISTORY OF INDIAN WHITE RELATIONS IN CANADA (1989).

51. Strangely enough, Aboriginal peoples were regarded simultaneously as nations in their own rights, with the power to negotiate treaties and wage war on the one hand, and as savages in need of saving and civilizing on the other. J. Edward Chamberlain, *Culture and Anarchy in Indian Country, in* ABORIGINAL AND TREATY RIGHTS IN CANADA: ESSAYS ON LAW, EQUALITY AND RESPECT FOR DIFFERENCE 3, 30 (Michael Asch ed., 1997). *See also* Bradford F. Morse, *Aboriginal Peoples, the Law and Justice, in* ABORIGINAL PEOPLES AND CANADIAN CRIMINAL JUSTICE 45-60, 46 (R.A. Silverman et al. eds., 1993). In the late 19th Century, the federal government assumed control of Indian affairs and signed treaties to establish a system of reserves designed to "protect and civilize" Aboriginal peoples. Don McCaskill, *When Cultures Meet, in* ABORIGINAL PEOPLES AND CANADIAN CRIMINAL JUSTICE 31-40, 32 (R.A. Silverman et al, eds., 1993).

52. McCaskill, *supra* note 51, at 32.

deavor.[53] "Kill the Indian and save the man" was the battle cry of church officials.[54]

As colonial settlement increased, the status, position, and social power of Aboriginal peoples decreased. The advent of special legislation in 1868 created a complex web of rules and regulations governing the lands and lives of Aboriginal peoples in Canada.[55] Most Aboriginal spiritual practices were criminalized, including the Ghostdance, as well as probate rituals like the potlatch.[56] Aboriginal peoples were divided into bands and enumerated.[57] When counting took place, Indians away from the community (on hunting parties, for example) were not registered under the Act.[58] Over the years, thousands who *were* registered lost their status. Many were "enfranchised" under the Act. In this manner, they gained the right to education in public schools and the right to vote (not granted to Status Indians until 1960), but relinquished the rights for which their ancestors had bargained.[59] Some enfranchisements were voluntary, but most were not.[60] These policies were designed to solve the "Indian question" through civilization and assimilation. As the deputy superintendent of Indian Affairs, Duncan Campbell Scott, pronounced to Parliament in 1920:

> Our object is to continue *until there is not a single Indian in Canada that has not been absorbed into the body politic* and there is no Indian

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53. *See generally* JAMES AXTELL, *Some Thoughts on the Ethnohistory of Missions, in* AFTER COLUMBUS: ESSAYS IN THE ETHNOHISTORY OF COLONIAL NORTH AMERICA 47-57 (1988).

54. PATRICIA PENN HILDEN, WHEN NICKELS WERE INDIANS: AN URBAN MIXED-BLOOD STORY 152 (1995) (quoting General Richard Henry Pratt, founder of the first and largest American Indian boarding school).

55. Now R.S.C. 1985, c. I-5 (as amended).

56. The Canadian government sought to implement its negative value judgments about Aboriginal peoples through a persistent effort to convince them that their traditions and customs were wrong. This message was repeated in schools and churches and disseminated by Indian agents. He writes, "Aboriginal law was largely ignored or overridden." *See* Morse, *supra* note 51, at 45-47.

57. *Id.*

58. Those registered under the Act became "Status Indians." While this designation is afforded through the bloodline (i.e., All progeny of male Status Indians are eligible) it still requires registration under the Indian Act to achieve status.

59. Some treaty rights to which Aboriginal peoples were entitled include: The right to live on the land allotted to them without being subject to the levies of the Crown; the right to special education (i.e., the residential schools); the right to a medicine box (now interpreted as a right to free medical care); the right to hunt on Crown lands in perpetuity. Venne, *supra* note 46, at 194-201.

60. A prime example of involuntary enfranchisement involves the double mother rule. Under this rule, one was automatically enfranchised upon the age of 21, and divested of their Indian status, if both one's mother and paternal grandmother had gained status through marriage. This law had devastating effects for Aboriginal peoples whose land base crossed the U.S.-Canada border, since *American Indians* were not considered Indians under the *Canadian* Indian Act. Thus, two generations of marriage in this community would result in loss of status, even though the child was fully of Indian blood. *See* Morse, *supra* note 51, at 47.

> question, and no Indian department and that is the whole object of this Bill.[61] (emphasis added)

These policies reached their pinnacle with the 1969 White Paper on Indian Policy.[62] Although this Paper was shelved in 1973,[63] it speaks bluntly of the official Canadian position on Aboriginal peoples: "[The] separate legal status of Indians and the policies which have flowed from it have kept the Indian people apart from and behind other Canadians."[64] The government proposed that Indian status (and the rights pertaining thereto) be abolished and the provinces take over the same responsibilities with respect to Indians that they had with respect to other Canadian citizens. As Miller reports, "The White Paper proposed to absolve the federal government of its commitments by revoking Indian status, eliminating the Department of Indian Affairs and transferring responsibility for Indian matters mainly to the provincial governments."[65] These policies were designed to impair and dismantle the traditional Indian way of life, indeed, to eradicate the Indian as Indian through assimilation and absorption into the body politic.

Assimilationist policies tend to promote family violence in several ways. First, they reduce the ability of Aboriginal peoples to succeed in colonial and post-colonial society. The change in status, rights and lifestyle was rapid and unprecedented. Aboriginal peoples had no understanding of the monumental changes that would occur as a result of European settlement and treaty signings.[66] Under the imposed foreign system, attention and effort shifted from progress and achieve-

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61. MILLER, *supra* note 50, at 206-07.

62. As J.R. Miller reports, "The term 'White Paper,' though perhaps unfortunate given the subject matter, had no racial connotation. A 'White Paper' was simply a statement of preliminary government policy, issued after a series of consultations and prior to cabinet adoption of a plan for legislation. It was a stage in an elaborate process of review consultation, and policy formation that [Prime Minister] Trudeau had introduced after his election in 1968." *Id.* at 225. CANADA, DEPARTMENT OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT, STATEMENT OF THE GOVERNMENT OF CANADA ON INDIAN POLICY (OTTAWA: INDIAN AFFAIRS 1969).

63. Aboriginal response to the White Paper was unabashedly hostile. The plan was shelved in 1973 as a consequence of this response.

64. CANADA, DEPARTMENT OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT, STATEMENT OF THE GOVERNMENT OF CANADA ON INDIAN POLICY (OTTAWA: INDIAN AFFAIRS 1969) at 5, 6, as quoted in MILLER, *supra* note 50, at 226.

65. MILLER, *supra* note 50, at 228.

66. Morse, *supra* note 51, at 47. In particular, the imposition the Indian Act, without any consultation, gave the government the self proclaimed authority to legislate in the best interests of the Aboriginal peoples. The Indian Act not only defined who could be an Indian, it also gave the government the ability to legislate away from its Treaty obligations so that it could provide less to those whom they had defined as Indians. The spirit of the Treaties has not been reflected in the application of the Indian Act. Of interest are the stories related to Treaty signings, which place emphasis on the Crown being a Queen who was pleading for the land so that she might care for her subjects. Aboriginal peoples respected and understood this caring and life-giving desire, and were told that the Queen wished to embrace the Aboriginal peoples

ment to merely coping and survival. Under the Indian Act, Aboriginal peoples had little control over their own lives,[67] and the attendant frustration created an environment prone to substance abuse. In their 1989 report, *Breaking Free*, the Ontario Native Women's Association asserts:

> The lack of self government for much of modern history in Aboriginal society has created a climate where abuses such as family violence and alcoholism have been allowed to flourish. The inability of people to determine their destiny based on their own cultural beliefs has stifled Aboriginal culture, creating a sense of confusion and loss of many of the traditional values which were predicated on respect and dignity of the individual. As Aboriginal people in general have been confined, with no place for the release of societal pressure, they have turned on themselves.[68]

Second, assimilationist policies were designed to drain Aboriginal people of self-esteem. Discouraged and prevented from relying on their own cultural tools, and afforded no new tools with which to succeed, Aboriginal people were doomed to a failure that bred depression and self loathing. Denied the power of their European counterparts, and deprived of their traditional venues for power, Aboriginal men were left frustrated and feeling inadequate. This too leads to violence. Scholars suggest that the violence may be an "acting out of being denied male power in other spheres."[69] In other words, the Aboriginal male under European rule fell so far on the social hierarchy that, to assert his power, he must oppress the weakest among his own people.[70]

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also as her children. She was described as having "arms big enough to look after all the indigenous people who made the treaty," VENNE, *supra* note 46, at 192.

67. For example, "[f]or nearly 25 years, the Indian Act made it a criminal offence for any person, without the permission of the superintendent general, to receive payment from an Indian for the prosecution of any claim for the benefit of his/her tribe or band. The practical effect of this provision, which was removed in 1951, was to deny registered Indians access to the legal profession and the civil court processes to resolve their land claims." Morse, *supra* note 51, at 55.

68. ONTARIO NATIVE WOMEN'S ASSOCIATION, *supra* note 1, at 22.

69. Kimberly Crenshaw, *Women of Color at the Center: Selections from the Third National Conference on Women of Color and the Law: Mapping the Margins: Intersectionality, Identity Politics and Violence Against Women of Color*, 43 STAN. L. REV 1240, 1258 (1991). *See also* ONTARIO NATIVE WOMEN'S ASSOCIATION, *supra* note 1, at 22; "The fact Aboriginal peoples face prejudice and ignorance by the majority non-aboriginal population only exacerbates the situation. This invariably creates alienation and the desire to have some sense of control in our lives. Coupled with a loss of identity due to societal transformation and the lack of skills to deal with those changes, the problems within Aboriginal collective society have been transferred to the individual within that society. The only place people have left to turn for both releasing the pressures they face and achieving some power in their lives is the family. Thus, the abusive relationship is a power relationship, one where the abuser seeks to control the partner due to the lack of control he/she faces everywhere else in their life."

70. While this theory has come under some scrutiny, several Native groups endorse it. One such group is the Ontario Native Women's Association in their 1989

Finally, these policies deprived women of power within their own communities by forcing cultural conversion to achieve assimilation. The destruction and denial of cultural rituals that celebrated women's creative power heralded the annihilation of the female voice and female power.[71] While these policies undoubtedly affected Aboriginal men and their expression through ritual, some men found voice through the new political structure.[72] Conversely, Aboriginal women were denied access to the new regime's political structure.[73] Without political or cultural venue, Aboriginal women were silenced by colonialism.

