

***THE SILENCE SPEAKS LOUDLY:
CONSIDERING WHETHER THE VICTIMS' NEEDS CAN BE MET
THROUGH CIRCLE SENTENCING***

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Abstract

The object of this paper is to *consider whether the victims' needs can be met through circle sentencing*. *Circle sentencing* refers to an alternative sentencing method used primarily in First Nations communities. The circle sentencing process involves community members in a search for creative sentencing alternatives for the offender and is intended to promote reparation between the victim, the offender and the community. The *victims* I refer to in this document are Aboriginal women living in reserve communities who are the victims of physical and sexual violence.

Standpoint theory inspires this exploratory study and the research is guided by institutional ethnography. Standpoint theory recommends a method of sociological inquiry which begins from women's experience -- or *standpoint*. The standpoint serves as the point of entry for further research, using institutional ethnography, into the institutions, structures and complex power relations which organize women's everyday experience. This is accomplished utilizing multiple methods of investigation. The primary methods of investigation used in this thesis were interviews and review of a myriad of secondary sources.

Formal interviews were conducted with sixteen advisors who had different experiences with the circle sentencing process. *In-depth interviews* were conducted with two key advisors, and *information interviews* were conducted with another fourteen general advisors. All interviews were open-ended and were designed to try to understand the standpoint -- or everyday experience -- of Aboriginal women who are the victims of violence, to learn how circle sentencing might be problematic for these women, and to reveal how their experience is inextricably bound by the power relations in First Nations communities and beyond.

This thesis entertains two levels of analysis. The first level of analysis of interview findings and secondary source material revealed that the needs of Aboriginal women who are the victims of sexual violence are seemingly less important than the needs of their offenders. Because of this situation many Aboriginal women are not speaking out about violence. An analysis of interviews hinted at some of the presenting reasons for the silence, however, it was apparent that the reasons for the silence were very complex and required a second level of analysis.

The Power and Control Wheel of the Domestic Abuse Intervention Project in Duluth, Minnesota provides the conceptual framework for the second level of analysis. This framework facilitates the explication of the dynamics of violent relationships and in this thesis reveals how the devastation of colonization, the influence of community and culture, and the law are the multiple sites of power and control which shape the everyday experience of Aboriginal women, specifically those who are victims of sexual violence. To demonstrate the appropriateness of the Power and Control Wheel as an analytical tool I employ a typographical style of Jacques Derrida to reinforce a parallel analysis of the means of power and control which have served to establish and maintain the marginalized status of Aboriginal people generally, and Aboriginal women in particular.

I find that circle sentencing has tremendous potential as an alternative measure which can remedy some of the problems that Aboriginal women victims and their predominately male offenders experience with the current criminal justice system. However, the interests of women who are the victims of sexual violence need to be given a higher priority in circle sentencing. Thus, the point of this exercise is not to diminish circle sentencing, rather it is to generate further discussion and thought about some of the problems with circle sentencing so that the process can be remedied to better meet the needs of Aboriginal women victims.

Acknowledgments

Many people contributed in many ways to help me complete this thesis. I acknowledge some of these people here. First, I express my sincere thanks to the people who met with me in person and over the telephone and shared their knowledge and experiences about circle sentencing. Without you there would be no thesis.

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Finally, I could not have finished this project without the love and support of my wonderful husband, Michael, and our young son, David. I have been working on this paper for my son's *whole life* and when I am not working away at the computer he sits there, loads up his toddler software, and importantly states "I *have to* work on my thesis."

Despite the assistance of all these people any errors in this work are a result of my efforts, research and interpretation.

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FIGURE 1: POWER AND CONTROL WHEEL

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A Note About Terminology

The Royal Commission on Aboriginal Peoples: *Report of the Royal Commission on Aboriginal Peoples*, 1996, provides the standard for terminology used in this paper.

The term *Aboriginal people* applies broadly to “refer to the indigenous inhabitants of Canada...” belonging to the political and cultural entities known as ‘Aboriginal peoples’.” *Aboriginal peoples*, “refers to organic political and cultural entities that stem historically from the original peoples of North America.”

“The Commission distinguishes between local communities and nations.” Consistent with this distinction, in this work I use the terms *First Nations community* to refer to “a relatively small group of Aboriginal people residing in a single locality and forming part of a larger *Aboriginal nation*.”

The term *Indian* is used only when contained in quotations, or when used in legislation or policy or discussions relevant to legislation or policy.

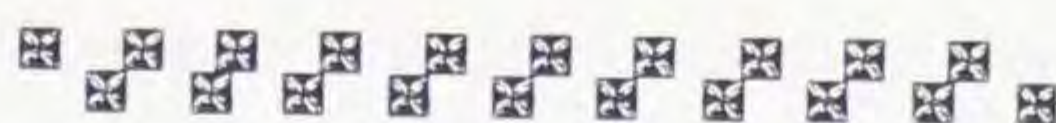
These choices were made with respect for Aboriginal people.

