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MAKING THE CIRCLE STRONGER: AN EFFORT TO BUTTRESS ABORIGINAL USE OF RESTORATIVE JUSTICE IN CANADA AGAINST RECENT CRITICISMS

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The reliance of the Canadian criminal justice system on adversarial procedures and incarceration is not very effective or productive when dealing with Aboriginal crime. Restorative justice is often presented as a more constructive way of dealing with Aboriginal crime, and as a solution to Aboriginal over-incarceration. There have however been recent criticisms made against restorative justice that call into question its effectiveness as a medium of social control. These criticisms have the potential to enter policy discourses on justice and frustrate Aboriginal aspirations regarding the use of restorative justice. Restorative justice, notwithstanding the criticisms, still has the potential to provide more constructive and effective responses to Aboriginal crime than adversarial and punitive approaches. The criticisms actually provide valuable insights to Aboriginal peoples. They can use those criticisms to design their restorative justice projects to address those criticisms and avoid the negative consequences predicted by those criticisms. Restorative justice projects will be better and more likely to succeed for it. They may also be more likely to win needed political and financial support as well from Canadian governments. Those studies that do indicate suggest may justify not only a certain optimism for Aboriginal use of restorative justice, but perhaps should motivate Canadian governments to seriously consider a paradigm shift, in terms of spending priorities and policy objectives, when it comes to Aboriginal crime.

1. INTRODUCTION

The object of this article is to sustain that restorative justice can still be an effective way to address Aboriginal crime notwithstanding recent critiques that have been made of restorative justice. The article will take the position that despite those criticisms, restorative justice still holds the promise to deal with Aboriginal crime more constructively and effectively. The criticisms actually provide valuable insights to what can go wrong with the practice of restorative justice. These insights can be beneficial to Aboriginal peoples in Canada. Aboriginal peoples can design and structure justice projects in such a way as to address the criticisms. They can strive to avoid the negative consequences of those criticisms. Aboriginal restorative justice projects can ultimately be better and more successful for such an endeavour. Projects that demonstrate a deliberate effort to address the criticisms may also be more likely to win needed political and financial support from Canadian governments as well.

Part II of the article briefly describes the rationale behind the use of incarceration and adversarial procedures in the Canadian justice system. Part III will briefly describe
how restorative justice applies to criminal conflicts, and how it differs from the traditional approaches to crime control. Part IV describes the relevance of restorative justice to contemporary Aboriginal peoples. Colonialism has left behind a terrible legacy for Aboriginal peoples in the form of low self-esteem, loss of value systems, and enduring poverty. This legacy has resulted in increased crime by Aboriginal peoples, and drastic over-incarceration of Aboriginal peoples. Restorative justice methods are touted as a solution by dealing with the root causes of Aboriginal crime, rehabilitating Aboriginal offenders, and healing relationships among Aboriginal peoples. Part V describes critiques made against traditional Western methods of justice. This serves the purpose of explaining in detail why adversarial procedures and reliance on incarceration do not deal effectively with Aboriginal crime, and how restorative justice promises to do better. Part VI describes in detail the criticisms that have been made against restorative justice. Examples of where the identified problems have actually occurred in practice among Aboriginal communities will be provided where appropriate. Part VII describes the potential threats these criticisms pose for Aboriginal aspirations for the use of restorative justice. They can enter the policy discourses on justice and shape policies that refuse to further accommodate Aboriginal use of restorative justice, or even roll back existing accommodations. Part VIII describes how Aboriginal peoples can respond to such a threat. They can actually gain valuable insights from the criticisms, and use those insights to shape their justice projects so as to further the chances for success. The projects may also be more appealing to Canadian governments if thoughtful efforts to address the criticisms are demonstrated. If there remains cause for optimism, this may still justify a called for shift in paradigm concerning how Aboriginal crime is dealt, both in terms of spending priorities and policy objectives. The discussion now begins with an explanation of traditional methods of justice in Canada.

II. TRADITIONAL WESTERN JUSTICE

The Canadian criminal justice system has at least two particular emphases. One is reliance upon punitive sanctions such as incarceration to address criminal behaviour. To be fair, incarceration is often reserved for more serious offences or for particularly recidivist offenders. The justice system also employs other measures such as probation and fines. Yet even these sanctions are classified as punishments.\(^1\) It should be noted at the outset that there is more than one justification for assessing punishment against an offender, and they are not necessarily consistent with each other. One justification is that by inflicting punishment upon a criminal, both that offender, and also other members of society are deterred from committing that crime. Another justification involves what is often referred to as the Just Desserts Theory. By committing a crime, an offender has inflicted harm upon another, and so pain must be inflicted upon that offender in proportion to the moral gravity of his or her crime. It is a retributive justification. Both of these objectives can be seen in s. 718 and s. 718.1 of the Canadian \textit{Criminal Code}\(^2\), which reads:

\(^{1}\) \textit{R. v. Wigglesworth}, [1987] 2 S.C.R. 541, where the Supreme Court of Canada concluded that fines are punishments, and therefore necessitates legal rights protections under the \textit{Charter} just like incarceration.

\(^{2}\) R.S.C. 1985, c. 46
718. The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

a) to denounce unlawful conduct;

b) to deter the offender and others from committing offences;

c) to separate offenders from society, where necessary;

d) to assist in rehabilitating offenders;

e) to provide reparations for harm done to the victim or the community; and

f) to promote a sense of responsibility in offenders, and acknowledgement of the harms done to victims and the community;

718.1 A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

One can see in s. 718(b) the utilitarian objective behind punishment. One can also see in s. 718(a) and s. 718.1 reflections of Just Deserts theories. The Canadian sentencing regime uses both justifications without stating a clear preference. In s. 718(c), there can be seen a third justification of punishment specific to incarceration, the incapacitation of the offender. By forcibly confining the offender in prison, the public is protected against further harms from the offender. The Canadian justice system responds to criminal behaviour with punitive sanctions that can be motivated by a number of objectives, which are not necessarily consistent with each other.

Another emphasis of the justice system is its reliance upon adversarial procedures. These procedures rely upon a neutral and impartial judge to decide a dispute. One party to a dispute competes with the other party through a variety of means such as giving evidence in support of the party’s case, cross-examining witnesses adverse to the party, and making legal and factual arguments in an effort to convince the judge that its position is the correct one. In the context of criminal justice, the sides to a dispute are the criminal accused and the state. The accused will usually be represented by a defence lawyer, while the state will usually be represented by a public prosecutor. Once both parties have had a fair chance to present their cases, the judge then renders a decision based upon the evidence presented and the arguments that have been made. It is now time to explain restorative justice as it applies to criminal conflicts.

III. RESTORATIVE JUSTICE EXPLAINED

Restorative justice as a concept does not readily lend itself to a standard or universal definition. It often has different understandings for different people. Kent Roach has noted that there has been no shortage of efforts to define restorative justice. Nonetheless, what will follow is an attempt to summarize what are commonly seen as essential features of restorative justice as applied to criminal justice. Unlike the adversarial system where a judge imposes a final resolution (vertical decision making), restorative justice envisions a horizontal process where persons with a stake in a conflict craft the resolution themselves by agreement. ‘Persons with a stake in a conflict’ is not necessarily restricted to the parties to a legal matter should the dispute proceed in adversarial court. It can include a wider circle of persons who have been affected, even

indirectly, by the conflict. The ideal is for the persons involved to reach a consensus on resolving the conflict.

Tied in with this horizontal emphasis is an aspect of restorative justice that is specific to criminal justice. In the adversarial justice system, the interests of the victim are often collapsed into the state’s interests in prosecuting crime. It is the state, through a prosecution lawyer, that speaks to the harm done to the victim before an adversarial court. In restorative justice the victim is given an opportunity to participate directly in the process. Ideally, a resolution to the conflict that is crafted by a restorative process will have the victim’s agreement, and will satisfactorily address the victim’s interests.

As previously mentioned, the Canadian justice system often emphasizes punishing an accused through measures such as fines and incarceration. Restorative justice, as applied to conflicts generated by criminal acts, frequently envisions non-custodial resolutions as an alternative to incarceration. The emphasis is less on deterrence, or retribution, or incapacitation by forcible separation from society at large. It is more on repairing relationships between those affected by the conflict. It strives to further harmony among those affected by the conflict. This includes the re-integration of the offender into the community as he corrects his behaviour, and strengthens his relationships with those around him and those he has affected with his behaviour. Such resolutions often include performing community service, making restitution to the victim, and participating in counseling programs to address offender problems such as substance abuse or anger management.

Another aspect of restorative justice specific to dealing with crime is its holistic emphasis. Punitive models of justice are said to focus on the actions of an offender, and then on what will be the appropriate punishment for those actions. Restorative justice emphasizes exploring the underlying reasons for an offender’s behaviour, whether it is alcoholism, or a troubled childhood, or problems within the offender’s community itself. Discovering the underlying causes of the criminal behaviour, and then searching for ways to deal with it, will form the basis for many of the discussions that occur between participants in a restorative process. It is now time to explain why restorative justice is relevant to contemporary Aboriginal peoples.

IV. RELEVANCE TO ABORIGINAL PEOPLES

An undeniable consequence of Canada’s widespread reliance is the incarceration of Aboriginal people far out of proportion to the rest of the population. Michael Jackson describes the situation in Canada in this way:

Statistics about crime are often not well understood by the public and are subject to variable interpretation by the public by the experts. In the case of the statistics regarding the impact of the criminal justice system on native people the statistics are so stark and so appalling that the magnitude of the problem can neither be misunderstood nor interpreted away. Native people come into contact with Canada’s correctional system in numbers grossly disproportionate to their representation in the community. More than any other group in Canada they are subject the damaging impacts of the criminal justice system’s heaviest sanctions. Government figures – which reflect different definitions of “native” and which probably underestimate the number of

4 For a succinct description of restorative justice principles in the context of criminal justice, see Barry Stuart, Building Community Justice Partnerships: Community Peacemaking Circles (Ottawa: Department of Justice, Canada, 1997) at 4-6.
prisoners who consider themselves native – show that almost 10% of the federal penitentiary population is native (including about 13% of the federal women’s prisoner population) compared to about 2% of the population nationally. In the west and northern parts of Canada where there are relatively high concentrations of native communities, the over-representation is more dramatic. In the Prairie region, natives make up about 5% of the total population but 32% of the penitentiary population and in the Pacific region native prisoners constitute about 12% of the penitentiary population while less than 5% of the region’s general population is of native ancestry. ...

Bad as this situation is within the federal system, it is even worse in a number of Western provincial correctional systems. In B.C. and Alberta, native people, representing 3-5% of the provinces’ population, constitute 16% to 17% of the admissions to prison. In Manitoba and Saskatchewan native people, representing 6-7% of the population, constitute 46% and 60% of prison populations.  

Carol LaPrairie provides more recent statistics: There is virtually no over-representation of Aboriginal people in provincial correctional institutions in Prince Edward Island and Quebec, but over-representation in Nova Scotia and New Brunswick is 1/5 to two times higher than would be expected given the size of their respective provincial Aboriginal populations. In B.C., this disproportionality is 5 times, in Alberta 9 times, in Saskatchewan 10 times, in Ontario 9 times, and, in Manitoba, it is seven times higher than expected.