B. *Policies That Upset the Traditional Intergenerational Flow of Values and Teachings*

As anthropologist Professor Wayne Warry notes, "There is an intense link between cultural identity, self-esteem, and feelings of personal control."[74] Policies that disrupt the flow of values and teachings from one generation to the next are designed to undermine cultural identity.[75] These include the many assimilation policies mentioned above; in particular, the criminalization of Aboriginal practices.[76] Rituals, and sometimes the Elders who practiced them, were forced underground. As a result, several generations grew up with little or no understanding of the rituals and the Aboriginal way of life.[77]

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report. After recounting several colonial practices (regulation through the Indian Act, residential schooling, the denial of status and rights for women who married non-status Indians, or non-Indians, and out-of community adoptions), the report declares, "In effect, family violence is a reaction against a system of domination, disrespect, and bureaucratic control." ONTARIO NATIVE WOMEN'S ASSOCIATION, *supra* note 1, at 8.

71. Lesley Malloch, *Indian Medicine, Indian Health - Study Between Red and White Medicine*, 10 Nos. 2 & 3 CANADIAN WOMEN'S STUDIES 105, 106 (1989); Venne, *supra* note 46, at 191. "One of the tactics used to destroy Indian government was the destruction of women's values by dissolving the institutions which nourished them," REDBIRD, *supra* note 38, at 128.

72. These new institutional structures were the Band Councils.

73. The same could be said of the division of labor in production. Elsie Redbird notes Sitting Bull's plea regarding the Dawes policy, which provided for individual property allotment, "Take pity on my women. . . . The young men will take the work out of the hands of women and the women will be stripped of all which gave them power," Redbird, *supra* note 40, at 129.

74. WARRY, *supra* note 34, at 221.

75. In an effort "to kill the Indian in the child", the department aimed at severing the artery of culture that ran between generations and was the profound connection between parent and child sustaining family and community. In the end, at the point of final assimilation, "all the Indian there is in the race should be dead," RCAP FINAL REPORT, vol.1, 234 Ch. 10.3 (1996), citing DAVID A. NOCK, A VICTORIAN MISSIONARY AND CANADIAN INDIAN POLICY: CULTURAL SYNTHESIS VERSUS CULTURAL REPLACEMENT 5 (1988).

76. Morse, *supra* note 51, at 46.

77. *Id.* at 47.

Residential schools[78] forcibly separated children from their parents and grandparents. While perhaps well intentioned, residential schools were severely detrimental to family relations[79] in four ways. First, with parents and children separated, the residential school provided no model for healthy families or healthy family relationships.[80] Second, within residential schools, siblings were often separated (according to age and gender),[81] thereby preventing the development of strong family bonds[82] or family history. Third, spurred on by evangelical zeal, residential schools abruptly severed children from their cul-

78. Most Treaties included an obligation on the Crown to provide education. When finally instituted, the schools were residential schools located several miles from the reserve. Children of many reserves were forcibly taken from their homes when their parents were on hunting expeditions. The residential school system was in place until the late 1960's. For a brief indication of some of the methods used to 'persuade' parents to allow their children to attend residential schools, *see* Venne, *supra* note 46, at 194-95. Foster care served a similar function. Parenting practices differed considerably between Europeans and Aboriginals. Despite Aboriginal traditions, children left in the care of grandparents were considered abandoned, and children participating in the hunt were considered truant. These misunderstandings forced many children into foster care for "their own protection." Interview with Janice Acoose, *supra* note 40.

79. Such a result was by design. The RCAP reported "[The children] had to be taught to see and understand the world as a European place within only which European values and beliefs had meaning; thus the wisdom of their cultures would seem to them only savage superstition. A wedge had to be driven not only physically between parent and child but also culturally and spiritually. Such children would then be separated forever from their communities, for even if they went home they would, in the words of George Manuel, bring "the generation gap with them." Only in such profound fashion could the separation from savagery and the re-orientation as civilized be assured. Ch. 10.1, Residential Schools, vol. 1, RCAP FINAL REPORT, *supra* note 75.

80. As noted in BREAKING FREE, "Compulsory to [sic] residential schooling of Aboriginal children, away from their parents, directly led to the decline of parenting skills because the children were denied parental role models." *See* ONTARIO NATIVE WOMEN'S ASSOCIATION, *supra* note 1, at 7-8. Revelations of even more dysfunctional relations, such as sexual abuse, have come to light in recent years. Kim Lunman, *Timing of Federal Apology Questioned,* THE GLOBE and MAIL MONDAY, December 11, 2000; Jane Armstrong, *Oblate Brother Faces Dozens of Sex Charges-Allegation are That Assaults Occurred at a British Columbia Residential School,* THE GLOBE and MAIL, A3, June 22, 2000; Joan Crockatt, *Churches Face Bankruptcy Threat: Abuse Claims Jeopardize Anglican, United Survival,* THE CALGARY HERALD A1-A2, November 20, 1999.

81. Acoose, *supra* note 40.

82. Note that the Native American experience was similar, where such institutions were called 'boarding schools'. An Ojibwe woman relates: "As I recalled us kids being taken away, I thought of my baby brother who was still in diapers at the time. We never had a family life after that and eventually we got separated from each other. As adults we found each other, but we were never able to be close again, there were too many memories that kept us apart. We could never talk about it. . . .No one can take my culture away from me now. I'll get back everything I've lost and more before I die. I'll never get my family back and that's something I've had to accept, but I will never forget." ROMA BALZER ET AL., FULL CIRCLE: COMING BACK TO WHERE WE BEGAN 80-81 (1994) as cited by Donna Coker, *Enhancing Autonomy for Battered Women: Lessons from Navajo Peacemaking,* 47 UCLA L. Rev. 1, n.97 (1999).

tures by renaming children with Christian names, prohibiting conversation in native languages, preventing contact among family members (often including parents who came to visit their children) and by cutting the children's hair.[83] Finally, residential schools were sites of strict discipline that often included emotional and physical abuse.[84]

These routines erased any models for healthy family relations and further ingrained feelings of low self worth for Aboriginal peoples. Although respect for authority was fostered in these institutions, respect for women and the family was not. Men raised in residential schools were taught how to suppress their feelings, not how to manage their anger and frustration.[85] Boys placed in residential schools were deprived of cultural training or even the experience of functioning families to provide any role model for appropriate adult male behavior. The Nuu-chah-nulth Health Board explains:

> [Children] were placed in institutions which were at best a poor substitute for a home, and at worst brutal places where the children were subject to physical and, all too often, sexual abuse. It is no surprise that many of these children for several generations grew up without the skills necessary to look after their own children.[86]

Since most residential schools were operated by nuns or priests,[87] residential school children were not exposed to functional relationships between men and women, much less between Aboriginal men and women. Traditional respect for women as givers of life was replaced with a fear of authoritarian nuns.[88] Without family models, residential

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83. Acoose, *supra* note 40. *See also Creating Little Dominions Within the Dominion: Early Catholic Indian Schools in Saskatchewan and British Columbia, and* Diane Pearson, *The Changing Experience of Indian Residential Schooling: Blue Quills, 1913-1970, in* INDIAN EDUCATION IN CANADA, VOL. 1, THE LEGACY (Jean Barman et al., eds., 1986). And further CELIA HAIG BROWN, RESISTANCE AND RENEWAL: SURVIVING THE INDIAN RESIDENTIAL SCHOOL (1988). Also, Eber Hampton and Steven Wolfson, *Education for Self Determination, in* ABORIGINAL SELF-GOVERNMENT IN CANADA: CURRENT TRENDS AND ISSUES, 90, 91 (John H. Hylton ed., 1994).

84. John D. O'Neil and Brian Postl, *Community Healing and Aboriginal Self-Government: Is the Circle Closing?, in* ABORIGINAL SELF-GOVERNMENT IN CANADA: CURRENT TRENDS AND ISSUES, 67, 70-71 (John H. Hylton ed., 1994). The authors also note that, in addition to the abuse, the medical situation in these schools led to 24% of all children who attended dying from tuberculosis within a fifteen year span.

85. The Christian ethic that was imposed demanded complete obedience. Frustration and insubordination were severely punished. The safest approach was therefore to hide one's feelings, rather than express them.

86. KARSEY, *supra* note 23, at 7.

87. The Christianizing of Aboriginal peoples was seen as indispensable to the civilizing endeavor. The Catholic Church was more than willing to assist the Canadian Government in this regard.

88. Who, ironically, had chosen to renounce their power as life givers.

school children acquired an austere and brutal view of social relations, one that condoned all violence.[89]

C. *Policies That Diminish the Status of Women*

Policies that diminish women's status sanction a power imbalance between the sexes. As the "weaker sex," women are seen to be under rightful male control. Without power of their own, women are less able to defend themselves against male violence. Such practices encompass the eradication of traditional Aboriginal forms of governance, the imposition of Euro-Christian spiritual mythology,[90] legislation aimed at the disenfranchisement of women and the introduction of European values with respect to the societal position of women.

The Indian Act replaced traditional Aboriginal governance with Band Councils.[91] In fact, the Band and the Band Council are not rooted in traditional Aboriginal governance. As Native Studies scholar Don McCaskill notes, "The reserve system, to some degree, replaced the Indian's traditional authority structures with the paternalistic authoritarianism of the larger society's agents."[92] Just as most Indian Affairs representatives at this time were male, so too were the band councils appointed to speak for Aboriginal communities. Although traditional Aboriginal government included powerful roles for women, these band councils did not encourage female participation. Mary Ellen Turpel writes:

> Male dominated Band Councils frequently sided with the Canadian government against disenfranchised women in the belief that to do otherwise would undermine the Crown's trust responsibility for Aboriginal peoples. As a consequence, women were forced to go outside the community to resolve the injustices of gender discrimination. . . . These are profound conflicts for cultures which are, in most cases, matrilineal in structure.[93]

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89. "Punishment, including striking children, was well within the bounds of non-Aboriginal community standards for most of the period covered by the history of the school system. Comments made by the deputy superintendent general, Vankoughnet, in 1889 on discipline – that "obedience to rules and good behavior should be enforced" by means including "corporal punishment" reflected such standards." RCAP FINAL REPORT, RESIDENTIAL SCHOOLS: DISCIPLINE AND PUNISHMENT, VOL. 1, Ch. 10:3, (1988).

90. In concert with the colonial enterprise was the missionary enterprise.

91. Warry says, "Forms of political representation - band councils and elections - were imposed on Aboriginal People under the terms of the Indian Act. The fact is that First Nations are incipient political communities. To date their identity has been defined by the state, rather than be the communities themselves." WARRY, *supra* note 32, at 230.

92. McCaskill, *supra* note 51, at 32.

93. Mary Ellen Turpel, *Aboriginal Peoples and the Canadian Charter: Interpretive Monopolies, Cultural Differences*, 6 CANADIAN HUMAN RIGHTS YEAR BOOK (C.H.R.Y.B.) 4 at 42-43.