Chapter One: Respecting the Silence



Introduction

I became interested in the topic of circle sentencing when I heard it discussed during a radio interview.¹ At the time I understood circle sentencing to be a sentencing method where community members are invited to join the victim, the offender and members of the court to provide input into the sentencing decision for an offender. The interviewer asked his guest whether he felt the victim was comfortable speaking out in a circle sentencing session when the offender was in the circle. The guest responded that circle sentencing only proceeds with the consent of the victim, and he described how the victim is encouraged to speak out in the circle. I wondered “*Can the victim freely speak out in the circle -- especially if the victim is a female victim of physical or sexual violence? What might be the consequences of her speaking out?*” This paper represents my quest to answer these questions. But my first task is to frame circle sentencing within the current political and social context.



The Honourable Judge Cunliffe Barnett, now retired from the Provincial Court of British Columbia, describes *circle sentencing* as:

A creative alternative to the usual sentencing process. Sentencing circles are usually held in an offender's home community, not in a far away courthouse. The judge and lawyers do not dominate the proceedings in a sentencing circle. The judge is there to listen to the victim, the offender, and to other concerned and knowledgeable community members. The hope is that a framework may be constructed to provide for sanctions against this offender, his rehabilitation, and the healing of wounds within the community.²

¹ This would have been in the winter of 1995. I was not able to secure the interview transcript.

² The Honourable Judge Cunliffe Barnett of the Provincial Court of British Columbia, 1995, Circle Sentencing/Alternative Sentencing. *In: Canadian Native Law Reporter* Volume 3 p. 1-7 at 1.

Circle sentencing initiatives, in limited use for several years, now fall under a broader mandate to support alternative justice measures which either divert offenders from being charged, from entering the courts, and/or from imprisonment.³ In October 1995 the Attorney General of British Columbia announced that "British Columbia will adopt traditional native sentencing circles to deal with some aboriginal *offenders*...."

[emphasis added]⁴ Announcements regarding alternative measures often highlight how alternatives are less adversarial than the mainstream court system and this benefits both the victims and the offenders. Of course, the government also stands to benefit from this policy direction by lessening the load on a stressed and expensive justice system which is not effectively leading to the rehabilitation of offenders.

Inspiring Alternative Justice Initiatives: Generative Forces

While the justice system is inaccessible and problematic for many people who encounter it, this problematic is compounded for Aboriginal people.⁵

... the criminal justice system has failed the Aboriginal people of Canada - Indian, Inuit and Metis, on-reserve, urban and rural, in all territorial and governmental jurisdictions. The principle reason for this crushing failure is the fundamentally different world view between European Canadians and Aboriginal peoples with respect to such elemental issues as the substantive content of justice and the process for achieving justice.⁶

The alarmingly high incidence of incarceration of Aboriginal people is often cited as an indicator of the problems the criminal justice system presents Aboriginal people. Aboriginal people represent who represent approximately "... 11 percent in federal correctional institutions...and 15 percent of provincial prison populations," compared to

³ Royal Commission on Aboriginal Peoples. 1996. *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada*. Ottawa: Canada Communication Group at 104.

⁴ *Prince George Citizen*, 23/10/95. Natives to Get Different Justice System. p. 1.

⁵ For more information about the ability of the justice system to meet the needs of those it serves refer to British Columbia Justice Reform Committee. 1988. *Access to Justice: Report of the Justice Reform Committee*. Victoria, BC: Queen's Printer.

⁶ James C. MacPherson. 1993. Royal Commission on Aboriginal Peoples. In: *Aboriginal Peoples and the Justice System: Report on the National Round Table on Aboriginal Justice Issues*. Ottawa: Canada Communication Group. pp. 3 - 12 at 4.

their representation in the general population which is "less than 3 percent."⁷ While such statistics do not reveal the complexities of problems which are largely symptoms of the lingering effects of colonization, they do offer "... considerable evidence to suggest that Native people are more likely to be charged with an offence than non-Native people in similar situations....[and] are at a much higher risk of entering the second level of contact with the justice system --the courts. They are also more likely to be placed in jail and less likely to be placed on probation."⁸ Another factor which skews these statistics is that many Aboriginal offenders, "nearly one third of Native males...and two thirds of Native females....", are incarcerated simply in default of fine payments: a direct result of the generally disadvantaged social and economic status of Aboriginal people.⁹