... An examination of change over time reveals that Aboriginal over-representation within the Federal prison population has grown from 11% in 1991/92 to 17% in 1998/99, and the increase has occurred primarily in the Prairie provinces. 6

The use of Aboriginal justice practices that resemble restorative justice is frequently touted as a solution to this problem. The concept is that Aboriginal communities use their traditional justice practices that resemble restorative justice to deal with criminal behaviour in a more conciliatory fashion that heals the offender, and others affected by the crime. The use of traditional processes deals with the underlying causes of the offender’s behaviour and restores community harmony. This typically contemplates the use of community-based resolutions as an alternative to incarcerating the offender. The ideal is to deal with Aboriginal offenders in a manner that is more effective, more in keeping with Indigenous traditions, and thereby alleviate the problem of over-incarceration by making the use of imprisonment in large part unnecessary. 7

The Royal Commission on Aboriginal peoples, in exploring a solution, states:

It is Aboriginal law, with Aboriginal law and through Aboriginal law that Aboriginal people aspire to regain control over their lives and communities. The establishment of systems of Aboriginal justice is a necessary part of throwing off the suffocating mantle of a legal system imposed through colonialism. 8

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8 Royal Commission on Aboriginal Peoples, Bridging the Cultural Divide: a report on Aboriginal people and criminal justice in Canada (Ottawa: Minister of Supply and Services Canada, 1996) at 58.
The Commission then draws upon the writing of Justice Murray Sinclair to build a dichotomy of Aboriginal/restorative justice vs. Western punitive justice. Among the passages from Justice Sinclair that they provide, these particular excerpts stand out:

Aboriginal cultures approach problems of deviance and non-conformity in a non-judgemental manner, with strong preferences for non-interference, reconciliation and restitution. The principle of non-interference is consistent with the importance Aboriginal peoples place on the autonomy and freedom of the individual, and the avoidance of relationship-destroying confrontations.

Rehabilitation is not a primary aim of the Euro-Canadian justice system when dealing with an offender, with the possible exception of very young offenders. It is only one of several factors taken into account by sentencing judges, and it is often undermined by lack of public support. Institutionalized support is rarely and only minimally offered to victims. Restitution is ordered generally as a form of financial compensation and usually only if the offender has the financial resources to do so. Thus, retribution is often the primary thrust of action taken against deviance.

Retribution as an end in itself and as an aim of society is a meaningless notion in an Aboriginal value system that emphasizes reconciliation of the offender with the community and restitution for the victim.9

The Commission then states:

Based on the evidence we have considered, it is our view that the contemporary expression of Aboriginal concepts and processes of justice are likely to be more effective than the existing non-Aboriginal justice system, both in responding to the wounds that colonialism has inflicted, which are evident in a cycle of disruptive and destructive behaviour, and in meeting the challenges of maintaining peace and security in a changing world.10

This article will now provide an overview of criticisms that have been made against both retributive approaches in the Canadian justice system, and restorative justice. There are a number of reasons for this. The criticisms made against the retributive approaches highlight why reliance upon incarceration has not been very productive in dealing with Aboriginal crime and why restorative justice may provide a better alternative. However, there have also been recent criticisms of restorative justice that call into question its effectiveness as a means of social control. It is very important for Aboriginal communities to take notice of and deal with these criticisms since they have the potential to shape policies that contain and restrict Aboriginal aspirations vis-à-vis restorative justice. How these criticisms apply to and have manifested among Aboriginal peoples will be described where appropriate. The discussion commences with criticisms made against retributive approaches to justice.

10 Bridging the Cultural Divide, ibid. at 66.
V. CRITICISMS OF WESTERN METHODS OF JUSTICE

A. Deterrence Unrealized

Restorative justice proponents claim that faith in the threat of imprisonment to deter criminal behaviour is often misguided. Norval Morris and David Rothman state, “Research into the use of imprisonment over time and in different countries has failed to demonstrate any positive correlation between increasing the rate of imprisonment and reducing the rate of crime.”

David Cayley also has this to say:

"In fact, contrary to what common sense might assume, levels of crime and levels of imprisonment show no regular or predictable relationship. Crime has certainly gone up in the countries of the disbanded Soviet Empire; but, in both Canada and the United States, it has gone down for a number of years without any abatement in the growth of prison population – as a recent headline put it, “Crime Keeps on Falling but Prisons Keep on Filling.”

Justice E.D. Bayda of the Saskatchewan Court of Appeal has also suggested that there are contexts outside the offence itself whereby jail has no deterrent value for certain people. He phrases it this way:

The offender has no material goods to lose, no job to lose and no hope of ever having one, no self-worth to lose, no dignity to lose, no honour to lose. My goodness, he has nothing to lose. How am I supposed to persuade him that he has something to lose by committing another criminal offence? Will sending him to jail by some magical process persuade him that he has something to lose when in fact he has nothing to lose? Will sending him to jail give him material goods, a job, self-worth, dignity, and honour so that in the end he has something to lose?

Furthermore we presume that this offender, like most offenders, acted freely when he chose to do what he did. But is that a fair presumption? Or is it fairer to assume that he did, more or less, what he was socialized to do? Does one deter that sort of offender by throwing him into jail? Does he respond to jail in much the same way as someone raised and living in the mainstream of society? A businessman for example?"

Jo-Anne Fisk and Betty Patrick also suggest that few people who act out in a moment of enflamed passion will be deterred by the prospect of jail. Consider now the continuity between Jackson’s and LaPrairie’s articles. It is readily apparent that deterrence has practically no utility when it comes to Aboriginal crime. Aboriginal over-incarceration is just as serious now as it was then. The critics also go on to suggest that jail not only fails to deter, but actually makes things worse.

B. Makes the Offender Worse

The assertion here is that jail actually makes offenders more given to criminal behaviour. Cayley devotes an entire chapter of his book, The Expanding Prison, to this...
theme. Prison life involves harsh conditions which hardens its inhabitants. Placing a convict among other convicted criminals creates conditions whereby a convict has to harden himself and be willing to commit violent acts without hesitation in order to survive and convince the other convicts to leave him alone. There exists within prisons a counter-culture where the conventional rules of society are turned upside down. Defiance, lack of respect for authority and violent behaviour become the norms. Once a person has done enough time, the painful effects of being separated from society wear off. In fact, a convict frequently becomes acculturated and habituated into prison life such that he is unable to adapt to life out of prison and prefers to remain behind bars.\(^{15}\)

This has apparently been true of Aboriginal peoples as well. Ross describes one of his personal conversations this way:

> In that regard, I remember an Aboriginal woman at a justice conference complaining about the use of jail. She felt that jail was a place where offenders only learned to be more defiant of others, more self-centred, short-sighted and untrusting. Further, because they had so many daily decisions taken away from them, she felt that their capacity for responsible decision making was actually diminished, not strengthened.\(^{16}\)

**Judge Heino Lilles stated:**

Jail has shown not to be effective for First Nation people. Every family in Kwanlin Dun [the Yukon] has members who have gone to jail. It carries no stigma and therefore is not a deterrent. Nor is it a "safe place" which encourages disclosure, openness, or healing. The power or authority structures within the jail operate against "openness." An elder noted: "jail doesn't help anyone. A lot of our people could have been healed a long time ago if it weren't for jail. Jail hurts them more and then they come out really bitter. In jail, all they learn is 'hurt and bitter'."\(^{17}\)

A concession that is made to Western justice systems is that jail does incapacitate an offender by forcible separation from society. During the jail term, the public is kept safe from that offender. Mark Carter states rather glibly: "The benefits of incapacitation, such as they are, are the only guarantees."\(^{18}\) The problem is that those terms are usually temporary. Once that offender is released, there exists the danger that the offender has been worsened by the experience of imprisonment. Fiske and Patrick, speaking in the context of small and isolated Aboriginal communities, stress that incarceration can ‘aggravate rather than alleviate’ the social tensions underlying a criminal offence. Their consultations with members of the Lake Babine Nation in British Columbia led them to believe that use of jail for violent or sexual offences can leave community offenders feeling unsafe after the offenders are released.\(^{19}\)

Justice Bayda also states that jails are some of the best recruiting grounds for street gangs. Exposing a convict to other more experienced criminals is more likely to worsen that convict’s propensity for crime.\(^{20}\) This is a phenomenon that is particularly worrisome among Aboriginal peoples. Aboriginal gangs are now in existence in significantly large numbers, and with every expectation of expanding their numbers. Bob Bazin of the Canadian Institute of Strategic Studies estimates that there are twelve

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15 Supra. note 12 at 101-122.
16 Supra note 7 at 74.
19 Supra note 14 at 41.
20 Supra note 13 at 322.
Aboriginal gangs in Saskatchewan with membership exceeding 500.\textsuperscript{21} Edmonton alone also has twelve gangs with membership exceeding 400 as of 2003.\textsuperscript{22} Aboriginal gangs have their genesis in the Canadian penal system. Their origins go back to when Aboriginal inmates formed associations to protect each other from rival inmates, such as biker or white supremacist inmates. The Criminal Intelligence Service of Canada reports:

In Alberta, Aboriginal-based gangs that once existed primarily in prisons for protection purposes have now recognized the financial benefit of trafficking hard drugs (e.g. cocaine) on reserves. Many of the gangs have ready access to weapons, including firearms, that has resulted in a number of incidents of violence.\textsuperscript{23}

Aboriginal gangs continue to have a large presence in the federal penitentiary system. As of 2005 there were an estimated 437 inmates in the federal system with Aboriginal gang affiliation, with only biker gangs having more. With this reality, one has to question how productive it is sending an Aboriginal offender to the federal system with all the likelihood of being recruited into the gangland culture that exists within. The next criticism deals with the why behind relying on incarceration, and suggests that it is misguided.

C. Mere Political Gesture

This criticism builds upon the momentum from stressing the lack of deterrent value that incarceration has. Theodore Blumoff hints that the infliction of punishment within the criminal justice system somehow soothes a human longing for safety. He states it this way:

We also punish in the hope and belief that, at the very least, the efforts we expend trying to prevent those who hurt us in the past from hurting us again are not in vain. Because we perceive the imminent surrounding randomness of violence, though, we can \textit{never} know that these wrongdoers won’t hurt our children – \textit{any} of our children – again. \textit{Never} and \textit{any} are highlighted because, as to \textit{never}, we genuinely hope that our judgment is wrong, although we know that crime will persist.\textsuperscript{24}

Cayley argues that over-reliance on incarceration reflects efforts by policy makers to appeal to this longing. An example he uses is a dramatic shift in British penal policy. Douglas Hurd, a minister in Margaret Thatcher’s government, commenced a policy starting in 1987 that emphasized restraint in the use of prison, and the use of community based alternatives. This led to a dramatic decrease in the British prison population while those of Canada and the United States were increasing just as dramatically. This policy was carried out administratively, well away from the public eye. Things changed after the notorious kidnap and murder of two year old Jamie Bulger by two pre-adolescent boys. The British government ended up repealing its own legislation that reflected Hurd’s reforms, and switched to a tough on crime policy. The British prison population naturally skyrocketed afterwards. Penal policy went from being a quiet administrative

\begin{itemize}
  \item \textsuperscript{21} “Police Tackle Growth of New Gangs Across the Province” \textit{Lloydminster Meridian Booster} (March 23, 2005) A10.
  \item \textsuperscript{22} “Native Gangs on the Rise: 10 Percent of Edmonton Aboriginal Community Struggling” \textit{Daily Herald-Tribune} (April 11, 2003) 8.
  \item \textsuperscript{23} 2003 \textit{Annual Report on Organized Crime in Canada} (Ottawa: Criminal Intelligence Service Canada, 2003) at 5.
  \item \textsuperscript{24} “Justifying Punishment” (2001) 14 Canadian Journal of Law and Jurisprudence 161 at 162.
\end{itemize}
exercise to a highly political commodity.\textsuperscript{25} Cayley also views American ‘get tough on crime’ and ‘war on drugs’ policies in a similar light.\textsuperscript{26} In Cayley’s estimation, such policies represent efforts to score political points with the public by showing that ‘Something has been done’, but without a rational consideration of whether such a policy effectively reduces crime.\textsuperscript{27} Justice Bayda also condemns such policies as ‘politicians pandering to public fears and stereotypes in order to get re-elected.’\textsuperscript{28} The reason why ‘something has been done’ is misguided is because it does not get to the bottom of why crime occurs in the first place, which leads to the next criticism.