Thus, traditional Aboriginal forms of governance were replaced with more male-dominated forms of government that denied Aboriginal women customary opportunities for participation in government. Aboriginal women were expelled from the public sphere and relegated to the private sphere, akin to women in European society.

A similar dislocation took place in the religious realm. A review of Aboriginal spiritual narratives, myths and folktales demonstrates that the female force was important to the peoples' health and well-being.[94] Conversely, the female presence in the Euro-Christian spirituality imposed by colonial settlers was significantly less. In the Christian tradition, female depictions of the divine are generally not central to the faith, and God is exclusively conceived of as male.[95] Christian doctrine likewise denigrates the Aboriginal belief in Mother Earth[96] by casting the earth as a place God gives to humanity to control and rule. University of New Mexico scholar Elsie Redbird contends, "Violence against both women and the land is a lasting legacy of the European thought about the control of the feminine force."[97] Under traditional European values, nature and its creatures exist for the benefit of man, in contrast to the Aboriginal belief which considers all creatures brethren.[98] Colonizing Christian evangelists customarily used local practices and traditions to introduce the new faith.[99] Subsequently, there was no Christian concept into which the Aboriginal reverence for the female could be channeled. Without a female deity, rituals that had previously honored female potency and power were meaningless. Aboriginal women were, in the spiritual sphere as in the personal and political spheres, left without the voice and status they once enjoyed.

Furthermore, Aboriginal women were removed from the roles through section 12(1)(b) of the Indian Act,[100] which gave a woman the status of her spouse, status Indian or not, upon marriage. Section

94. This is not to say at all that there is only one set of stories for the numerous First Nations of the Americas. However, some commonalties do exist. Among them are the belief in Mother Earth and Father Sky, and the respect for women's power to give life through her womb. R. Erdoes and A. Ortiz, eds., AMERICAN INDIAN MYTHS AND LEGENDS, (1984).

95. MARILYN FRENCH, BEYOND POWER - ON WOMEN, MEN AND MORALS 115 (1985).

96. *We May be Brothers After All (Chief Seattle's reply to the U.S. government's offer of a reservation in 1854),* 51 PART 2 THE ADVOCATE 21 (1993).

97. Redbird, *supra* note 40, at 126.

98. *We May be Brothers After All, supra* note 96.

99. FRENCH, *supra* note 95.

100. Sections 11 and 12 of the INDIAN ACT 1951 (Can.), c. 29, which replaced previous legislation on the subject, deal with entitlement and non-entitlement to registration on the Band Lists. These lists do not only have a prospective application, but they authorize the purging of lists by removal of names of persons who under the Act would not be entitled to registration. Section 12(1)(b) reads: "12(1) The following persons are not entitled to be registered [as an Indian under the Indian Act], namely (*b*) a woman who is married to a person who is not an Indian." §12(1)(b), INDIAN ACT, (Can.) c. 29, 1951.

12(1)(b) legislated the dependence of women upon men, even for their very identity. As a result of 12(1)(b), thousands of women over the years lost their Aboriginal status and, consequently, the benefits of reserve land and the reserve community.[101] Children born of such marriages did not enjoy Aboriginal status, and they could not claim any Aboriginal rights, even if they came from a matrilineal clan and traced their lineage through their Aboriginal mother.[102] The policy was originally intended to protect Aboriginal tribes against unscrupulous white men who might try to get a "free ride" by moving onto the reserve with their Aboriginal wives. Instead, women who divorced and sought to return to the reserve with their non-status children were driven off the reserve, and forced to live isolated lives away from family, unable to provide their children with an environment true to their heritage.[103] When section 12(1)(b) was finally repealed in 1985 with the passage of Bill C-31, 70,000 men, women and children were added to the Federal Indian registry and Band Lists.[104]

Overall, the influx of European values on the relative position of women to men had a significant effect on Aboriginal society. Lilianne Krosenbrink-Gelissen points out that:

> [t]he Indian Act implicitly held 19th century European assumptions on the general position of women; they were subordinated to men, their status and position depended on those of either their fathers or husbands, they had no political decision-making power (at least until 1951) and in the legal sense they were not mature. Gradual internalization of western notions of femaleness which distorted Indian thought had a serious impact on gender relations within Indian community life.[105]

Characteristic of these notions was the view on family violence. Until the late nineteenth century, spousal assault was barely recognized as a criminal offense in Canada.[106] Wives were subject to "reasonable chastisement" by their husbands, entirely lawful, and often seen as part of a husband's responsibilities.[107] Thus the problem was not that Europeans felt it was acceptable for Aboriginal men to beat their Aboriginal wives, but that they felt it was acceptable for *any* man to beat his wife. As part of the process of civilization and assimilation, this value had to be incorporated into the new cultural lexicon of Aboriginal peoples. These values did not evaporate with the advent of the

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101. Jackson, *supra* note 28, at 182.

102. Note how this practice also serves to disrupt the flow of traditions and values from one generation to the next by depriving children of rights and responsibilities over their ancestral lands and clan.

103. Krosenbrink-Gelissen, *supra* note 38, at 151.

104. Jackson, *supra* note 28, at 182.

105. Krosenbrink-Gelissen, *supra* note 38, at 150.

106. Kathleen Mahoney, *The Legal Treatment of Spousal Abuse: A Case of Sex Discrimination*, 41 UNBLJ 21 at 23, 24 (1992).

107. So long as the rod used to punish them was no thicker than the man's thumb, hence the phrase "rule of thumb." Koshan, *supra*, note 25, at 23-54.

Twentieth century. Legislation, like section 12(1)(b) of the Indian Act, continued to compound the effects of European values on Aboriginal women, directly affecting even the current generation.

In the aggregate, these three types of policies fostered violence against Aboriginal women by: reducing the power and status of Aboriginal men in relation to all peoples except Aboriginal women; reducing the power and status of Aboriginal women by stifling the values and traditions which protected and honored them; stripping Aboriginal people of their culture and proffering European values in return; decimating any opportunities women had to hold power; and by validating violence against women as a way to resolve domestic problems. Given current rates of family violence in Aboriginal communities and the utter lack of evidence of any similar rates in pre-colonial Aboriginal society,[108] there is little question that current rates of family violence are partly a result of the colonial settlement of Canada and its Aboriginal inhabitants. Consequently, many Aboriginal activists argue that a return to traditional ways of being and dealing with disputes is the best solution to the problem of violence against Aboriginal women.[109]

In light of pre-contact traditions of an egalitarian public life and woman-centered spirituality, Aboriginal Justice Commissions also take this position. For instance, the Aboriginal Justice Inquiry of Manitoba recommended that "Aboriginal traditions and customs be the basis upon which Aboriginal laws and Aboriginal justice are built."[110] Spurred on by such reports, the Canadian government has chosen to endorse some Aboriginal Justice Initiatives which seek to alleviate and battle the social ills plaguing Aboriginal communities.

Any program which attempts to improve the lives of Aboriginal women must, as a preliminary matter, demonstrate a sophisticated understanding of not only the current conditions, but also the events

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108. Redbird contends, "Despite evidence that Indian nations had low sexual assault rates in pre-contact times, Indians learned the ways of paternalism, patriarchy and the violence which accompanies those modes of control over women," Redbird, *supra* note 40, at 131.

109. Nahanee opines, "There needs to be a return to traditional ways, healing circles, and a sharing of power between the men and the women," T. Nahanee, *Dancing with a Gorilla: Aboriginal Women and the Charter*, PAPER PRESENTED TO THE ROYAL COMMISSION ON ABORIGINAL PEOPLES, ROUND TABLE ON JUSTICE ISSUES at 9. (1992). Krosenbrink-Gelissen agrees, "Aboriginal self-government is closely linked to the revival of authentic Indian cultures," Krosenbrink-Gelissen, *supra* note 38, at 155. See also Jane Dickson Gilmore, *Resurrecting the Peace: Traditionalist Approaches to Separate Justice in Kahnawake Mohawk Nation*, 8 LAW & ANTHROPOLOGY 83,84 (1996); McCaskill, supra note 51 at 33, 36, 39; Curt Griffiths and Alan A. Patenaude, *Aboriginal Peoples and the Criminal Law, in* ABORIGINAL PEOPLES AND CANADIAN CRIMINAL JUSTICE 69, 76 (R.A. Silverman et al. eds., 1994).

110. A.C. HAMILTON AND C.M. SINCLAIR, PUBLIC INQUIRY INTO THE ADMINISTRATION OF JUSTICE AND ABORIGINAL PEOPLE, THE REPORT OF THE ABORIGINAL JUSTICE INQUIRY OF MANITOBA. VOL. 1: THE JUSTICE SYSTEM AND ABORIGINAL PEOPLE 323 (1991).

which gave rise to these conditions.[111] The mere implementation of traditionally-based dispute resolution practices, without sufficient attention to the differences between modern and traditional times, will serve only to further diminish and isolate the Aboriginal women who suffer domestic violence. While the Canadian sentencing circle reintroduces Aboriginal concepts of reconciliation, healing, equality and respect, the field on which these concepts now play is hardly level between Aboriginal men and women. Nonetheless, the sentencing circle may prove useful for other kinds of cases.

PART II: THE SENTENCING CIRCLE – AN OVERVIEW

Sentencing circles are among the newest attempts to assist Aboriginal offenders and their communities.[112] As a post conviction mechanism, the sentencing circle is designed primarily to bring healing and closure to the offender and his community, thereby reducing recidivism among Aboriginal offenders. Because it is aimed at restoring harmony within the community, the sentencing circle is often described as a restorative justice method.[113]

The sentencing circle is an alternative to the mainstream sentencing hearing. The offender has already been found guilty, or has pleaded guilty to the offence with which he/she was charged. In the ordinary case, a judge sentences with the benefit of a pre-sentence report (usually prepared by a psychologist), arguments by the Crown and the defense attorneys, the guidance of case law and the limitations of the Canadian Criminal Code.[114] The sentencing circle expands these resources, involving not only these familiar judicial players, but other community members, including elders and the of-

111. For support of this position, *see* WARRY, *supra* note 34, at 241, "Community healing and self-government as linked processes, need to rest on a solid understanding of colonial history, and a cautious pragmatism about the nature and pace of change that must occur in future."

112. The first sentencing circle officially recognized by the Canadian judiciary took place in 1992. The Queen v. Moses, 11 C.R. (4th) 357, 360 (Yukon Terr. Ct. 1992).

113. "Restorative justice is a new way of settling disputes. The victims, their families and friends, and the broader community are seen as the recipients of the harm caused by the offender's actions. Restorative justice approaches seek to repair this harm by direct contact between victim and offender rather than solely by the state. The process of reparation involves bringing together the offender, victim and community to seek solutions that, to the greatest extent possible, satisfy all parties. Through this process of mediation, reparations are negotiated and the process of forgiving and healing is initiated," JAMES BONTA, JENNIFER ROONEY, AND SUZANNE WALLACE-CAPRETTA, REPORT OF THE SOLICITOR GENERAL OF CANADA: RESTORATIVE JUSTICE: AN EVALUATION OF THE RESTORATIVE RESOLUTIONS PROJECT, 4 (1998).