\section*{D. The Roots Causes of Crime}

A common criticism made against reliance upon imprisonment is that it frequently fails to address the underlying causes of criminal behaviour. For example, the British Columbia Court of Appeal considered an appeal from a jail term for a twenty year old Wet’suwet’en man who had a prolonged history of property offences. His latest offence would normally have required an increased jail term on the rationale that previous and shorter terms of jail were insufficient to deter him from repeating the same kind of crime. The Court had this to say about such an approach:

\begin{quotation}
In some cases it is unfortunate to think that some of these unfortunate persons can be rehabilitated once the cycle starts by successive and increased periods of imprisonment, especially when, upon release, they are returned to the same environment, lifestyle, frustrations and temptations which contributed to their misfortune in the first place.\textsuperscript{29}
\end{quotation}

Indeed, the Court ended up concluding that what the offender really needed was guidance, supervision, and training so as to become self-sufficient and responsible.\textsuperscript{30} The above excerpt hints strongly at why critics often suggest that restorative justice holds out greater promise than incarceration. Jail fails to address the roots causes behind why an offender commits crime. Restorative justice discussions aspire to flush out those underlying causes, and then explore solutions to dealing with them.\textsuperscript{31} One of Ross’ criticisms against punitive approaches is that they reduce an individual who commits a crime to an abstracted label, ‘the offender’. This in turn leads to labeling the actions as ‘right’ or ‘wrong’. They are judgmental and stigmatizing labels. They can blind justice system participants to the broader context behind the behaviour, the underlying causes behind the behaviour, the relationships of the offender and within the community that are involved with the behaviour, and alternative methods to deal with that behaviour.\textsuperscript{32} Ross stresses the need to need to look beyond the events themselves and explore the broader context, the influences upon an individual’s life that explain why the action was committed.\textsuperscript{33}

\textsuperscript{25} Supra note 12 at 32-35; See also David Garland, \textit{The Culture of Control: Crime and Social Order in Contemporary Society} (Oxford: Oxford University Press, 2001).
\textsuperscript{26} Ibid. at 23-26.
\textsuperscript{27} Ibid. at 3 and 98; See also David Garland, supra note 25.
\textsuperscript{28} Supra note 13 at 326.
\textsuperscript{29} R. v. Mitchell (February 21, 1990) (B.C.C.A.) (unreported) at 7.
\textsuperscript{30} Ibid.
\textsuperscript{31} For example, see Stuart, supra note 4 at 8 & 13.
\textsuperscript{32} Supra note 7 at 101-102.
\textsuperscript{33} Ibid. at 135-136.
This theme has also found its way into Supreme Court of Canada jurisprudence. In *R. v. Gladue*, the Supreme Court interpreted s. 718.2(e) of the *Criminal Code* which reads: ‘… 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.’ The Supreme Court describes the circumstances of Aboriginal offenders as follows:

Years of dislocation and economic development have translated, for many aboriginal peoples, into low incomes, high unemployment, lack of opportunities and options and opportunities, lack or irrelevance of education, substance abuse, loneliness, and community fragmentation. These and other factors contribute to a higher incidence of crime and incarceration.

The Court then took this further by stating that these circumstances will often justify a restorative approach to dealing with crime:

However, most aboriginal traditional conceptions of sentencing place a primary emphasis on the ideals of restorative justice. In general terms, restorative justice may be described as an approach to remedying crime in which it is understood that all things are interrelated and that crime disrupts the harmony which existed prior to its occurrence, or least which is felt should exist. The appropriateness of a particular sanction is largely determined by the needs of the victims, and the community, as well as the offender.

This criticism also takes issue with the just deserts justification of imprisonment. The concept that moral gravity of an action is the primary determinative of a sentence can end up neglecting the broader contexts and underlying causes behind an offence. Jonathan Rudin and Kent Roach state that applying just deserts sentencing rationales to Aboriginal offenders would be fundamentally unjust since it compounds the injustices and social debilitation that have already been inflicted upon Aboriginal peoples by colonialism. The next criticism takes issue with how retributive justice addresses harms suffered by the victim.

E. Does Not Serve the Victim

As previously mentioned, the harm done to the victim is often collapsed into the state’s interest in prosecuting crime. The victim tends not to have direct involvement in the proceedings, while the prosecutor speaks to the public interest before the court. Restorative justice proponents routinely suggest that pursuit of the latter does not necessarily serve or do justice to the former. Cayley expresses it this way:

Assuming the power of prosecution was in criminal cases was one of the ways in which modern states built up their power. Victims, until very recently, were pushed to the side. They had no part in the proceedings. The restoration of their health, dignity, or property was unlikely to figure in

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the sentence. Instead, the state, through its criminal courts, presented itself as the surrogate victim.\textsuperscript{38}

Restorative justice attempts to reverse this by providing a crime victim with the opportunity to speak to his or her fears, concerns, and interests in the course of the process. The ideal is that the victim does so in an atmosphere with a feeling of safety, and in complete honesty. By explicitly incorporating the victim’s dialogue into the process, the victim’s interests and concerns will be addressed by the resolution, the end-product of the restorative process.\textsuperscript{39} As will be explained in more detail below, an advantage that restorative justice claims over traditional Western sentencing practices is an increased capacity to inspire contrition and responsibility in the offender. This is often seen as integrally bound up with the victim’s participation in the restorative process. Cayley expresses it this way:

If contrition is possible for the offender, it is the victim’s suffering above all that is likely to trigger it. If healing and reconciliation are possible for the victim, then it is the humanization that occurs when an offender acknowledges and tries to atone for what he has done that is most likely to bring it about. In this respect each holds the key to the other’s liberation from the continuing thrall of whatever violence has occurred.\textsuperscript{40}

By including victim participation, and reaching a resolution that accounts for the victim’s concerns and interests, restorative justice claims to provide a result that serves the victim better than state administered punishment. The concept is that by effectively addressing the offender’s behaviour, the victim also stands to benefit. The benefits can include the victim’s safety, even after the victim has suffered serious violence. Rudin and Roach express it this way in the context of domestic abuse in Aboriginal communities:

Although some Aboriginal women who have been victimized by crime have opposed some sentencing innovations, other Aboriginal crime victims who participated in the development of innovations, such as the Hollow Water Community Holistic Circle Healing, have argued that community sanctions better protect Aboriginal victims and communities than imprisonment. A properly tailored community sanction addressing the causes of offending, and attempting to protect victims, may be a more meaningful response to crime, and have better chance of reducing high rates of crime victimization among Aboriginal people than yet another short, routine, and temporary stay in prison.\textsuperscript{41}

A meta-analysis of several restorative justice programs in Canada, Australia, the United States, and Europe indicated that victim satisfaction tends to be quite high, ranging from around 65\% to as high as 90\%. Benefits to the victims included monetary restitution, a chance to confront the offender, and increased feelings of safety and security.\textsuperscript{42} The next criticism purports to hold that punitive approaches are inferior when it comes to motivating the offender to reform him or herself.

\textsuperscript{38} Supra note 12 at 217.
\textsuperscript{39} Rupert Ross, supra note 7 at 148-149; Stuart, supra note 4 at 45-47.
\textsuperscript{40} Supra note 12 at 219-220.
\textsuperscript{41} Supra note 37 at 30-31.
F. Does Not Promote Responsibility

The Canadian justice system, due to the prospect of imprisonment and other punitive sanctions, provides procedural safeguards that afford protections to a criminal accused. One such safeguard is that evidence tendered by the Crown must prove the accused’s guilt beyond a reasonable doubt. These safeguards are themselves a target for restorative justice proponents. The idea is that restorative systems do not ultimately aim to inflict punishment upon the accused for its own sake, but rather to heal the offender and correct his behaviour. This leads to the reintegration of the offender with society, which in turn is part of the broader agenda of restoring relationships and harmony in the community.\(^{43}\) The problem becomes when an accused uses the procedural safeguards to garner an acquittal, or otherwise nullify the charges. The accused ends up not having to accept any responsibility for the crime, and the possibility of restoring harmony and relationships has been lost.\(^{44}\)

Besides acquittals, sanctions such as fines and imprisonment are deemed to be not very conducive towards encouraging responsibility in offenders. The sentence is pronounced by a judge, which is often accompanied by a lecture. But chances are the offender will never see that judge again. Both the sanction itself and the manner in which it is handed out tend not to bring the message home to the accused.\(^{45}\)

Restorative justice, it is said, has a greater potential to inspire contrition and responsibility in the accused. The victim, and perhaps other members of the community as well, have the opportunity to describe how the offender’s actions have affected them. The offender is forced to face up to the consequences of the behaviour. This in turn can lead to contrition, remorse, and an acceptance of responsibility. It can produce a genuine desire on the part of the offender to change his or her ways, and make right by those who have been affected. This in turn provides a stronger assurance that the accused will complete any rehabilitative measures that are agreed upon through the restorative process, such as counseling and community service.\(^{46}\) In this respect, it is often said that restorative justice does not present a truly softer option than jail. Both the meeting with the victim (and perhaps others affected by the crime), and the rehabilitative measures that are employed, can make a restorative justice resolution just as or even more onerous than a prison term.\(^{47}\)

Michael Jackson describes an example of this, but one where it was not so much an individual victim but the offender’s community that inspired contrition and acceptance of responsibility. A young woman of the Coast Salish nation in British Columbia had been caught and charged with shoplifting. Her community addressed the matter in their own way. A ceremonial dinner was held which included family members and community elders. She had been the holder of a ceremonial rattle, which was of importance during Longhouse ceremonies. During the dinner, it was made clear to her that her action brought shame not only to herself, but also her family. The consequence

\(^{43}\) Ross \textit{supra} note 7 at 20; Roach, \textit{supra} note 3 at 263-266.
\(^{44}\) Ross, \textit{supra} note 7 at 202.
\(^{45}\) Rey,Cayley, \textit{supra} note 12 at 219.
\(^{46}\) \textit{Ibid.} at 219-220 and 290.
\(^{47}\) Roach, \textit{supra} note 3 at 263 and 265-266.
was that she could no longer be the keeper of the rattle for a year. When the judge was made aware of the seriousness of such a decision within the context of Coast Salish culture, an absolute discharge was granted. The shaming before family and community members, although done with the ultimate purpose of reintegration, was seen as more onerous than a routine fine or probation. If the process does not enhance the victim’s concerns, or further an acceptance of responsibility by the offender, then relationships in the community remain fractured. This forms the basis of the next criticism.