114. Timothy Quigley, *Some Issues in Sentencing of Aboriginal Offenders in* CONTINUING POUNDMAKER & RIEL'S QUEST: PRESENTATIONS MADE AT A CONFERENCE ON ABORIGINAL PEOPLES AND JUSTICE, 269, 288 (R. Gosse, J. Youngblood Hendeson, and R. Carter, comp. 1994).

fender's and victim's families.[115] Often, the social worker or case worker,[116] the probation officer, and other rehabilitation experts, such as the psychologist, will also participate.[117]

The physical structure of the sentencing circle encourages participation. Everyone sits facing each other. Tables are generally dispensed with, leaving only a circle of simple chairs.[118] Without the barriers of podiums or witness boxes, participants face each other as community members and persons, not titles and positions. Justice Coordinator Mary Crnkovich states, "The theory behind the circle is that everyone in the circle is of equal status. The circle is intended to promote equal access and equal exposure with everyone facing each other."[119] Within the circle, the judge's opinion is no more important than that of an elder or a family member. Speaking one at a time, discussion moves around the circle until the group determines the appropriate disposition.[120] Often a stone, eagle feather or stick is passed from person to person to preserve the speaking order.[121] The whole process may have multiple rounds and take several hours. Consensus is necessary for a final determination.[122]

The innovation of the sentencing circle does not, however, prevent the maintenance of essential judicial principles and practices. The individual rights of the accused are not compromised by the sentencing circle procedure. The Crown and defense counsel retain their traditional roles as advocates for the state and the offender. Open court is maintained, written summaries or full recordings are filed,[123] upper limits to the sentences remain in place and the accused is, in fact, given greater opportunity to speak to his sentence.[124] Judge Barry Stuart, credited with holding the first sentencing circle, reports "All other changes in the court process — being seated in a Circle, using first names, relying on local Keepers to facilitate the process and other Circle practices — do not offend any evidentiary or procedural

115. *Id.* at 288-89.

116. A representative of the Department of Social Services assigned to the individual's case.

117. The Queen v. Moses, 11 C.R. (4th) at 360.

118. *Id.* at 366-72. Note that Judge Stuart eloquently discusses the benefits of the circle versus the traditional court as a physical setting.

119. Mary Crnkovich, *Report on a sentencing circle in Nunavik, in* INUIT WOMEN AND JUSTICE: PROGRESS REPORT NUMBER ONE 19, 21 (Pauktuutit Inuit Women's Association, 1995).

120. GREEN, *supra* note 8, at 85-95.

121. *Id.*

122. *Id.*

123. BARRY STUART, BUILDING COMMUNITY JUSTICE PARTNERSHIPS: COMMUNITY PEACEMAKING CIRCLES, 27 (Dept. of Justice Canada 1997).

124. As in American criminal cases, Canadian criminal procedure affords defense counsel and the offender an opportunity to argue for leniency with respect to sentence. In Canada, this is referred to as "speaking to sentence."

rules and are instrumental in advancing the sentencing objectives championed by the formal justice system."[125]

In the first sentencing circle recognized by the Canadian justice system,[126] *The Queen v. Moses*,[127] Judge Stuart of the Yukon Territorial Court drew on his knowledge of sentencing reform recommendations to explain what led to the sentencing circle:

> Currently the search for improving sentencing champions a greater role for victims of crime, reconciliation, restraint in the use of incarceration, and a broadening of sentencing alternatives that calls upon less government expenditure and more community participation. As many studies expose the imprudence of excessive reliance upon punishment as the central objective in sentencing, rehabilitation and reconciliation are properly accorded greater emphasis. All these changes call upon communities to become more actively involved and to assume more responsibility for resolving conflict. To engage meaningful community participation, the sentence decision-making process must be altered to share power with the community, and where appropriate, communities must be empowered to resolve many conflicts now processed through criminal courts.[128]

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125. STUART, *supra* note 123, at 27.

126. Since sentencing circles are based upon traditional dispute resolution techniques, the 1992 Circle can hardly be called the first sentencing circle. The power of the current sentencing circle model lies, in part, in the formal recognition it receives.

127. The Queen v. Moses, 11 C.R. (4th) at 357. Philip Moses was a 26-year-old member of the Na-cho Nyàk Dun First Nation with a history of violent crime spanning 43 previous convictions. Though the crimes themselves were not extraordinary (carrying a weapon, theft and breach of probation), Mr. Moses' story was compelling enough for Judge Stuart to depart from mainstream sentencing, and make the leap from proposal to practice. Note his remarks at page 357 of his judgment:

> [Philip's] long history with the criminal justice system had proven two unmistakable conclusions.
>
> First, the criminal justice system had miserably failed the community of Mayo. Born and raised in Mayo, his family in Mayo, Phillip instinctively returned to Mayo after each of the previous seven jail sentences. He would again return after any further jail sentences; each time returning, less capable of controlling either his anger or alcohol abuse; more dangerous to the community and to himself. The criminal justice system had not protected, but had endangered the community.
>
> Secondly, the criminal justice system had failed Mr. Moses. After 10 years, after expending in excess of a quarter of a million dollars on Mr. Moses, the Justice system continues to spew back into the community a person whose prospects, hopes and abilities were dramatically worse than when the system first encountered Phillip as a wild, undisciplined youth with significant emotional and general life-skill handicaps. His childhood had destined him for crime, and the criminal justice system had competently nurtured and assured that destiny.

If the criminal justice system had failed, what could the community do? It was hardly the model case to experiment with community alternatives. What could be lost in trying?

128. *Id.* at 360.

In keeping with the predominantly Aboriginal population of the area, Judge Stuart drew on Native traditions and beliefs in choosing the sentencing circle as the vehicle of reform. Since all life is said to exist in a circle, the Circle is a sacred symbol.[129] It encompasses traditional Aboriginal values such as reconciliation, forgiveness, healing and kindness.[130] However, while the sentencing circle has its *roots* in traditional Aboriginal spirituality and culture, it is only a partial return to traditional Aboriginal dispute resolution techniques. It is not identical to a truly traditional healing circle[131] which would operate without any involvement from the white justice system. As such, the sentencing circle is best considered a mixture of two judicial cultures, drawing aspects of each to achieve balance. Native Law professor Tim Quigley explains:

> Although there is, as might be expected, some variation from place to place, there are common features to these types of modern sentencing circles. First of all, they are really a *hybrid* of the traditional form of Aboriginal community justice and our criminal justice system. The judge retains the final authority to impose a sentence. What changes is the process by which that sentencing is arrived at. In principle at least, sentencing circles are a variation in procedure, not necessarily a change in the substance of sentencing.[132]

From the outset, advocates have hailed the sentencing circle as a tremendous breakthrough in Aboriginal Justice Reform.[133] Because it incorporates and returns to traditional Golden Age values of healing, respect, and reconciliation, use of the sentencing circle is also seen by many as a long-overdue recognition of the sophistication and practical value of Aboriginal dispute resolution methods. Aboriginal political

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129. The sacred concept of the Circle encompasses the four (or eight) directions, and all living things. It recognizes cycles in life and the interdependency of all living things.

130. Marcia Hoyle writes, "Community healing is acknowledged as having been the central goal of traditional [Aboriginal] law since pre-colonial times." Marcia L. Hoyle, *'A Fitting Remedy': Aboriginal Justice as a Community Healing Strategy, in* POPULAR JUSTICE AND COMMUNITY REGENERATION: PATHWAYS OF INDIGENOUS REFORM 143, 146 (Kayleen M. Hazlehurst, ed., 1995) but see, "[there is] a growing complex of reinvented traditions. . . . Much of what is thought to be tradition is actually syncretized fragments of Native and Western traditions which have become highly politicized because they have been created from the context of colonization," La Roque , *supra* note 37, at 76.

131. The Peacemaker Courts of Native American Nations (specifically the Navajo Nation) may be closer to this, since it can start from much earlier in the process. However, traditional dispute resolution methods might have been used to determine whether someone has in fact committed a crime, something absent from Navajo Nation Peacemaker Courts and Canadian Sentencing Circles. PUBLIC INQUIRY INTO THE ADMINISTRATION OF JUSTICE AND ABORIGINAL PEOPLE, REPORT OF THE ABORIGINAL JUSTICE INQUIRY OF MANITOBA, *supra* note 109 at 50-54.

132. Quigley, *supra* note 114.

133. Critics have branded the sentencing circle as 'special treatment'. However, the Circle's core concepts of healing, reconciliation and equality have caught on and have been transplanted, successfully, to a wide variety of youth offender projects.

leaders, academics, elders and tribal members throughout Canada have endorsed a return to the old ways as the singular path to Aboriginal survival and success.[134] Their faith in the old ways is echoed in an approving nod from the Canadian government, which provides funding for sentencing circle programs and supports the use of alternative sanctions for Aboriginal offenders under the Canadian Criminal Code.[135]

The recognized sentencing guidelines of the Canadian criminal justice system adhere to four basic principles: Protection of the public and Deterrence (General, Rehabilitative, and, to a much lesser degree, Retribution specific).[136] In essence, these principles do not vary from those governing a sentencing circle. Based on Aboriginal concepts of community and healing, the sentencing circle process also emphasizes rehabilitation and restoration over retribution. Judge Stuart relates:

> Aboriginal culture does not place as high a premium on individual responsibility or approach conflict in the direct confrontational manner championed by our adversarial process. Aboriginal people see value in avoiding confrontation and in refraining from speaking publicly against each other. In dealing with conflict, emphasis is placed on reconciliation, the restoration of harmony and the removal of underlying pressures generating conflict.[137]

However, along with these, there are additional benefits to a sentencing circle. In a mainstream sentencing hearing, the Crown Prosecutor remains separate from, but representative of, the community that has been wronged; the society that bears the cost of the offense has little say in the actual sentence.[138] In the sentencing circle, the affected community fashions the sentence, and individual community members play a direct role in the offender's rehabilitation and reintegra-

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134. But see Marianne O. Nielson, *Criminal Justice and Native Self-Government, in* ABORIGINAL PEOPLES AND CANADIAN CRIMINAL JUSTICE 243, 251 (R.A. Silverman et al. eds., 1994) where the author reports that some Native people have come to regard traditional ways as inferior or even worthless in the modern world. *See also* WARRY, *supra* note 34, at 219, where the author notes "there is political capital to be made from capturing the rhetoric of cultural revitalization. . . but for community members the restoration of cultural ways is potentially divisive."

135. As section 718.2(e) of the Canadian Criminal Code provides: "(e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders." R.S.C. C-46 §718.2(e) (Can.). This subsection may be seen as doing two things - 1) acknowledging the tremendous harm done to Aboriginal societies and that crime is Aboriginal communities is partially symptomatic of that harm; and 2) recognizing that there are a variety of Aboriginal Justice Initiatives currently in place (most well known being the sentencing circle) which can work to make non-custodial sentences successful. The ruling case on this provision and its implications for Aboriginal people is Regina v. Gladue (1999) 1 S.C.R. 688 (Can.).

136. R.S.C., ch. C-46, § 718.2(e) (Can).

137. The Queen v. Moses, 11 C.R. (4th) at 375.

138. GREEN, *supra* note 8, at 37.

tion. The sentencing circle may thus be seen as a democratizing force, as it moves power from the hand of the judiciary and the mainstream system into the hands of the community itself.

However, the sentencing circle has not emerged without obstacles. Questions of when the sentencing circle is appropriate and under what circumstances[139] brought early cases to the appellate courts.[140] While it would be premature to say matters have been settled, some general guidelines have emerged.[141] Sentencing circle jurisprudence furnishes the following indicia for when a sentencing circle is *not* appropriate:

1. for purely punitive sanctions or where a term of incarceration in excess of two years is realistic;
2. where there have been frequent repeat offenses or the offence is indictable;
3. where the attitude of the offender prohibits his/her involvement;
4. where there are no community sentencing options available to the circle; and
5. where the community is not prepared to be involved in the circle.[142]

In addition, Judge Fafard of the Saskatchewan Provincial Court pronounced in *The Queen v. Joseyounen*,[143] the following general criteria for all sentencing circles:

1. The accused must agree to be referred to the sentencing circle.

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139. Issues include use of the sentencing circle when: the offender may not have the benefit of a cohesive community, as in urban centers; the victim is non-Aboriginal and opposes the sentencing circle; for offenses which would generally demand a custodial disposition over 2 years; the offender did not plead guilty but was found guilty pursuant to trial. See The Queen v. Craft Y.J. No. 15 Whitehorse Registry No. T.C. 94-00644 (Yukon Territorial Court) (oral, filed Jan. 17, 1995); the victim chooses not to participate; the community does not possess sufficient resources to provide long term rehabilitative services to the offender; the offender appears to be a career criminal; the circle is not a tradition in that Aboriginal nation; it is used to impose traditional punishments including banishment. In addition to these cases, an overview of several issues may be obtained from J. V. Roberts and Carol La Prairie, *Sentencing Circles: Some Unanswered Questions*, 39 CRIMINAL LAW QUARTERLY 69 (1996).

140. The Queen v. Morin, 101 CCC (3d) 124 (Sask. C.A. 1996). The Saskatchewan Court of Appeal probed the question of sentencing circle use in urban communities, where the existence of a 'cohesive community' is doubtful.

141. SENTENCING CIRCLE: A GENERAL OVERVIEW AND GUIDELINES, 3:3 JUSTICE AS HEALING NEWSLETTER 1 (1998).

142. *Id.*

143. Despite the early development of these guidelines, it should be noted that they have not been firmly adopted. Many Sentencing circles continue without victim participation for instance, and many in domestic violence cases take place where no support is offered to the victim. Northern communities continue to prize the flexibility the sentencing circle provides. The Supreme Court of Canada has not, to date, pronounced any universal guidelines for use in sentencing circles. A brief review of the cases demonstrates the wide variety of cases in which the process is used, even for non-Aboriginals in some cases.

2. The accused must have deep roots in the community in which the sentencing is held and from which the participants are drawn.
3. There are elders or respected non-political community leaders willing to participate.
4. The victim is willing to participate and has not been subjected to coercion or pressure in so agreeing.
5. The court should try to determine beforehand, as best it can, if the victim is subject to battered women's syndrome. If she is, then she should have counselling and be accompanied by a support team in the circle.[144]
6. Disputed facts have been resolved in advance.
7. The case is one in which a court is/would be willing to take a calculated risk and depart from the usual range of sentencing.[145]

This list clearly evinces a concern for Aboriginal victims of domestic violence. In general, its provisions are in keeping with those objectives established by Canadian courts with respect to domestic violence cases. *The Queen v. Brown*,[146] as adopted in *The Queen v. Manyfingers*,[147] laid down the following guidelines for sentencing a domestic violence offender:

1. What would be a fit sentence if there had been an assault between strangers?
2. The general sentencing policy is that imprisonment is not only for deterrence, but it is also 'an instrument of breaking the cycle of violence' in the family 'even at the risk of the relationship coming to an end during the enforced separation.'
3. General deterrence.
4. Individual deterrence to prevent further repetition of the unlawful conduct.
5. Denunciation to 'express the community's wish to repudiate such conduct in a society that values the dignity of the individual.'
6. Rehabilitation.
7. There is no exhaustive list of factual elements which should be taken into account. Since the violence incurred in the context of the spousal relationship the court must consider:
   a. is the assault relatively minor, or an isolated event,
   b. are there 'other circumstances which make it desirable that the sentence not be such as to be counter productive to the possibility that the family relationship will be preserved (if there is such a possibility remaining).'
8. The plea of the spouse for the return of the offender and to avoid being further victimized by the effects of imprisonment 'should not readily be permitted to prevail over general sentenc-

144. For further discussion of this criterion, see Part IV of this paper.

145. The Queen v. Joseyounen, 6 W.W.R. 438, 442-46 (Sask. Prov. Ct. 1995).

146. The Queen v. Brown, Highway, Umpherville 73 CCC (3d) 242, 250-253 (Alta. C.A. 1992).

147. The Queen v. Manyfingers, A.J. No. 1025 (1996) at 43.

ing policy that envisages imprisonment' as a means of deterrence and denunciation of such unlawful conduct.

9. In the case of an aboriginal offender, status alone will not constitute an exemption to the principles of deterrence and denunciation. However based on future changes in the judicial system [now section 718.2(e)] and special needs, a process of rehabilitation and deterrence within the aboriginal community could be considered provided that there is satisfactory evidence to support such an approach.[148]

In reality, the goals in a sentencing circle may be ordered quite differently from those described above. While they wish to rid the community of crime, for Aboriginal peoples, regaining power over their own future is critical. While the judge retains authority over the final imposition of the sentence, the practice has been to defer to the consensus of the circle. Thus, the sentencing circle represents a significant step in the ability of Aboriginal communities to regain control over dispute resolution and justice matters. Aboriginal peoples have long spoken of how incarceration only produces more criminals, and does nothing to address the underlying cause — colonization. If Aboriginal peoples can demonstrate reduced recidivism among Aboriginal offenders as a result of sentencing circles, there is a better chance the mainstream will acknowledge that viable alternatives to mainstream sentencing do exist.[149]

Therefore, the sentencing circle has serious political ramifications for Aboriginal peoples. Success in the circle means success for the individual offender, *and* another step towards recognizing Aboriginal self-government.[150] While this is clearly a great opportunity, it also places tremendous pressure on Aboriginal nations. Given the tension between Aboriginal peoples and the dominant society, it is unlikely the dominant society will exhibit the same patience with sentencing circle failures as Aboriginal people have exhibited with respect to failures of the adversarial justice system.[151] In order to be

148. *Id.*

149. LaPrairie reminds us, ". . . the written law has serious limitations. It is more conducive to regulating relations among strangers than to resolving disputes among those who are familiar and living in proximity with one another." Carol La Prairie, *Self-Government and Criminal Justice: Issues and Realities, in* ABORIGINAL SELF-GOVERNMENT IN CANADA: CURRENT TRENDS AND ISSUES 108, 109 (John H. Hylton ed., 1994).

150. Hoyle, *supra* note 130, at 146.

151. "[Commitment] is necessary to ensure that community based criminal justice initiatives do not suffer the 'here today gone tomorrow' syndrome of so many activities in aboriginal communities dependent on outside funding," La Prairie, *supra* note 22, at 142. In particular, note the remarks of the Court in The Queen v. Brown, Highway, Umpherville 73 CCC (3d) 242, 253 (Alta. C.A. 1992): ". . . it is beyond the ability of a trial court or an appellate court to consider some modification of sentencing principles in a particular case unless there is evidence before the court that the accuser's community is ready, willing and able to undertake some process which will enhance the possibility of rehabilitation and set an example which will deter other members of the community from similar conduct. Where the offence is not a minor

effective, sentencing circle practice will have to produce a significant reduction in recidivism rates before it will provide meaningful assistance in the transfer of greater power to Aboriginal peoples. Consequently, the pressure to *make* the sentencing circle work affects everyone in the community and can prevent the domestic violence victim from participating equally in the circle.

PART III: THE VICTIMS – HOW ABORIGINAL WOMEN EXPERIENCE THE SENTENCING CIRCLE

What is the experience of Aboriginal women victims in the Circle? Justice Coordinator Mary Crnkovich, after observing a sentencing circle used in a domestic violence case, remarked:

> Aside from the fact that the sentence was based on a proposal presented by the accused, the victim could hardly, in her position, oppose such a proposal or complain that it was not working. Again to suggest that her attendance [for counseling] would keep the accused honest, demonstrates, in the author's view, the judge's misunderstanding of the life circumstances of this woman as a victim of violence. How could she speak out against the Mayor, the Chair of the Inuit Justice Task Force, and others in her community? Did the Judge really believe she would speak out, based on the history of this case to date? The victim's actions, or lack thereof during the circle, demonstrated the degree of fear and deference paid to her spouse.[152]

Is Crnkovich's assessment correct? Is this the common experience of Aboriginal women in the circle? Unfortunately, it is impossible to answer this question with absolute certainty. However, based on what is known of mediation in domestic violence cases, sentencing circle operation, *and* the dual discrimination Aboriginal women face, Crnkovich's appraisal is not only accurate but representative; Aboriginal victims of domestic violence receive little benefit from the sentencing circle so widely hailed as a solution.

Sentencing circles can be likened to mediation given the consensus requirement and the face-to face participation of victim and offender. While Alternative Dispute Resolution (ADR) advocates have urged mediation use in general, significant controversy has emerged over mediation when domestic violence is present.[153] Critics of medi-

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one, . . . neither a trial court nor an appellate court is likely to be impressed by some vague reference by counsel to cultural differences between the aboriginal communities and non-aboriginal society unsupported by more."