G. Does Not Promote Relationship Reparation

Another criticism made against traditional Western justice systems has to do with their adversarial processes. As previously mentioned, those processes, which include cross-examination and presenting arguments in support of opposing positions, have a competitive emphasis. Ross describes the criticism, along with a contrast to Aboriginal customs, as follows:

... western law puts people through adversarial processes, necessarily adding to the feelings of antagonism between them. Traditional teachings, not surprisingly, suggest that antagonistic feelings within relationships are in fact the cause of antagonistic acts. Traditional law thus requires that justice processes must be structured to reduce, rather than escalate, that antagonism.

Larry Chartrand also develops this theme in the specific context of lawyers in the criminal justice system. His position is that a lawyer’s duty of advocacy does not fit well within an Aboriginal consensus-based process (e.g. a sentencing circle). A defence lawyer is obligated to pursue the best possible result for the client. He pursues this by speaking on behalf of the client and presenting the judge with a proposal with the goal of obtaining the most lenient sentence possible. A sentencing circle involves allowing members of an Aboriginal community at large to speak to the judge, and influence the decision. This can involve a number of different opinions on what the best sentence would be, and would not necessarily reflect what the defence lawyer would pursue. Furthermore, sentencing circles are designed to give Aboriginal communities at least some measure of control over the process. A defence lawyer advocating a position on behalf of the client can threaten the transformative potential of the process, and devalue the community’s role. A defence lawyer challenging the credibility of participants in a sentencing circle can likewise undermine the process.

Restorative justice processes are thus better structured to facilitate relationship reparation. It aspires to create a setting whereby those with a stake in the conflict can freely and equally speak directly to how to resolve the conflict, and repair the relationships between themselves that have been damaged by the conflict. The seating arrangement involved with a sentencing circle for example is more than a mere physical placement. It invokes a certain symbolism that reinforces the essential equality of all present. Even though a Canadian judge who sits in a sentencing circle can veto the

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48 Supra note 5 at 207-208.
49 Supra note 7 at 271; See also Stuart, supra note 5 at 5.
51 Ross, supra note 7 at 158.
circle's proposal and impose his or her own sentence, the judge nonetheless does sit in
the same circular arrangement. It represents at least a symbolic departure from the usual
top-down decision making seen in the adversarial process, and emphasizes that the
community has a real role to fulfill in the process. The next criticism holds that
punitive approaches yield inferior results when it comes to recidivism.

H. Restorative Justice is More Effective

A claim frequently made is that by successfully changing the offender's
behaviour, and addressing its underlying causes, restorative justice is ultimately more
effective in curbing criminal recidivism. Restorative justice proponents can often garner
some pretty impressive statistical evidence in support of such claims. Evaluation studies
of restorative justice programs for juvenile crime frequently report substantial statistical
improvements against recidivism. One study found that youth who participated in
selected victim-offender mediation programs in California and Tennessee re-offended at
a rate 32% less than those who did not participate. Another study of Community
Justice Communities in Arizona found that youth who completed the program were 0.81
times less likely to re-offend. Youth who successfully completed a conferencing
program in Indianapolis were 23% less likely to re-offend. A study of a program in
Australia found a 38% reduction in driving while intoxicated and violent offences by juveniles.
Success does not stem only from juvenile crime. A recent meta-analysis of
35 restorative justice programs, juvenile and adult, in Australia, Canada and the United
States concluded that these programs had in the aggregate substantially reduced
recidivism relative to non-restorative approaches to criminal behaviour.

It can be claimed that restorative justice can succeed even for those who commit
serious crimes such as would normally warrant incarceration. In Ottawa, the
Collaborative Justice Program applies restorative approaches to offences regardless of
seriousness such as robbery, intoxicated driving causing bodily harm or death, and sexual
offences. Of those who completed the program in the years 2002 to 2005, 15.4% re-
offended within a year after completion and 32.3% within three years of completion. A
comparison group of offenders were found to have re-offended at rates of 28% within the
first year and 54% within three years. Kathleen Daly's study of a program in South
Australia dealing with youth sexual offences found that those who completed the

52 Stuart, supra note 6 at 59-61.
53 William Nugent et al., "Participation in victim-offender mediation and reoffense: Successful
54 Nancy Rodriguez, "Restorative justice, communities, and delinquency: Whom do we reintegrate?"
55 Edmund F. McGarrell and Re-Offending Among First-Time Juvenile Offenders: The Indianapolis
Experiment" (2007) 24:2 Justice Quarterly 221.
56 Lawrence Sherman, Heather Strang, and Daniel Woods, Recidivism Patterns in the Canberra
Reintegrative Shaming Experiments (RISE). [unpublished]
57 Jeff Latimer, Craig Dowden, and Danielle Muise, The Effectiveness of Restorative Justice Programs: A
Meta-Analysis (Ottawa: Department of Justice, Research and Statistics Division, 2001).
58 Tanya Rugge, James Bonta, and Suzanne Wallace-Capretta, Evaluation of the Collaborative Justice
Project: a Restorative Justice Program for Serious Crime 2002-2005 (Ottawa: Public Safety and
program re-offended at a lower rate (48%) than those who were dealt with through the standard court process (66%). A particularly remarkable indication of success regarding sexual offences comes from an Aboriginal setting. Rupert Ross describes the success of the Hollow Water Healing Circle Program, which dealt with pervasive sexual abuse in a Manitoba Aboriginal community, as follows: “Out of the forty-eight offenders in Hollow Water over the last nine years, only five have gone to jail, primarily because they failed to participate adequately in the healing program. Of the forty-three who did, only two have repeated their crimes, an enviable record by anyone’s standards.” A follow up evaluation found that the number of recidivists remained at 2 even after another 64, for a total of 107, had gone through the program.

This ties in with another criticism made by restorative justice proponents, that the high costs of incarceration just are not worth it. Cayley has this to say with reference to Canada’s prison budget: “The CSC’s costs per prisoner are estimated at up to $50,000 annually. The hiring of 1,000 new correctional officers, announced in April of 1998, will increase the ratio of officers to prisoners to 42.7 per 100 and take those costs even higher.” Consider this in light of the success of the Family Group Conferencing Program in New Zealand, which drew upon traditional Maori principles of mediation as a response to youth crime. Judge F.M.W. McElrea reported that admissions to youth custody facilities dropped from 2712 in 1988 to 923 in 1992/93. Half of those facilities had been closed as a result. Prosecutions against youth dropped 27 percent from 1987 to 1992. It was estimated that in a diversionary program in Chilliwack, British Columbia, an average of 12.45 hours was spent for each participant in comparison to an average of 34.5 hours for an offender in the standard justice system. The argument is that restorative approaches represent the better demand on resources in the effort to address crime. For all these strong points, restorative justice is not immune to criticism, as we shall now see.

VI. CRITICISMS OF RESTORATIVE JUSTICE

It is now time to analyze criticisms of restorative approaches to criminal justice. At the outset, it must be noted that critiques of retributive justice will have received a fuller treatment. There is a reason for this. There has been a certain academic vogue since at least the 1990s in extolling the virtues of restorative justice as an alternative approach. Efforts to criticize restorative approaches have begun more recently by comparison, and are therefore less in quantity. An analysis of these criticisms also serves to demonstrate that Aboriginal use of restorative justice is not without its problems.

60 Supra note 7 at 36.
62 Supra note 12 at 3.
A. Faking Responsibility

One of the most concerted efforts at critiquing restorative justice comes from Annalise Acorn, in her book *Compulsory Compassion: A Critique of Restorative Justice.* One of her key criticisms involves the idea that the practice of restorative justice has produced a standardized set of expectations. One of those expectations is the production of contrition and acceptance of responsibility in the offender. Acorn cautions us against assuming the sincerity of an offender’s display of contrition and accepting responsibility. That assumption may be unduly optimistic. The restorative process itself holds out a script of displaying remorse, contrition, apologizing to the victim and others affected by the crime, and the offender’s promise to mend his ways. As such, it is open to the offender to manipulate the process to his benefit by effectively playing the expected role. The offender can play the script to escape a harsher sanction. In the end, restorative justice does necessarily promote a genuine acceptance of responsibility.

Acorn also suggests a number of reasons for not feeling genuine contrition aside from wanting to get off easier and having more to do with the variety in human nature. These can include an offender’s perception that the victim contributed to the commission of the offence (e.g. angered the offender), the offender as a lower class person may resent a wealthier victim as more privileged, the offender may actually enjoy having caused the victim to suffer, or the offender does not perceive the harm to have been serious to begin with. The next criticism examines more closely the why behind faking responsibility.

B. The Softer Sanction

Closely bound up with Acorn’s criticism is the perceived objective behind the offender faking his remorse, to obtain a softer sanction. As previously mentioned, restorative justice proponents often claim that restorative justice resolutions are not truly softer. They can involve aspects of shaming before community members, painful interactions with those affected by the crime, and demanding rehabilitative conditions. The critics for their part suggest that this line of reasoning is flawed. Cayley, acknowledging this criticism, relates the observations of an Ottawa lawyer named Mary Crnkovich who had been working in consultation with Inuit communities in the north:

The man, who had been ordered to abstain from alcohol, resumed drinking and beating his wife. Later he was found guilty of a sexual assault on his wife’s sister and sent back to jail. The whole proceeding, in Crnkovich’s view, was a perfect illustration of how alternatives can be abused in the absence of other supports. Her impression was confirmed when she received a call from an Inuk prisoner who said, “I hear you can get me a sentencing circle. I want out.” After explaining that he had called the wrong person, she talked with this man and concluded that what he had heard about sentencing circles was that they were “a quick way out of jail.”

Another example may be seen in an American case involving two Tlingit men named Guthrie and Roberts. They had ambushed and assaulted a pizza delivery man named Tim Whittlesley with a baseball bat. He suffered a fractured skull, and was left...
deaf and partially blind. Under Washington law, they would each have faced 3 to 5 and a half years for 1st-degree armed robbery and assault with a deadly weapon. At the behest of Tlingit tribal officials and a Tlingit elder named Rudy James, Judge Allendoerfer of the Snohomish Superior Court agreed to release the two offenders. The conditions were banishment into a remote wilderness for a year, and restitution to Whittelsey. After 18 months, they would appear before Judge Allendoerfer again for purposes of determining whether further punishment would be needed. However, this is what happened:

After assisting them in constructing one-room shelters, the elders left them to the certainty of a brutal winter with fishing poles, a wood stove, sleeping bags, religious books, a two-week supply of food and little more than dogs to protect against wolves and bears. Guthrie and Roberts expressed their fear of wild animals, the cold, the potential for injury, and Bigfoot, which the Tlingit believe inhabits the islands to which they were banished. However, both took heart in the knowledge that the banishment would purify their spirits and that the entire tribe would gather for a day of ceremony and feasting after which they would be welcomed back into the tribe and their banishment would never again be mentioned.

By December, the portents of failure had been proven accurate. Tlingit tribal officials from the Central Council discovered that Guthrie and Roberts were living not on separate islands as decreed but on the Kuiu Island, a mere few miles apart. Roberts' father and grandfather, who had been making scores of visits to deliver contraband food, radios, and rifles, ignored repeated tribal cease and desist orders. By early 1995, the two were frequent visitors in towns neighboring their reservation, and on more than one occasion when Guthrie became violent the police were summoned. The final straw was the August 1995 transfer of the duo from Kuiu Island to a small tribally-owned island a mere three miles and ten minutes from their homes after the U.S. Forestry Service discovered Kuiu Island was federal land.

With the banishment now "starting to look more like an extended camping trip" than a sentence for serious felonies, James was ordered into court on September 19 by Judge Allendoerfer for a status conference. James was forced to concede that the Tlingits had failed to live up to their responsibilities, and that Guthrie and Roberts should be sentenced to prison. Judge Allendoerfer promptly ordered Guthrie and Roberts to appear before him on October 3, for a sentencing hearing during which, while conceding some improvement in the character of the two wrongdoers, he subtly castigated the failure of the Tlingits to uphold their agreement. Judge Allendoerfer elected to end the experiment while it could still be deemed a partial success and sentenced Guthrie and Roberts to prison terms of fifty-five and thirty-one months respectively, with credit of nearly two years for time served while awaiting trial and while banished. Judge Allendoerfer also held them jointly liable for $35,000 in restitution to Whittlesey.

What we have in these examples are not onerous programs of rehabilitation promoting accountability and responsibility, but abuse of restorative idealism to get off easy. The next criticism suggests that restorative justice does not adequately address the concerns of victims of crime.

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70 Ibid. at 595-596.
C. Not in the Victim’s Interests

Restorative justice idealizes the finding of a common ground between an offender and a victim, and that the process will better serve the victim’s interests. Critics suggest that there are fallacies in such ideals. Another one of the standardized expectations that Acorn refers to is that the victim will extend forgiveness to the offender. Acorn explains that forgiveness can be a difficult concession to make, even for relatively minor slights or harms. Forgiveness becomes correspondingly more difficult to grant when more serious harms are involved. The demand for forgiveness that restorative approaches to criminal justice make of the victim seems at odds with human nature itself. Indeed, Emma Larocque for example has pointed out that studies “suggest that emphasis on ‘forgiveness’ adds stress and guilt to victims of sexual assault, something that victims can do without.”

As previously mentioned, Cayley criticizes policies based on increasing use of imprisonment as political pandering based on demonstrating that ‘Something has been done.’ Acorn holds that this ‘Something has been done’ may in fact be something of value and worth to the victim. Acorn explains this as follows:

Retributive justice aspires to bracket the desire for vengeance, to interpose the state between the victim and offender, and evenhandedly to deal out proportionate allotments of punishment commensurate with the nature of the offence. Thus retribution confines the extent of comeuppance for the offender by claiming a monopoly on violence and insisting that the offender’s suffering not extend beyond the token of punishment authorized and delivered by the state. At the same time, punishment stands for vengeance and gives official, though circumscribed, acknowledgment and legitimacy to the victim’s and community’s sense of indignation.

In other words, measured retribution carried out by the state answers a more realistic and preferred desire on the part of the victim. The public vindicates the victim’s indignation over the harm suffered. Restorative justice erodes this pursuit. Acorn expresses this as follows:

Restorative justice humours the victim’s anger while invalidating its central intuition: that the perpetrator deserves to suffer because of what he has done. Restorative justice gives dramatic space to the victim’s vengeful longings, while at the same time denying the force of those longings as reasons for either state or private action. It admits entry to the victim’s desire for revenge, while at the same time giving priority to the protection of the perpetrator’s dignity and person.

Indeed, Kent Roach has noted that crime victims sometimes do demand punishment and retribution. Restorative justice proponents often claim that victims are often dissatisfied with the process and punishments allotted by the usual justice system. Acorn

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71 Supra note 65 at 10-12.
73 Supra note 65 at 53.
74 Ibid. at 54.
counters this by suggesting that some harms may be so irrevocable that complete satisfaction for the victim is ultimately elusive. In the end, the victim may still prefer the standard punishment than the softer option that restorative justice pursues.\textsuperscript{76}

Another goal of restorative justice is the furtherance of community harmony through relationship reparation, including the relationship between the offender and the victim. Acorn counters this by suggesting this may not be what the victim wants. Contriving to continue the relationship between victim and offender, where the offence reflects strained circumstances, may lead only to further hostility, resentment, and even the offender’s repetition. This is particularly so in the context of domestic abuse. Sometimes the victim, for the sake of her own sense of security and peace of mind, may want the relationship to end permanently.\textsuperscript{77}

Closely tied in with this argument is that restorative justice may be contrary to the victim’s interests by jeopardizing the victim’s safety. Acorn points out that domestic abuse often follows patterns of apology (by abuser) and forgiveness (by the victim) that sustain a relationship of power over the victim. Restorative justice in a sense replicates that pattern with its expectations of apology and forgiveness. Without having to face retribution or a permanent severance of the relationship, the restorative process can end up reinforcing that relationship of power whereby the abuser continues the pattern of abuse against the victim.\textsuperscript{78}

Julian Roberts and Phillip Stenning argue that lighter sentences under s. 718.2(e) may produce an injustice whereby crimes against Aboriginal crime victims, and Aboriginal women in particular, are not punished to the same degree as similar crimes committed against non-Aboriginal victims.\textsuperscript{79} Lighter sentences themselves can undermine the safety of the victims by minimizing the harm done to them. Judge Barrett of the British Columbia Provincial Court had this to say in \textit{R. v. J. (H.).}:

\begin{quote}
There have been instances when Canadian judges were persuaded to bend the rules too far in favour of offenders from Native communities or disadvantaged backgrounds. When that happens a form of injustice results; specific victims and members of the public generally are given cause to believe that the justice system has failed to protect them.\textsuperscript{80}
\end{quote}

Emma Larocque also suggests that in the context of sexual assault, allowing an abuser to remain in the same home as the victims is inherently contradictory with safeguarding the safety of the victim.\textsuperscript{81} The common thread in these arguments is that lighter sanctions trivialize harms done to victims, and this in turn can lead to a sense in a community that perpetrating such harmful action will not lead to any meaningful sanction. Potential offenders know that there is little risk involved with inflicting harm upon a victim. Potential victims, particularly vulnerable people such as women or children, end up in an unsafe environment. The Royal Commission on Aboriginal Peoples acknowledges these arguments in this fashion:

\begin{quote}
If family violence is addressed without proper concern for the needs of the victims, two dangerous messages are sent. The first is that these offences are not serious. This message puts all who are
\end{quote}

\textsuperscript{76} Supra note 65 at 54-55.
\textsuperscript{77} Ibid. at 99-119.
\textsuperscript{78} Ibid. at 74.
\textsuperscript{80} Court file no. 1095FC, Reasons for Sentence, 17 January 1990 (Pr. Ct. B.C.) 1.
\textsuperscript{81} Supra note 72 at 81.
vulnerable at risk. The second and more immediate message is that the offender has not really done anything wrong. This message gives the offender licence to continue his actions and puts victims in immediate danger.  

Perhaps the most potent criticism made against restorative justice is its susceptibility to abuse by a stronger party. It is to this criticism that we now turn.

D. Power Imbalances

An ideal of restorative justice is to create of a setting where everybody can speak to, and have their concerns addressed equally. Part of this is victim empowerment, where the victim is placed on a footing equal to that of the offender and the other participants. The critics suggest that this is a flawed conception, in more than one respect. There are some crimes which by their very nature involve a considerable power imbalance between offender and victim. Sexual assault and domestic assault come readily to mind. This theme was also presented in Acorn’s discussion of how restorative justice can jeopardize victim safety in the context of domestic abuse. Hughes and Mossman describe the argument of Barbara Hudson as follows:

For Hudson, it is important to acknowledge how power relationships within society affect the commission of the crime. She suggested, for example, that social inequality which “pushes so many young men into economic marginality” may prompt them to use violence to establish their claims to racial and gender superiority. As a result, she argued that differential power relationships are completely different in domestic, racial and sexual crime, by contrast with property offences and other types of “economic survival” crimes. Thus, she expressed concern that victim-offender mediation processes, which make the relationship between victim and offender central – displacing the relationship between offender and state – may “reproduce and reinforce the imbalance of power in a crime relationship, rather than confronting the offender with the power of the state acting on behalf of (in place of) the victim”.

Indeed some cases have emerged where it has been either suspected or confirmed that victim participation in Aboriginal sentencing circles for domestic violence was coerced.

Another source of power imbalance may arise from outside the process itself. If the victim, the offender, and other interested parties all reside in the same community, then power relations and imbalances within that community can reverberate in the restorative process itself. Sherene Razack’s concern with the use of community-based sentencing in Aboriginal communities is that they reflect gender imbalance in those communities. Aboriginal communities are suffused with patriarchal power structures that replicate Canadian forms of governance. It is male Aboriginal leaders who pursue community-based sentencing initiatives, to the benefit of male Aboriginal offenders who

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82 Supra note 8 at 269.
83 Roach, supra note 7 at 270.
84 Supra note 65 at 74.
commit crimes against Aboriginal women.\textsuperscript{87} She describes one similarly expressed position as follows:

In the Northwest Territories, the Status of women Council has also been clear that women’s relationship to community is fraught with contradictions. The Council’s report on violence identifies as problematic community denial of abuse, alcohol used as an excuse for violent behaviour, and the fact that ‘some of our worst abusers may be community leaders.’\textsuperscript{88}

Bruce Miller relates that abuse of power against Coast Salish women plagued the South Vancouver Island Justice Education Project. Coast Salish elders (often from powerful families) would try to convince female victims to acquiesce in lighter sanctions for offenders under the Project rather than the usual justice system by using a variety of tactics, including attempts at laying guilt trips, attempts to persuade the victims to cover up or drop the allegations, the threat of witchcraft to inflict harm, or threatening to send the abuser to use physical intimidation. Some women felt that the problem was exacerbated by the fact that some of the Elders were themselves convicted sex offenders, which left them wondering how seriously their safety and concerns would be addressed. The ultimate result was the end of the Project in 1993.\textsuperscript{89}

Acorn also argues that the very nature of the restorative process itself is intrinsically tipped in favour of the offender. If the process brings out the offender’s life circumstances and reasons why the crime was committed, it can generate a certain emotional momentum towards favouring the offender. It can encourage a feeling of fellowship towards the offender, a desire to welcome the offender back in as the prodigal son that ends up prioritizing the offender’s suffering over that of the victim.\textsuperscript{90} This in turn produces pressure upon the victim. It is expected that the victim will extend understanding and forgiveness to the offender on the road to repairing relationships. The process will frown upon the victim for not meeting this expectation. If the victim will not comply, she is seen as acting against her own interests, against the interests of the broader community, imposing isolation upon both herself and the community, and sabotaging a legitimate effort to promote harmony.\textsuperscript{91} In summary, the standardized expectations of restorative process favour the offender over the victim.