152. Crnkovich, *supra* note 119, at 24.

153. *See for example:* Kerry Loomis, *Domestic Violence and Mediation: A Tragic Combination for Victims in California Family Court*, 35 CAL. W. L. REV. 355 (1999); Kelly Rowe, *The Limits of the Neighborhood Justice Center: Why Domestic Violence Cases Should not be Mediated*, 34 EMORY L. J. 855 (1985); Douglas D. Knowlton and Tara Lea Maulhauser, *Mediation in the Presence of Domestic Violence: Is it the Light at the End of the Tunnel or is a Train on the Track?*, 70 N. DAK. L. REV. 255 (1994), Fischer et al, *supra* note 28; Marg O'Donnell, *Mediation Within Aboriginal Communities: Issues and Challenges, in* POPULAR

ation use in family violence cases see an inherent difficulty in asking these victims to come to a compromise or consensus with their abusers. Professor Karla Fischer notes three factors which argue against mediation in domestic violence cases: 1) the learned helplessness of the victim;[154] 2) the one-sided nature of the violence; and 3) the seriousness[155] of domestic violence- it is more a crime than a dispute.[156] These factors highlight the power imbalance inherent in abuse cases. Professor Fischer's research emphasizes that, in domestic violence cases, the blame is not shared, but should rest squarely on the shoulders of the abuser.[157] The considerations exist in all battering relationships, including those in Aboriginal communities. To suggest that a mediation type approach will work for Aboriginal victims of domestic violence, simply because it is grounded in traditional native practices, is to ignore the complexities and power hierarchies of the battering relationship.

In fact, the power imbalance between victims and abusers causes even strong sentencing circle advocates to hesitate. Ross Gordon Green writes, "Given the ubiquity of domestic violence, mediation in criminal offences and the meeting of offender and victim in a sentencing circle may be problematic."[158] Critics of mediation warn that the mediator is unable to significantly counteract the power imbalance given his role as an impartial, uninterested party.[159] Similarly, in a sentencing circle, the community's desire to support and rehabilitate the offender, and to recognize *his* pain and suffering, makes it difficult to right the scales of power. Green admits, "Where the [power] imbalance is not offset by some other visible community support for the victim, the logic of a community based sentencing hearing is dissipated."[160]

This imbalance cannot be rectified simply by sitting in a chair in front of a mediation expert.[161] Kerry Loomis writes, "[the victim] de-

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JUSTICE AND COMMUNITY REGENERATION: PATHWAYS OF INDIGENOUS REFORM 89 (Kayleen M. Hazlehurst ed., 1995).

154. This refers to the futility victims experience. Despite heroic efforts to control the violence and prevent its eruption, victims learn that the violence cannot be controlled through their own behavior. Regardless of what they do, or fail to do, nothing is good enough. Eventually, based on their inability to control the attacks, victims become passive, submissive and helpless.

155. This in itself would not necessarily militate against the use of sentencing circles in domestic violence cases. Sentencing circles have been used in cases as serious as manslaughter, and some would argue that it is the most serious cases which require community intervention as in a sentencing circle.

156. Fischer, *supra* note 28, at n37.

157. This is especially important since a recognition that the abuse is not her fault is crucial to the psychological recovery of the victim. LOOMIS, *supra* note 153, at 363.

158. GREEN, *supra* note 8, at 80.

159. Loomis, *supra* note 153, at 363.

160. GREEN, *supra* note 8, at 83.

161. Loomis, *supra* note 153, at 360.

velops a pattern of selflessness, which serves as a complete compromise to her individuality and liberty. . . . The result is that the victim becomes passive and accepting of the abusive relationship and nonassertive in mediation."[162] Consequently, the abuse victim is more likely to accept a less favorable result.[163]

Just as mediation is most successful when the disputants have equal bargaining power,[164] *the sentencing circle is most effective when all parties in the circle come as equals.* While the sentencing circle is designed to give the victim a voice,[165] the abuse has already stolen whatever voice she had. Without addressing the underlying conditions of her abuse, the victim in a sentencing circle remains mute. This is painfully obvious in the case observed by Crnkovich, *The Queen v. Naapaluk.*[166] This case involved an accused who plead guilty to assaulting his wife. This was his fourth formal charge of this type, but he freely admitted to the court that he had probably beaten his wife more than fifty times.[167] An interim order before the passing of final sentencing provided for his return to the marital home and joint counseling.[168] Judge Dutil's summary of the circle states, "All the participants expressed themselves amply; some spoke several times. . . .The accused himself spoke several times, as did the victim, his wife."[169] Crnkovich reports "[The victim] said very little during the entire process and only spoke when called upon to do so by the judge."[170] The transcript reveals that in fact the victim spoke only three times, each time only when asked a direct question by the judge.[171] Similarly, based on his three year study, Green found that victims were appearing to participate less and less in sentencing circles, and receiving less support,[172] notwithstanding several court rulings which hold victim participation an essential element of the circle.[173] While the power disparity in any family violence case is difficult to overcome, it is magnified when the victim is both Aboriginal *and* female.

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162. *Id.* at 359, 362.

163. Fischer, *supra* note 28, at n.33.

164. Loomis, *supra* note 153, at 357.

165. Based on submissions by the Hollow Water Healing Circle of Manitoba, as recorded by GREEN, *supra* note 8, at 89.

166. The Queen v. Naapaluk, (Transcript of Dutil J. of the Que. Prov. Ct. 4 May 1993, unpublished). Kangiqsujuac # 640-01-001054-924.

167. *Id.*

168. *Id.*

169. *Id.* at 11.

170. Crnkovich, *supra* note 119, at 24.

171. Naapaluk, Transcript of Dutil J. of the Que. Prov. Ct. 4 May, 1993.

172. GREEN, *supra* note 8, at 137.

173. *See for example,* The Queen v. Joseyounen, 6 W.W.R. 438 (1995); The Queen v. Paul 1 C.N.L.R. 149 (New Brunswick Prov. Ct. 1999); The Queen v. Rich 2 C.N.L.R. 143 (Court of Quebec 1994); The Queen v. S.R. NJ 108 (Nfld. Sup. Ct. 1994); The Queen v. W.M., OJ No. 2778 (Ont. Ct. Justice, Gen. Div. 1997).

Minority women suffer from dual discrimination; they are marginalized as minorities *and* as women.[174] Professor Kimberle Crenshaw has characterized this position as the experience of *intersectionality*.[175] She explains that this experience is not one that can be explained wholly by examining the race dimension or the gender dimension separately. It is not the addition of two types of marginalization, but rather the way in which these two types of marginalization intersect to produce an experience unique to women of color.[176] This experience is not generally addressed because most politics, services and organizations are designed to deal with either race or gender, but not a combination of both.[177] While Crenshaw bases her article primarily on the experiences of African American women, the theory applies equally with respect to all minority women, including Aboriginal women.

In essence, Aboriginal women are victims of discrimination for two reasons: first, because they are women; and second, because they are Aboriginal. These forces intersect to place Aboriginal women at odds with the values and priorities of the sentencing circle. While focusing on Aboriginal traditions, the circle ignores the current reality of female community members, especially as victims. This is largely because, being part of the criminal process, the circle is offender-centered. The purpose is, after all, to get to the root of the offender's problems, and stop him from re-offending.[178] The healing, reconciliation, and acceptance on which the sentencing circle is premised are all offender-focused.

Meanwhile, the victim is also experiencing race, class and gender discrimination, but these go unexamined.[179] Even though she actually suffers the blows, *the victim is obscured by central focus on the offender as a victim of colonial society.* There is no longer any place at the center of this "traditional practice" for women. Thus, even within this practice rooted in a Golden Age where women were honored, the female victim in the Modern Age is marginalized.

The conflict is obvious even before participating in the circle. The oppression of Aboriginal peoples as a whole inhibits the reporting of domestic violence crimes because this could lead to scrutiny

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174. As La Roque reminds us, "Aboriginal women have been objectified not only as women, but also as Indian women. The term used to indicate this double objectification was and is 'squaw,'" Emma La Roque, *Violence in Aboriginal Communities, in* THE PATH TO HEALING, REPORT OF THE ROYAL COMMISSION ON ABORIGINAL PEOPLES 73 (1994).

175. Crenshaw, *supra* note 69, at 1242. For an additional analysis of intersectionality from another minority perspective *see also,* Jenny Rivera, *Domestic Violence Against Latinas by Latino Males: An Analysis of Race, National Origin and Gender Differentials, in* CRITICAL RACE FEMINISM: A READER 259 (Adrien Katherine Wing ed., 1996).

176. Crenshaw, *supra* note 69, at 1244.

177. *Id.* at 1283.

178. GREEN, *supra* note 8, at 97.

179. La Roque, *supra* note 37, at 80.

and detention at the hands of a racist police force.[180] In commenting on Teresa Nahanee's paper, *Dancing with a Gorilla*, Professor Margaret Jackson notes that "customary cultural values- such as kindness, reconciliation, and family cohesiveness - may actually prevent Aboriginal women from officially reporting violence in the home."[181] If she decides to go beyond community boundaries, the community may see it as an act of betrayal,[182] especially since so many still see domestic violence as a 'private issue.' First, she "must decide whether to invoke assistance from an outsider who may not look like her, sound like her, speak her language or share any of her cultural values."[183] Even if she seeks mainstream assistance, inadequate police, and judicial response to domestic violence generally, and to Aboriginal domestic violence in particular, can serve to perpetuate the cycle of learned helplessness.[184] If she chooses to press members of her own community for support, she may be met with "claims that such issues cause division within the community and negatively impact on the larger struggle for equality."[185] If she decides to leave the community altogether, she suffers loneliness and isolation.[186]

The principles that govern the circle, while they may prove positive for the offender, also place Aboriginal women in desperate positions. Healing and family reunification may require the offender remain in the community. For instance, this forces him to feel, on a daily basis, the shame he has brought upon his family. It also permits him to interact with elders and family members, who can support and guide him. Finally, it allows him to spend time with his children (if there are any) and perhaps even to counsel them not to engage in violent behavior. Community members may feel capable of policing the offender.

In contrast, as an Aboriginal, the victim also believes in family unity, but this principle does not serve her needs. As a woman living with domestic violence, protection for herself and her children is likely paramount. While the victim may not support incarceration as a long-term solution, imprisonment does provide short term protection. Her empowerment however, requires disempowering a male member

180. Crenshaw, *supra* note 69, at 1257.

181. JACKSON, *supra* note 28, at 191. Also, as Griffiths quotes, "the N.W.T. Task Force on Spousal Assault noted: 'The concern to keep families and communities together appears to keep many victims from making complaints, from seeking help, from leaving. Parents and grandparents encourage victims to stay with or return to their spouses for the sake of the children and the extended family,'" C.T. Griffiths et al., *Crime, Law, and Justice in the Baffin Region: Preliminary Findings From a Multi-year Study, in* LEGAL PLURALISM AND THE COLONIAL LEGACY 131, 149 (Kayleen M. Hazlehurst ed., 1995).