In this respect, it can be said that this is where adversarial processes are better than restorative processes. A judge uses rules of procedural fairness to enforce equality between the parties. The rules of adversarial procedure can prevent the abuses of power imbalance that can plague restorative approaches.\textsuperscript{92} As Hudson’s argument clearly suggests, there may also be a point to the state pursuing prosecution as the surrogate victim. Particularly vulnerable victims, such as battered spouses, are now ensured at least an equal representation in the process. The state marshals its superior power and resources to call the accused to task. Of course, the state could easily assert greater power than the accused. But the adversarial rules of procedural fairness ensure that the

\textsuperscript{87} Looking White People in the Eye: Gender, Race, and Culture in Courtrooms and Classrooms (Toronto: University of Toronto Press, 1998) at 77-78.
\textsuperscript{88} Ibid. at 66.
\textsuperscript{89} Bruce Miller, The Problem of Justice: Tradition and Law in the Coast Salish World (Lincoln and London: University of Nebraska Press, 2001) at 198-199.
\textsuperscript{90} Supra note 65 at 150-158.
\textsuperscript{91} Ibid. at 75-76.
\textsuperscript{92} Hughes and Mossman, supra note 85 at 125-126.
field remains level. Another criticism holds that restorative justice erodes a vital function of state criminal law.

E. Lack of Public Denunciation

Consider the following quote from Allan Manson with reference to a report from a sentencing commission: ‘The Commission, like others who have considered this issue, accepted that there is a general deterrent effect but that is flows from the overall process of apprehension, conviction and punishment rather than a particular sanction intended to produce a particular result for a category of offences.’93 This comment is made with reference to deterrence, but it does not take much to see its applicability to denunciation. If a person commits a crime then the state will do something to him or her as a consequence for that action. The state and the justice system announce to society at large that certain behaviours are unacceptable and will be met with prosecution. A concern is that restorative criminal justice involves moving the resolution away from a state vs. accused forum and placing it in the hands of the offender, the victim, and other persons with a stake in the conflict. This removal from the public forums of the courts leads to a loss of ability to perform denunciation. Hughes and Mossman state: “Privatization of justice, whether in the civil or criminal context, often fails to address the societal interest in ensuring that widespread wrongdoing is known and addressed or that societal values are reaffirmed.”94 The next criticism asserts that restorative justice threatens excessive disparity in sanctions that are handed out for similar offences.

F. Offends the Sentencing Principle of Parity

The idea is that when offenders commit the same crime, and with a similar degree of moral culpability, there should be at least some degree of parity with the sentences received by the offenders. Of course, restorative justice proponents emphasize broader societal contexts and mitigating circumstances in offenders’ lives to argue for greater flexibility and individualization in sentencing. A point stressed by those who emphasize parity in sentencing is that for the same crimes with a similar degree of moral culpability, individualization in sentencing should only go so far. Philip and Stenning phrase their objection to s. 718.2(e) of the Criminal Code in this way:

Retributive theories are essentially communicative theories of punishment. Blame or reprobation is conveyed to the offender for his conduct. Were there no need for a reprobative response to offending, the institution of punishment could be replaced by another regulatory response which did not convey censure or confer blame on the offender. But blaming has many features and functions, not the least of which involves a communication to the victim, a recognition that he has not just lost property, human dignity, or the ability to walk freely and without fear, but that he has been wronged by another's moral decision-making.

Moreover, although desert theories are not without their critics and their weaknesses, and they have been held responsible, rightly or wrongly, for a number of evils, including the shocking increase in imprisonment rates in the United States, few until now have accused desert theorists of being irrational. ... Desert theories specify a rationale or justification for punishment, guiding sentencing principles which can only be violated by undermining the theoretical coherence of the

94 Supra note 85 at 120; See also Roach, supra note 3 at 268-269.
whole, and specific requirements such as the criteria for proportionality. One of the main reasons why we are opposed to the Aboriginal sentencing provision in paragraph 718.2(c) is that it violates one of those criteria (parity in sentencing).

The next criticism suggests that restorative efforts to lessen formal state control may yield an ironic result.

G. Widens the Net of Social Control

Restorative justice often imposes some pretty onerous obligations upon the offender. These can include community service, substance abuse counseling, and making restitution to the victim. These obligations can also endure for lengthy periods of time. There is plenty of room for an offender to slip. A typical inducement to complying with the demands of a restorative sanction is the threat of incarceration should the offender fall short in discharging his obligations. Roach, as well as Hughes and Mossman, point out that determining what is criminal conduct is a highly subjective and normative exercise. Expanding the reach of restorative justice initiatives, especially when extended to minor offences, can lead to not a more effective method of dealing with crime but to a frightening expansion of social control over citizens.

Roach describes some of the mechanics of how this net widening can operate. A conditional sentence under Canadian law involves serving incarceration within the offender’s own home under strict curfew conditions as an alternative to going to prison. A conditional sentence can include many other conditions, such as community service, counseling, and appearing before a court or probation officer as and when required. If an offender breaches a condition of his sentence, the consequences can be grave. There is a presumption, subject to a hearing before a judge, that the offender will serve the remainder of the sentence in jail. There is also a presumption that the offender will be detained after a breach charge. The Crown only needs to prove the breach on the balance of probabilities. The next criticisms deal with economic concerns.

H. Economic Objections

One criticism is based on an allegation of substantive inequality. Restorative justice often values the offender making economic reparation to make good the loss suffered by the victim. This often arises in property damage offences. Yet it is not a given that an offender possesses the means to provide that reparation. Richer offenders will be able to certainly, but often not those from the lower economic strata of society. This in turn can mean that some victims will receive recompense for their loss, while others will not.

Another objection is that restorative justice can make immense demands on resources. They often require treatment programs, facilities, funding in order to cover

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95 Supra note 18 at 84-85.
96 Hughes & Mossman, supra note 85 at 120-121; Roach, supra note 3 at 259-260.
97 Ibid., Roach at 261.
98 Hughes and Mossman, supra note 85 at 31-32; Acorn, supra note 65 at 15-16; Roach, supra note 3 at 271.
costs, and human resources, either as volunteers or as paid staff. Acorn includes the demand of resources as another reason why we should not embrace restorative justice uncritically. Roach also states that if restorative justice programs do not receive adequate funding, the initial enthusiasm may soon wane.

There is a specifically documented example of this. The Mi’kmaq Justice Institute had apparently made some progress dealing with crime in Mi’kmaq communities such as to receive the Canada Law Day Award in 1998. However, maintaining a minimum of operating staff and a volunteer base was challenge enough within a small community. With shrinking financial resources, volunteer participation declined as well. The growing lack of financial and human resources meant the Institute was unable to meet the growing demand for justice programs in the communities. The staff were laid off in 1999, due to insufficient resources.

A lack of adequate programs and resources can spell trouble for the success of the restorative process itself. Philip and Stenning state:

... an increasing resort to conditional sentences for relatively "high-risk" Aboriginal offenders, combined with a lack of resources within Aboriginal communities to support such offenders and to help them avoid breaching the conditions of their sentences, may be resulting in disproportionately high numbers of Aboriginal offenders being incarcerated for breach of sentence conditions, thus increasing the overall incarceration of Aboriginal offenders. In other words, paragraph 718.2(e), as applied in combination with the conditional sentence provisions of the 1996 sentencing reforms, may actually be having the very opposite effect from that which was intended.

Restorative justice proponents, of course, would contend that resource demands in and of itself does not provide a valid objection. The reliance on prisons is itself a waste of resources better spent on approaches that deal with the root causes of crime. The question then becomes one of which approach to justice stakes a better claim to the allocation of resources. This naturally leads to another criticism.

I. Faith in Success Questionable

Restorative justice proponents have been able to marshal statistical evidence in support of their positions. As it turns out, for nearly any study that indicates success, the detractors can point to another study that indicates failure. Some studies have suggested that some restorative justice programs have made little to no progress in addressing juvenile criminal recidivism. Jane Dickson Gilmore and Carol La Prairie found that
among Aboriginal offenders who participated in a sentencing circle in Saskatchewan from 1993 to 2000, 54% had re-offended.\textsuperscript{105} They also emphasize that Aboriginal justice projects have not over the years made a significant impact on Aboriginal over-incarceration.\textsuperscript{106} Acorn assesses Sherman’s and Strang’s study as follows:

However, the evidence about the effectiveness of restorative justice in reducing repeat offending is equivocal. Empirical research on restorative justice and recidivism has found that repeat offending was lower for violent offenders, higher for drunk drivers, and the same for property offenders who participated in restorative processes in comparison to those who went through the court system.\textsuperscript{107}

Even if some programs have succeeded in reducing recidivism, it has been argued that recidivism is too narrow a measure to go by. L. Kurki and Kay Pranis contend that effects on victims and communities should be emphasized as more important measures of success rather than offender recidivism.\textsuperscript{108} Dickson-Gilmore and La Prairie question the success of the New Zealand Family Group Conferences in this manner:

First, if victims were present in only about 50 per cent of the family group conferences held, and 60 per cent of those victims felt positively about the process, this means that only about one-third of all victims obtained benefits from the conference process. While this is not to be scoffed at, it certainly suggests a much more modest degree of success than popular discourse around the FGCs would tend to associate with these processes.\textsuperscript{109}

An evaluation study of the Hollow Water program found that only 28\% of victims found participation to be a satisfactory experience in contrast to 72\% of offenders. Only 33\% of victims felt that they had the support of the broader community. The study also concluded that while the community was supportive of the general principles of the program, very few had either participated in it or had knowledge of its specific operations.\textsuperscript{110} Dickson-Gilmore and La Prairie also point out that there is a gap in our research as there is no empirical demonstration that restorative justice succeeds in one of its key claims, to improve relationships and harmony in the broader community.\textsuperscript{111} As it turns out, all of these criticisms have potential implications for Aboriginal aspirations to make use of restorative justice. It is to this subject that we now turn.

VII. POTENTIAL PROBLEMS FOR ABORIGINAL JUSTICE

Restorative justice has been subjected to a number of critiques that call into question whether it can provide an effective medium of social control. This has potential repercussions for executive accommodations of Aboriginal justice initiatives. The critiques have the potential to enter policy discourse and thereby contain or frustrate Aboriginal aspirations for the use of restorative justice.

\textsuperscript{105} Will the Circle be Unbroken?: Aboriginal Communities, Restorative Justice, and the Challenges of Conflict and Change (Toronto: University of Toronto Press, 2005) at 218.

\textsuperscript{106} Ibid. at 208-212.

\textsuperscript{107} Supra note 61 at 61.

\textsuperscript{108} Restorative Justice as Direct Democracy and Community Building (St. Paul, Minnesota: Minnesota Department of Corrections, Community and Juvenile Services Division, 2000).

\textsuperscript{109} Supra note 105 at 195.

\textsuperscript{110} Therese Lajeunesse, Evaluation of the Hollow Water Community Holistic Circle Healing Project (Ottawa: Solicitor General Canada, 1996).

\textsuperscript{111} Supra note 105 at 209-210.
The present state of executive accommodation of Aboriginal restorative justice typically takes the form of diversionary programs, sentencing circles, and sentencing advisory panels. The diversionary programs are mostly limited to minor offences such as theft and simple assault. This can admit to exceptions. Consider the Community Council Project, located in Toronto, Ontario. It is a highly expanded diversionary program that accommodates Aboriginal community-based approaches to dealing with crime. Under a protocol worked out between Aboriginal Legal Services of Toronto and the Crown Prosecutors’ offence, no offence is inherently ineligible for diversion. There is also the Peacemaking Court of the Tsuu T’ina nation near Calgary, Alberta. It is presided over by Judge Leonard Mandamin, an Ojibway Indian. The distinguishing feature of this court is a highly expanded diversionary program. After consultations, the elders of the Tsuu T’ina nation decided that only sexual assault and homicide offences would be ineligible for diversion. A remarkable feature of this court is that if the Crown Prosecutor does not assent to an offender’s diversion, Judge Mandamin can override the Crown Prosecutor and allow for the offender’s participation. What is still true is that executive accommodation of Aboriginal restorative justice programs is limited mostly to minor offences.

Sentencing circles and advisory panels are also subject to offence bifurcation. Certain offences, and offences committed under certain circumstances, could render an Aboriginal accused ineligible for a community based sentence under s. 718.2(e). *R. v. Wells*, which revisited s. 718.2(e), holds that if an offence requires imprisonment in excess of two years, then a community based sentence will not be appropriate. The presence of mitigating factors can reduce an otherwise appropriate term of imprisonment to less than 2 years, and thereby make an Aboriginal offender eligible for community based sentences. Furthermore, if a judge decides that an Aboriginal offender is a danger to the public, that offender will not be eligible for community based sentences.

One can imagine how criticisms of restorative justice can enter the policy discourse so as to maintain the status quo or even result in decreased accommodation. The fact remains that Aboriginal peoples try to procure accommodation of restorative justice projects within a political culture that favours retributive approaches to crime control. Public opinion surveys during the mid 1990s indicated that approximately 80% of the voting public in Australia, Canada, England, the Netherlands, and the United States felt that existing sentences are too lenient.

Rachel Dioso and Anthony Doob

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113 *Bridging the Cultural Divide*, ibid. at 148; See also Craig Proulx, *Reclaiming Aboriginal Justice, Identity and Community* (Saskatoon: Purich Publishing, 2003).


performed a study to gauge public Canadian public opinion on s. 718.2(e). They admit that the sample of participants for their survey is not necessarily representative of Canada as a whole. One of their findings was that participants who viewed the present justice system as too lenient on offenders also tended to view s. 718.2(e) negatively.\textsuperscript{117} One has to wonder how the Canadian public at large views s. 718.2(e) given that surveys indicate that approximately 80\% of the Canadian public feels that the present justice system is too lenient. It is therefore not surprising that a frequent response to crimes that gain public notoriety for being prevalent and/or serious is to increase the imprisonment terms for those offences. Recent examples in Canada include street racing, auto theft, as well as possession of or trafficking in crystal meth.\textsuperscript{118}

The criticisms that have been made against restorative justice can then provide additional justification to not further accommodate, or even roll back, Aboriginal justice projects. For example, the federal executive or provincial executives could feel a political disincentive towards accommodating the use of Aboriginal restorative justice for domestic or sexual assaults as serious offences. They could draw upon criticisms that have been made based upon party imbalance and victim safety to justify their refusals. It could also result in less government funding available for Aboriginal justice projects. A government could draw upon the criticisms of restorative justice, particularly the ones based on the widening of social control and the one questioning the successes of restorative justice, to decide that available money is better spent on prisons, or other spending priorities. A question that Aboriginal communities should ask themselves is what to do about this possibility?

VIII. ABORIGINAL RESPONSES TO THE CRITICISMS

A. Procedural Criticisms

Some of the criticisms that have described here are of a conceptual nature, describing problems that can occur with the process in practice. What is very telling is the success of both the conferencing program in South Australia and the Hollow Water program in dealing with sexual abuse, a type of offence whose context makes the practice of restorative justice especially vulnerable to criticisms based on victim safety, power imbalance, and unreasonable demands for forgiveness. Ross Gordon Green ascribes the success of the Hollow Water program in part to ensuring that support teams were assigned to work with both the offender and the victim. The victim and offender would not be brought together into the restorative process until they were both ready to face each other. As such, it is apparently possible to address even serious power imbalances with intervention prior to the restorative process itself.\textsuperscript{119}


\textsuperscript{118} For street racing and auto theft, see “Cotler to table bills inspired by Cadman” The Vancouver Sun (September 28, 2005). For crystal meth, see Jonathan Fowlie, “Liberals to ramp up war on meth” The Vancouver Sun (December 12, 2005) A1.

\textsuperscript{119} Ross Gordon Green, “Aboriginal Community Sentencing and Mediation: Within and Without the Circle” (1997) 24 Man. L.J. 77 at 94-95. See also Stuart, supra note 4 at 45-47.
Power imbalance can arise not only from the nature of the offence itself, but from relationships of power in the community. Bruce Miller describes it this way:

Despite this, contemporary justice narratives from within the communities are largely outward looking in that they are primarily directed to managing relations with the dominant society and focus conservatively on a purported period of harmony prior to contact and the establishment of treaties and reservations. As a consequence, they fail to adequately describe and analyze historical or contemporary issues of power, a step that appears necessary for the establishment of meaningful, localized, community-based justice practices.120

In the context of initiatives based upon Aboriginal customary law in Australia, Diane Bell relates that Aboriginal women felt that it was absolutely necessary to establish separate consultation processes for both men and women since the women had less power in the communities, and were especially vulnerable as the frequent victims of crimes committed by Aboriginal males.121 Failure to discern power structures and relations and failure to address them can lead to the same kind of scenario that played out with the South Vancouver Island Justice Education Project.

There is at least one possible way to deal with this. When a sentencing circle is held with a courtroom itself, a judge can maintain vigilance over the discussions to ensure that a more powerful party does not coerce or intimidate the other side into an unfavourable resolution. What happens though when the restorative discussions take place outside a courtroom as one could expect in a diversionary approach? The idea is that community members who are trained as facilitators and mediators can perform this function. Green describes it this way:

Despite this judicial caution over circle power imbalances, trained and experienced community members could eventually perform the facilitation function currently performed by judges during circle sentencing. ... Although judges provide protection from power imbalances during court, the court party regularly departs from these communities upon the conclusion of the court session, leaving community circle participants to deal directly with offenders in the court's absence. As a result, development of mediation and facilitation skills would strengthen local/informal systems of social control that attempt to change offender behaviour and promote rehabilitation.122

Donna Coker describes the potential of a Navajo Peacemaker (a role similar to mediator) to remedy power imbalance in the context of domestic assault as follows:

Peacemaking's primary approach to coercion in the process is to rely on the peacemaker and the victim's family to stand up for the victim. As noted earlier, reliance on the victim's family to ensure that no "gang-ups" occur may be misplaced where the family is frightened of the batterer or where the family blames her for the batterer's violence. Additionally, the batterer's family members may be instrumental in the development of a batterer's belief that his violence is the result of his partner's victimization of him. Peacemaking may provide a platform for the expression of those beliefs. Further, the use (or lack of use) of criminal sanctions may be instrumental in an individual batterer's understanding of the morality of his actions or of their harm to the victim: "If this were a crime, it would be heard in a criminal courtroom." However, unlike the family court mediator, the peacemaker may play a very interventionist role in the Peacemaking session. A peacemaker committed to gender fairness has the ability to confront victim-blaming statements and to increase the likelihood of fair outcomes.123

120 Supra note 89 at 11.  
122 Supra note 119 at 112.  
This relates to another criticism of restorative justice, that it can jeopardize the safety of crime victims. Protecting victim safety, however, does not necessarily mean an automatic recourse to jail. It is questionable that jail terms actually enhance victim safety in the long run. Bell relates that Aboriginal women in Australia were concerned about how incarcerating Aboriginal men often resulted in a violent rebound upon themselves.\textsuperscript{124} Restorative justice still has the potential to enhance victim safety alongside offender rehabilitation. Coker describes possible approaches under Navajo peacemaking:

Peacemaking also provides a forum for the victim's family to intervene on her behalf. For example, in one case, an uncle was a copetitioner with his niece. The uncle expressed concern that his niece's daughters took her husband's side in arguments and that both the father and the daughters verbally and physically abused the mother.

In addition to encouraging family participation, Peacemaking may also provide a mechanism for transferring material resources to the victim, thus lessening her economic and social vulnerability. This could occur in three ways. First, the abuser or his family or both may agree to provide nalyeeh (reparations) in the form of money, goods, or personal services for the victim. Nalyeeh is a concrete recognition that the harm of battering is real and that responsibility for it extends beyond the individual batterer. In addition, both abuser and victim are likely to be referred to social service providers and to traditional healing ceremonies. The assistance given by agencies and by traditional healers often results in increased community and governmental material support. Finally, the victim's family may overcome past estrangement from the victim and agree to provide her with assistance.

Though it is not clear that extending such assistance to include goods, services, or both is now a common practice in Navajo Peacemaking, such an extension appears congruent with traditional Navajo practices. Assistance of this kind may alter the battered woman's material conditions and decrease her vulnerability to ongoing battering. For example, his family members may agree to such help as loaning a car or providing transportation. Her family members may agree to spend the night with her on a rotating basis. In addition, bank accounts may be changed or split so that she has greater financial independence. The agreement may also include assistance with job training, employment, or childcare. The subsequent reorganization of the financial priorities of the batterer's extended family may serve to emphasize the injustice done to the victim and, at the same time, to decrease the victim's vulnerability to the batterer's control.\textsuperscript{125}

Coker goes on to suggest that these kinds of measures can be coupled with the batterer attending counseling and traditional healing ceremonies.\textsuperscript{126} Designing restorative justice initiatives must always be done with an eye towards how the safety of the victim is to be preserved. The above description suggests that designers may have to envision some very creative methods or end results for their justice initiatives. On the other hand, if processes cannot be designed to address these realities, matters may be such that a restorative justice initiative is untenable for a certain community or cannot deal with everything, at least for the time being. This in itself is a valid choice. The Peacemaker Court of the Grand Traverse band in Michigan, for example, does not use

\textsuperscript{124} Supra note 121 at 304.
\textsuperscript{125} Supra note 123 at 45-46.
\textsuperscript{126} Ibid. at 46-47.
peacemaking for domestic assault precisely because it was felt that the Court was not ready to deal with the power imbalance involved. 127

The merit in the criticisms is readily apparent, yet they are not fatal to the restorative justice enterprise. If anything, the critics actually perform a valuable service by pointing out what can go wrong in the practice of restorative justice. It is imperative for Aboriginal communities to take heed of these criticisms and what can go wrong. This is so that they can structure restorative justice initiatives in such a way as to address those criticisms and thereby increase the chances for their success rather than their failure. A proposal for a restorative justice project that is genuinely designed to enhance victim safety and avoid other potential pitfalls may be more likely to attract financial and political support from Canadian officials. This also leads into another point of contention between the proponents and the critics.