182. Rivera, *supra* note 175, at 263.

183. *Id.* at 261.

184. Loomis, *supra* note 153, at 360.

185. Rivera, *supra* note 175, at 265.

186. *Id.* at 264.

of the community.[187] In some Aboriginal nations, it is unethical to say angry things about someone in his or her presence, or to complain about the past.[188] Will her community be able to protect her now, when they have failed thus far? Therefore, the values of the circle can actually prevent the victim from complaining.

Shame functions paradoxically within the sentencing circle. Traditional Aboriginal dispute resolution depends upon shame (among other things) to rein the offender in. The chastisement of his peers and the knowledge that he has disgraced his family provide motivation for change. Families and community members must be fully aware of the offending behavior so they can exercise the appropriate pressure. However, the victim may not be ready psychologically to relive the abuse in the circle, especially when support for domestic violence victims is so minimal.

In Aboriginal communities where family violence has become a lifestyle, shame may also be visited upon the victim. Thus, a significant problem in addressing this issue is the change in traditional values. While respect for women may be a traditional aboriginal value, a victim's stoic resilience has become of greater value than speaking out.[189] Domestic violence is no longer an aberration in Aboriginal communities, but the norm.[190] Aboriginal women have responded to this epidemic by accepting violence as part of family life. Some community members may feel she provoked the abuse, others will feel she should have tolerated it longer. This promotes a culture where violence is accepted and the victim is more deserving of shame than the offender. There are those who will blame the victim simply for coming forward. The victim may be ostracized by her community.[191] Thus, the victim's faith in shaming the offender is at odds with her desire for confidentiality.

Worst of all, external control over Aboriginal peoples can have the greatest impact on the victim's decisions. The Aboriginal woman is already battling against the larger mainstream perception about Aboriginal men and violence. Because she has confirmed the stereotype in coming forward about the abuse, she may attempt to reduce the damage by holding back information. Even while she feels angry towards her abuser, she may feel obligated to exhibit forgiveness and

187. *Id.* at 262.

188. Rupert Ross, *Leaving Our White Eyes Behind: The Sentencing of Native Accused, in* ABORIGINAL PEOPLES AND CANADIAN CRIMINAL JUSTICE 145, 148-49 (R.A. Silverman et al. eds., 1994).

189. *Victim Impact Statements and the Role of Inuit Women in the NWT Justice System, in* INUIT WOMEN AND JUSTICE: PROGRESS REPORT NUMBER ONE 9, 15 (1995).

190. LaPrairie suggests, "The disproportionate levels of violence might suggest that interpersonal violence has become normative behaviour." Carol La Prairie, *Dimensions of Aboriginal Over-representation, in* CANADIAN CORRECTIONAL INSTITUTIONS AND IMPLICATIONS FOR CRIME PREVENTION, LEGAL PLURALISM AND THE COLONIAL LEGACY 159, 178.

191. Ross, *supra* note 188, at 158.

understanding in order to demonstrate their importance in the Circle and in Aboriginal life. The sentencing circle thus encourages the Aboriginal woman, once again, to place her community's interests ahead of her own. Even if, as a woman, she desires protection, as an Aboriginal person, she is expected to reconcile with the offender. Her acquiescence is driven by a hope for long term gain and her own values, which include sacrifice for the good of the group and an understanding of collective rights.[192] The visible endorsement of the circle by the reserve's politically powerful[193] is impossible to ignore. Crnkovich reports from *The Queen v. Naapaluk*:

> Not only did the victim have a history of being silenced by her husband, but the sentencing circle may also have imposed an even greater silence. This circle was the first of its kind, being supported by the Judge and Inuit leaders. If she spoke out about further abuses or her dislike of this sentence, what would she be saying about this process everyone supported? Now, in addition to fearing her husband's retribution, she may fear that by speaking out she would be speaking out against the community. . .[Afterwards] [t]he victim may be afraid to admit she is being beaten because such an admission, she may fear, may be interpreted as a failure of this process. She may hold herself to blame and once again continue to suffer in silence.[194]

Aware of the political importance of sentencing circles, the Aboriginal woman, desirous of self government, may sacrifice her own needs to achieve a non custodial disposition. She may not provide details as to the full extent of the violence to provide the community greater flexibility in fashioning a sentence.[195] In the end, the interests of the Aboriginal community are pitted against the interests of the battered Aboriginal woman.[196]

The sentencing circle attempts to provide for victim input and support, as well as community input and support. However, in prac-

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192. Jennie Jack of the Assembly of First Nations suggests that the collective role is the more appropriate one for Aboriginal women, quoted in Jackson, *supra* note 28, at 188. However, Emma La Roque suggests that the popularity of the collectivity model is really a reflection of the continuing colonization of Aboriginal peoples, because it is a function of the requirement that Aboriginal peoples be completely different in order to achieve their rights. See La Roque, *supra* note 37, at 86.

193. As noted in Part I, the politically powerful are generally male dominated band councils. Carol La Prairie raises the concern that local justice systems not become extensions of the local political structures. See La Prairie, *Self-Government and Criminal Justice, supra* note 149, at 117. Even within small aboriginal communities, there are power hierarchies based on clan or family affiliation. This results in the views of some residents weighing more heavily in decisions regarding the administration of justice, See C.T. Griffiths et al., *Addressing Aboriginal Crime and Victimization in Canada, supra* note 181, at 181.

194. Crnkovich, *supra* note 119, at 24.

195. La Roque states, "Leniency is seen as good for everybody," LA ROQUE, *supra* note 37, at 80.

196. Fischer, *supra* note 28, at n.176.

tice, the circle focuses only on how the effects of colonization have created the offender, and fails to consider the effect of colonization on the status of Aboriginal women. Without recognizing how time has changed the position of Aboriginal women, the circle continues to fail them as victims. As La Roque says, "[Justice officials] are drawing on Native traditions as if they exist in whole for models which on the one hand support offenders and [on the other] undermine victims."[197] To be truly beneficial, a sentencing circle must first take measures to counter the colonial violence that has contributed to the problem. A return simply to golden age methodology, without an understanding and correction of the victim's modern day subordination, will not successfully address domestic violence issues.

Sentencing circles as they are currently practiced do nothing to overcome the effect of colonial policies which diminished and dishonored Aboriginal women. As victims of colonial policies and as victims of domestic violence, these Aboriginal women come to the circle dually disadvantaged and dually discriminated against. Consequently, it is impossible for them to assume their rightful place in the circle as equals, even though the circle operates from the assumption that all participants are equal simply by sitting on the same level and saying they are equal. Unfortunately, although the female victim sits on the same level, and in the same circle as the offender, her position is much weaker. Even if a support group accompanies her to the circle, the singular focus on the offender and his needs robs her of support, simply because no one is paying attention to her victimization.

PART IV: THE RESULTING PREDICAMENT – WHERE CAN VICTIMS TURN?

Though many urge a return to traditional ways as the proper path to return women to their revered roles, the current implementation of the sentencing circle fails to even support women, much less honor them. Without correcting the power discrepancy that exists between Aboriginal women and Aboriginal men *before* they sit in the circle, the circle is unbalanced because it was originally designed for use where participants are equally powerful. Unless something is done to buoy up the debilitated status of Aboriginal women, so that it more closely matches the status of Aboriginal men, the circle will run lopsided, and Aboriginal victims of domestic violence will gain no benefit from it. Given the problems in the current implementation of the sentencing circle for domestic violence cases, what has been the effect thus far?

Preliminary figures continue to support use of the sentencing circle as a way of reaching and rehabilitating Aboriginal offenders, demonstrating dramatic improvement.[198] Furthermore, the Criminal

197. La Roque, *supra* note 37, at 89.

198. A reduction in the crime rate has been reported in the Yukon since the inception of sentencing circles. STUART, *supra* note 123; In 1993, Dutil J. reported that the crime rate in the Yukon had fallen approximately 35% in less than two years

Code and several members of the judiciary appear to endorse sentencing circle use.[199] It may be that the difficulties with sentencing circle use for domestic violence cases are merely growing pains that must be endured. Over time, these initiatives may lead to a restored balance between men and women within the community more akin to that of the Golden Age.[200] However, there are no published studies examining the effect of sentencing circle use in domestic violence cases on recidivism rates for domestic violence offenders. Further, there are no published studies on the effects of sentencing circle use in domestic violence cases on rates of family violence within the community.[201] Therefore, it is difficult to assess whether the problematic engagement of domestic violence victims within the circle is one that will lessen with time and experience.

Like those who warn against the use of mediation in family violence cases (court ordered and otherwise), critics of sentencing circle use in family violence cases see inherent difficulty in asking these victims to come to a compromise or consensus with their abusers,[202] especially because spousal abuse is so entrenched within the Aboriginal community. In addition, the dual oppression of race and gender is not always a factor in forced mediation cases, and it is unlikely any other circumstance would bring into play the complex strategies surrounding Aboriginal self-government. While these factors are not readily found in the literature, several courts have recognized that the current implementation of sentencing circles is highly problematic for use with spousal assault cases.[203] Rather than adapt the sentencing circle to better address the needs of Aboriginal women in these cases, the response to this dilemma has been to discourage sentencing circle use in spousal assault cases.[204] Sentencing circle jurisprudence, though still in its infancy, has guidelines which tend to retreat from circle use in domestic violence cases.[205]

The Queen v. Tiivi, Alaku, Kangiqsujuac 640-000065-939 (Quebec Prov. Ct. October 19, 1993).

199. C.J. BAYDA, *The Theory and Practice of Sentencing: Are They on the Same Wavelength,* DAWN OR DUSK IN SENTENCING, April 24, 1997, Montreal Quebec, at 12.

200. *But see,* Jackson, *supra* note 28, at 194, where the author argues that "the harm done to customary Aboriginal ways of being is already too great for a return to spiritual balance without the imposition of structure and process. . . . What meaning does a healing circle have to someone born in a city where concrete, and concrete poverty, provide the surround?"

201. This being said, it is certainly possible that the use of sentencing circles for other offenses, and the close community attention and counseling which generally follows, reduces the incidence of violence within the home in Aboriginal communities. This may extend beyond the individual offender to the surrounding community as a consequence of community empowerment and increased funding for rehabilitative efforts.

202. Fischer, *supra* note 28, at n.187.

203. See The Queen v. Joseyounen, 6 W.W.R. 438 (1995).

204. *Id.*

205. *Id.*

A retreat creates several unfortunate consequences. First, it reduces opportunities to air the problem of domestic violence within the community. The sentencing circle process provides an opportunity and forum for the victim to seek community support. While domestic violence has become the commonplace plague of Aboriginal society, it is not generally spoken of in terms of a community problem; it remains a private affair within the family. The sentencing circle provides an organized forum in which community awareness is raised, and community participation is elicited. Without community participation in battling spousal assault, the problem is even more likely to be driven further underground.

Second, denying the sentencing circle option for domestic violence cases denies abusers the opportunity for community focused and involved rehabilitation. Government funding to address the needs of families in crises is usually sorely lacking. Furthermore, most communities lack the staff and physical resources to deliver services for victims, let alone offenders. In many communities, sentencing circles may represent the only path to government funded, long term, culturally appropriate counseling.

Third, denying the sentencing circle option in domestic violence cases further isolates women from their communities and the justice system. Without viable alternatives, the Aboriginal victim is left in a terrible position. If she turns, or returns, as the case may be, to the mainstream system for assistance, it is unlikely to solve the problem with any greater efficacy than it has in the past. Even worse, in the wake of reduced and non-custodial sentences for other offenses via sentencing circles, she may face even greater ostracism if her abuser is incarcerated. Community members may expect her to forego any prosecution that returns an Aboriginal male to the victimization of mainstream sentencing procedures (which generally result in disproportionately high rates of incarceration).

In comparison to sentencing circle dispositions, any mainstream disposition (especially incarceration) is likely to be seen as "two steps back" in the struggle to establish Aboriginal self-government. Once again, the victim is urged to put aside her own needs for the good of her community. As other kinds of victims experience healing and reconciliation through the sentencing circle process, her injuries are perceived as unimportant and dispensable in the larger scheme of things. Communities focus on making a success of sentencing circles for cases other than domestic violence. However, domestic abuse cases become simply too complicated to address at this delicate stage. Faced with the social dangers of proceeding through the mainstream process, and aware that community resolutions, like the sentencing circle, are not available, the victim is left with no recourse but to suffer the blows in silence.

PART V: PROPOSALS AND PERSPECTIVE

If sentencing circles are to be effective in combating domestic violence and meeting the needs of Aboriginal victims, they need modification. The only way to return the current model to pre-contact efficacy is to restore those conditions which were vital to the success of the circle, prior to European contact. In other words, we must counteract the subordinate position of Aboriginal women *before* they arrive at the circle. There are several alternatives available. First, women must be returned to their honored place prior to justice system involvement. Such measures include education about the role and status of women in traditional Aboriginal society, specific measures to restore the traditional role of Aboriginal women in tribal government, spiritual events and rituals, and within the family. These could be permissive, but mandatory requirements for equal representation on band councils are more likely to propel immediate change.

Second are measures wholly independent from the sentencing circle. Perhaps initiating special services within Aboriginal communities, to deal specifically with domestic violence issues, would help victims to find their voices and break free of the battering cycle. Alternatively, women could adopt the circle model for their own purposes, apart from the criminal justice system, creating separate healing circles for use solely in battering relationships, or a victim's support circle, held on the same principles, conducted prior to the sentencing circle. Either of these might help to offset the lack of support the victim feels in the sentencing circle. Similarly, a campaign to inform community members about the various factors which make sentencing circles in domestic violence cases problematic, may serve to generate empathy and understanding for the victim.

Finally, a third option is to alter the structure of the sentencing circle itself. For instance, the format could be changed so leaders are precluded from offering opinions before the victim has made her needs clear. Another approach would be to change the focus of the sentencing circle to deem it victim centered. This alteration would alleviate concerns stemming from the sentencing circle's hybridity. However, both these modifications represent a departure from a traditional healing circle, founded upon the equal participation of *all* members and focused on *community* restoration.

These suggestions bring to the fore the larger issues presented by sentencing circle use. How much deviation from traditional practice can be tolerated and still be grounded in a specific culture? And if deviation from traditional practice is necessary to best serve the disputants and the community, are culturally specific methods valid for adjudication at all? If culturally specific methods are not appropriate for all disputants of a specific culture, then on what basis should they be applied? A review of sentencing circle use in domestic violence cases makes it clear that culturally specific methods are not appropriate in

all circumstances. Given these results, what can be said about culturally specific adjudication in general?

In addressing this question, it is essential to distinguish between sentencing circles and other modes of culturally sensitive adjudication, like the cultural defense. While there is no formally recognized "cultural defense," the term has come to stand for the various stratagems used to put the cultural beliefs of the defendant at issue in criminal cases.[206] This defense consists of asserting that the defendant should not be held culpable because, under his cultural norms, the act is not blameworthy or because his culture colored his perception of the situation such that, had his perception been true, the act would not have been blameworthy.[207] The cultural defense seeks to justify or excuse certain behaviors because they are culturally predicated. That is, the cultural defense seeks to exonerate the defendant who commits an act because it is appropriate in his cultural frame of reference[208] or because his culture influenced his perception of the situation such that he lacked the *mens rea* to commit the offence.[209] In simpler terms, the cultural defense is invoked when a defendant is being punished because he is 'too deep' in his culture and does not think like members of the majority. In the context of battering, a cultural defense is to assert, "I beat my spouse because in my culture it is acceptable to beat my wife, and I had a cultural responsibility to do so as moral guardian of the family."[210] Conversely, sentencing circles are applied for precisely the opposite reason. Aboriginal peoples are punished for being too far from their cultural traditions. That is, the sentencing circle is applied to rescue the offender from his unbearable and painful separation from his culture; it re-introduces the offender to his cultural traditions. An assertion in keeping with the goals of sentencing circles is "I beat my spouse because my culture has been stripped from me, but I wish to reconnect with my traditions." While an in depth examination is not possible herein,[211] it is important to

206. *See for example,* the case of *People v. Kimura,* No. A.091133 (Super. Ct. L.A. County Apr. 24, 1985), wherein a mother takes her two infant children into the sea with her in an effort to commit *oyaku shinju,* parent child suicide, in response to learning of her husband's infidelity.

207. *Id.*

208. *Id.*

209. *See for example People v. Moua,* No. 315972-0 (Fresno Superior Ct. Feb. 7, 1985) wherein a young Hmong man in attempting the ritual of *zij poj niam,* marriage by capture, has intercourse with his chosen bride believing her protests to be merely feigned in accordance with the customary indications of chastity.

210. Battered women's advocates state that this kind of assertion is sometimes made in court on behalf of defendants who come from a strong patriarchal culture.

211. For a deeper discussion of the cultural defense and its workings, *see* Chiu, *supra* note 10. For more information regarding Navajo Peacemaking, a similar approach to the sentencing circle among the Navajo Nation of the United States, specifically in the context of domestic violence cases, *see generally,* Donna Coker, *Enhancing Autonomy for Battered Women: Lessons From Navajo Peacemaking,* 47 UCLA L. REV. 1 (1999).

note that these competing models (punishment for being 'too deep' in culture and punishment for being 'too far' from culture) clearly force Aboriginals to walk a fine line to be socially accepted.

Obviously, the simultaneous presence of these opposing models for minority groups (in Canada and the United States) provoke vexing questions about the relationship between culture and adjudication. What does an examination of sentencing circles in the context of domestic violence cases teach about such questions?

First, the examination demonstrates that questioning the appropriateness of culturally specific adjudication is a valid enterprise. The evidence shows that sentencing circles have proven successful in some kinds of cases[212] and there are political advantages to sentencing circle use. However, they are not suited to all cases. A closer examination of culturally specific adjudication is, therefore, in order.

Second, there is a realization that culturally specific adjudication is complex. It involves more than cultural sensitivity. There are competing interests, and political agendas, in addition to the stated goals of resolving the dispute and stopping the behavior. There is tremendous diversity within the community, which may render cultural values antagonistic to the needs and desires of some community members. In such cases, it may be impossible to accurately represent the needs of community members in a culturally specific process. Therefore, culturally specific adjudication based solely on the cultural identity of the offender and victim, without considering underlying interests, is unwise.

Third, *if* there is a committment to culturally relative adjudication, as the sensitive and respectful approach in a heterogeneous and multicultural society, it must be taken seriously. Equitable application of culturally specific adjudication requires a holistic appreciation — historical, political and social — of underpinnings, operation and effects. Anything less will result in failed processes and, subsequently, inconsistent application.

Finally, understanding why today's sentencing circle is inappropriate for domestic violence cases should help elucidate the reasons for its success in other cases. Understanding the preconditions for success should lead to greater success.

PART VI: CONCLUSION

The future direction of Canadian sentencing circles remains uncertain. It is hoped they will effectively reduce the disproportionate involvement of Aboriginal peoples in the criminal justice system and aid in healing Aboriginal communities across the country. At present,

212. Judge Barry Stuart reported a crime reduction of 35% in his Yukon community within 2 years of sentencing circle implementation. Furthermore, the use of restorative justice programs *not* specific to Aboriginal peoples has demonstrated a 13-22% reduction in recidivism rates. BONTA, *supra* note 113, at 26.

they fall short of healing the victims of domestic violence. Some recommend a departure from the circle in domestic violence cases. Karla Fischer argues, "A judicial proceeding, with its focus on protection of individual rights, is necessary in the battering context."[213] Marcia Hoyle also suggests, "It may be that First Nations communities would be willing to adopt a court model for certain categories of dispute . . . for example in instances of family violence."[214] However, John Hylton, Human Justice and Public Policy advisor, reminds us there is "[a]mple evidence to suggest [that solutions to the social problems of Aboriginal people] lie in the direction of programs run by Aboriginal people for themselves."[215]

Like Hylton, I believe solutions to these problems lie in Aboriginal answers. However, the mere introduction of the sentencing circle mechanism, without an attempt to recreate the strong egalitarian society that was once at its base, will not solve the issue of domestic violence in Aboriginal communities. Traditional mechanisms require modification[216] before they can yield the results of pre-contact times in this post-colonial era. Regardless of the specifics, significant effort must be directed to offset the power imbalance to address the needs of Aboriginal victims of domestic violence.

This study of sentencing circle use in domestic violence cases is a window to better understanding the operation and potential of culturally specific adjudication. In addressing such matters, it is vital to listen to the women themselves, by first restoring their voice. Elsie Redbird believes "the cycle of violence . . . can be broken by rehonouring Indian women's roles and knowledge."[217] If this is to happen, it must happen first, and it can only come from placing women at the center.

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213. Fischer, *supra* note 28, at n.188.

214. Hoyle, *supra* note 130, at 158.

215. JOHN H. HYLTON, *The Case for Aboriginal Self-Government: A Social Policy Perspective, in* ABORIGINAL SELF-GOVERNMENT IN CANADA: CURRENT TRENDS AND ISSUES 34, 45 (John H. Hylton ed., 1994).

216. "Using customary practices, *modified to reflect contemporary realities in Aboriginal communities,* can yield significant opportunities for communities to exercise more effective and more culturally appropriate forms of social control." La Roque, *supra* note 37, at 111 (emphasis added).

217. Redbird, *supra* note 40, at 134.