B. Promise of Success or Bound for Failure?

Proponents of restorative justice can come up with any number of studies that laud the ability of restorative justice to reduce criminal recidivism and provide victim satisfaction, just as the critics themselves can come back with other studies that suggest failure on either front. This can suggest an entrenched war of statistics that cannot be resolved. Perhaps there is a need to move beyond the numbers themselves and explore the reasons behind them. Restorative justice is a theory of justice that expresses an ideal. Restorative justice in its practical application is dependent upon real world empirical factors. Roach states, “Pure theories of justice are, however, often tempered by other real world considerations.” 128 For example, Nancy Rodriguez suggests that the degree of success of a restorative justice program can be tied in with certain community factors. Restorative justice may run more smoothly in a community that is racially homogenous in contrast to one that is racially heterogeneous. Communities with higher unemployment rates may afford a greater volunteer base that is available to a program. 129 In this vein, it could be asserted that the ability of a restorative justice program to address procedural criticisms such as power imbalances represent some of those empirical factors that can contribute to either success or failure.

An effort to catalogue every possible factor that can contribute to the success or failure of a restorative justice program is likely impossible at this point, and outside the scope of this work. Yet the considerable variegation in results and identification of some known contributive factors up to the present suggest that more thorough consideration and future research is needed to gain a fuller understanding of under what conditions restorative justice can make a positive impact. 130

Nonetheless, one that readily comes to mind is the issue of financial support and resources. Restorative justice initiatives will be empty shells unless certain programs are available to the community to enable meaningful resolutions. These can include

128 Supra note 3 at 257-258.
129 Supra note 54 at 121.
130 A sentiment shared by Dickson-Gilmore and La Prairie. supra note 105 at 226, 232.
treatment programs, educational programs, job training initiatives, counseling services, and facilities. Restorative justice also places significant demands for human resources. Hughes and Mossman write, “Restorative justice projects are labour intensive, requiring a great deal of preparation of the major participants and training of facilitators and mediators. These processes require real and not perfunctory participation with a commitment to changed behaviour ...” In small Aboriginal communities, finding enough committed individuals to provide qualified staff and a sustained volunteer base can be quite a challenge, a reality to which the Mi’kmaq Justice Institute attests. Personnel are needed to run the project itself, and this can include monitoring offender progress. In small Aboriginal communities, there may not be as stringent a need for justice staff to monitor the offender, since the offender may be ever under the watchful eye of his or her peers. The concept of community control may not be as meaningful in urban areas however, where an offender would enjoy a greater degree of mobility and a less intimate sense of membership in a community than would be the case in a small isolated community. This raises the possibility that an urban Aboriginal community where an offender lives in is less able to conduct follow-up and monitoring to ensure that the offender is complying with his conditions. This may mean that a greater number of justice project staff or probation officers have to assume that role, the latter requiring agreement from the prosecution office and probation services. The result being that the location may not rule out the possibility of restorative justice, but affects the specifics of its implementation. If the staff, facilities and programs are there, a restorative justice program has every chance of producing success. Of the first 214 offenders deal with by the Community Council Project in Toronto, only 13.9 percent had failed to perform their requirements.

But therein is frequently the problem. A lack of sustained support has indeed been an issue that has consistently dogged Aboriginal justice projects. The Royal Commission on Aboriginal Peoples states that Aboriginal justice initiatives in Canada have been dominated by a ‘pilot project mentality’. This result is not only inadequate funding for present tasks, but also makes ‘long-term planning and expansion difficult if not impossible.’ Kayleen Hazelhurst and Cameron Hazlehurst state:

Over many years of government experience, the cutting up into small pieces, and the dispersal to the winds, of Aboriginal funding had proved to be fundamentally flawed strategy. A multitude of inadequately funded and poorly developed projects very quickly came to nothing – failing as their funding evaporated or when their over-burdened and under-skilled staff resigned.

Dickson-Gilmore and La Prairie add:

There must be provision for sufficient workers in a project to enable it to function smoothly. Workload and responsibilities must be shared over a sufficient number of workers to avoid undue pressures impinging on a few select individuals, who thereby become the essence of the project.

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131 Bridging the Cultural Divide, supra note 9 at 173; Carol LaPrairie, “Community Justice or Just Communities? Aboriginal Communities in Search of Justice” (1995) Canadian Journal of Criminology 521 at 530.
132 Supra note 85 at 118; See also Stuart, supra note 4 at 20-23.
133 Ross Gordon Green, supra note 119 at 116-117.
134 Bridging the Cultural Divide, supra note 8 at 153.
135 Supra note 8 at 295.
The tendency for Aboriginal community justice programs to become the province of one or a few volunteers is all too common, and endangers both workers, who risk burn-out, and the project as a whole, which cannot function without these persons. Employing sufficient workers, however, requires sufficient resources, and the evaluations suggest strongly that, for the majority of community justice projects, funding is insufficient, short term, and uncertain. Of course, this is also exactly what contributed to the collapse of the Mi’kmaq Justice Institute. Chris Cunneen and Evelyn Zellerer stress that Western governments must provide consistent financial support for Aboriginal justice initiatives.

This comes back to the question of whether the Aboriginal restorative justice enterprise merits that support. There remains one position of restorative justice proponents that seems impenetrable by the critics. A strong argument that restorative justice proponents make is that incarceration can and does worsen a prisoner’s propensity towards criminal behaviour. To be fair, Cayley, Ross, and Justice Bayda rely upon anecdotal evidence to sustain this position. It may be more convincing if there were statistical studies available that made a link between recidivism and prison conditions as well. It is nonetheless interesting to note that Acorn, Hughes and Mossman and other critics have not addressed this position directly. While the data on whether restorative justice fulfills its objective with respect to offender recidivism or victim satisfaction may be equivocal, those evaluations that do indicate success suggest that restorative justice still has the potential to deal with Aboriginal crime more constructively and effectively in comparison to the worsening effects of prison. It may not guarantee the production of utopias in Aboriginal communities, but at the very least it can make a positive contribution and a significant one at that. At least this may remain the case until subsequent research resolves this question and what factors contribute to that. How do we know that the varied results from Aboriginal justice projects and their failure to make an appreciable dent in over-incarceration cannot be attributed to Canadian governments’ emphasis on piecemeal support and a political culture that sustains offence bifurcation?

If future research establishes that restorative justice is viable and under what conditions, it may raise a legitimate issue of whether Canadian governments should drastically alter their spending priorities and policy objectives when it comes to Aboriginal crime. If restorative justice does prove to be the overall better vehicle for addressing crime, even serious crimes, under the right conditions then why should our governments not embrace it more fully beyond the conventional boundaries of offence bifurcation and allocate budgets accordingly? Dhami and Joy assert:

The insufficient funding of RJ initiatives in Canada is particularly difficult to accept in light of the large amount of money that the federal and provincial governments save through diversion cases from the traditional system into RJ programs. Volunteer-run, community-based programs are both efficient and cost-effective.

To Canadian leaders, such a shift in paradigm may seem overly bold and drastic, requiring a courage that may be difficult to swallow. It may however prove not that drastic and ultimately beneficial. Japan’s criminal justice system has a strong emphasis on an offender’s acceptance of responsibility, apology, and reparation to the victim. The

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137 Supra note 105 at 198.
138 Supra note 112 at 255.
139 Supra note 64 at 19.
Japanese system also emphasizes that imprisonment is to be used as ‘sparingly as possible’. The results of this approach are described as follows:

... a rate of imprisonment of 37 per 100,000 (lower than almost by half than the lowest rates in Europe), and a rate of registered crime that is a small fraction of that in any other industrialized country. The United States has 205 armed robberies per 100,000 of population; Britain has 50; Japan has less than 2. This rate, moreover, has dropped consistently since World War II, while crime rates in all economically comparable countries have risen.

Bayda describes the situation in Holland as follows:

Holland is an interesting study in this respect. The incarceration rates in that country since World War II have been very low. Students of this phenomenon have ascribed it to two things: the experience of imprisonment at the hands of the Nazis and a law school curriculum that questioned imprisonment. The latter resulted in the moulding of a whole generation of lawyers and judges who hold in very low esteem imprisonment as an essential component of justice. I remind you Holland is not reputed as a crime-ridden country.

It then becomes a question of whether there is the political will to move in such a direction and away from our current culture that emphasizes incarceration. A study by Anthony Doob suggests that a transition towards a system that de-emphasizes imprisonment in favour of a system that emphasizes community based alternatives may be more politically palatable than Canadian politicians often assume. Doob acknowledges that public opinion surveys often indicate the attitude that sentences are not harsh enough. He contends however that a more complex picture emerges if people are asked more specific questions about justice objectives and methods. When asked if they thought that increasing sentence terms was the best way of reducing a crime, less than a third of the respondents in his survey answered in the affirmative while the majority preferred alternatives such as reducing unemployment and developing social programs.

When confronted with a hypothetical that involved the prisons being full, almost two thirds preferred reliance on sentencing alternatives to building more prisons. Over 80% indicated that when a sum of money to spend on justice was available it was better to invest it in preventative measures rather than prisons. Doob then presented the respondents with a hypothetical scenario involving a first time break and enter. When confronted with a reminder that the monthly cost for imprisoning an offender ranged from $3,700 to $6,000, 84 to 86% preferred a conditional sentence and fine to jail.

This insight perhaps suggests that far from being constrained by perceived public attitudes that demand harsher sentences, Canadian governments could mould public opinion to become more supportive of alternatives. Perhaps if Canadian governments made an effort to educate the population, engage the public through consultations and other forums of dialogue, then a political transition towards a different

\[140\] Cayley, supra note 12 at 278-279.
\[141\] Ibid. at 276-277.
\[142\] Supra note 13 at 331.
\[144\] Ibid. at 329.
\[145\] Ibid. at 331.
\[146\] Ibid. at 331.
\[147\] Ibid. at 334-335.
justice paradigm could be viable. This is admittedly speculative, but it is worth considering as food for thought.

IX. CONCLUSION

Proponents of restorative justice have made many critiques against traditional methods of justice that rely on adversarial procedures and incarceration. These criticisms highlight why the use of these approaches in the Canadian justice system is not well-suited to dealing with Aboriginal crime. Restorative justice has itself been subjected to some persuasive critiques that question its utility as a system of social control. These critiques have the potential to enter policy discourses on justice and thereby frustrate Aboriginal aspirations for the use of restorative justice. It does not have to work out this way for Aboriginal peoples though. For all the criticisms that have been made, restorative justice still holds the promise of dealing with Aboriginal crime more constructively and effectively than a widespread reliance on incarceration. The criticisms can ultimately be beneficial to Aboriginal peoples. They can design and structure restorative justice projects so as to address the criticisms, and avoid the consequences that those criticisms suggest. Aboriginal justice projects can be better and more likely to succeed for it. Furthermore, justice projects that demonstrate a deliberate effort to address the criticisms may be more likely to win political and financial support from Canadian governments. If present indications of success bear out, and future research establishes that restorative justice can succeed and under the right conditions, this can justify a substantial shift in paradigm in how Aboriginal crime is addressed, both in terms of spending priorities and policy objectives. This of course requires a dramatic departure from our present political culture that often demands frequent and prolonged use of incarceration, but even this perhaps is not impossible to realize.