This urgent situation has inspired representatives of some First Nations communities to work with representatives of the Western justice system to identify alternative justice measures which will better meet the needs of Aboriginal people. Circle sentencing offers one alternative to contemporary sentencing methods which is more closely aligned with the world view of Aboriginal peoples. As quoted above, the world view of Aboriginal peoples with respect to justice is different. While the focus of the Western justice system is on *retributive measures* -- punishment, the historical focus of First Nations justice is on *reparation* or *restoration* -- healing the harms that the victim, the offender, and the community experience as a result of the offence. Circle sentencing is recognized as a justice measure that promotes reparation and restoration, and looks more like traditional Aboriginal justice systems. Traditional systems of justice were outlawed by the colonizers because these systems were viewed as different, therefore

⁷ Vic Satzewich and Terry Wotherspoon. 1993. *First Nations: Race, Class, and Gender Relations*. Scarborough, Ontario: Nelson Canada at 181.

⁸ James S. Frideres with Lilianne Ernestine Krosenbrink-Gelissen. 1993. *Native Peoples in Canada: Contemporary Conflicts*. Scarborough, Ontario: Prentice-Hall Canada Inc. at 208. For a criticism of the usefulness of research data in 'crediting the system with the problem of over-representation' refer to Carol LaPrairie 1995. *Conferencing in Aboriginal Communities in Canada: Finding Middle Ground in Criminal Justice?* Ottawa: Department of Justice at 2.

⁹ James S. Frideres with Lilianne Ernestine Krosenbrink-Gelissen. *Native Peoples in Canada* at 212. Apparently, sanctioning jail terms for fine default has recently been discouraged.

inferior to European systems and laws. It is important to note that although circle sentencing emulates traditional systems of aboriginal justice it is still tightly bound by the colonial character of Western jurisprudence and this remains problematic.¹⁰ Therefore, circle sentencing is viewed as a small step towards First Nations assuming responsibility for justice.

The term “circle sentencing” was conceived by Yukon Territorial Court Judge Barry Stuart when he used the term to describe an innovative approach to sentencing in the case of *R. v. Moses* in 1992.¹¹ Philip Moses was a young repeat offender with a tragic history of physical and sexual abuse, limited education and movement between foster homes, group homes, and juvenile centers. It was obvious the court system had not protected the community from this offender, nor deterred him from re-offending, thereby not fulfilling two of the primary goals of the justice system: protection of society and offender rehabilitation. The Court adjourned to consider alternatives which might help break the “pernicious cycle plaguing the life of Mr. Moses.”¹² What followed is now known as a circle sentencing (also known as a sentencing circle in some jurisdictions). The more common characteristics of the circle sentencing process are described below.

Circle sentencing occurs after there has been an admission of guilt, or sometimes a finding of guilt, during a regular court proceeding. After the court hearing members of the community are invited to participate in a sentencing circle. The goal of circle sentencing is to discuss alternatives to typical sentencing remedies including all available alternatives to a jail sentence. Meaningful participation by the victim, offender, members of the justice system, family and community members in the sentencing circle is encouraged through establishing a less formal courtroom dynamic. For example, the courtroom is arranged in a circle and the judge usually does not wear a robe. The

¹⁰ Furthermore, there is some concern over legal technicalities, for example, that rules of evidence may be contravened through circle sentencing, and over potential jurisdictional conflicts. Discussion of these and other technical legal points are beyond the scope of this paper. For more information about these concerns refer to RCAP, *Bridging the Cultural Divide* at 204 and at 249.

¹¹ Judge Cunliffe Barnett, 1995. In: *Canadian Native Law Reporter*, [3] at 1.

discussion is informal and relaxed rather than structured and confrontational.¹³ The judge considers the input of circle participants in arriving at the sentencing decision, or disposition. However, the judge always makes the final decision with regards to sentencing and the judge's disposition is constrained by the parameters of the law.

R. v. Moses is often reported as the first case to use circle sentencing, but Judge Barnett references earlier cases that came before him, particularly the case of Frank Brown, where a similar process was used successfully.¹⁴ In the case of Frank Brown an alternative sentence of banishment is credited with changing the behavior of this member of the Heiltsuk First Nation at Bella Bella in British Columbia.

Frank Brown appeared before me in Bella Bella in 1978. He was 14, had been in trouble before, and had been the leader during a very serious armed robbery. Frank was obviously on his way to a jail cell. But wise and concerned persons from within the Bella Bella community did not want to see that happen. They met outside the courtroom and then proposed a better alternative inside the courtroom. Frank was ordered to leave Bella Bella and to stay on a nearby uninhabited island for a few months. He was visited regularly by his uncle. That experience transformed Frank's life: he is a young leader of the best sort now.¹⁵

Here the community members were instrumental in influencing a change from the regular court proceedings, and Judge Barnett accepted the alternative punishment of banishment proposed by the community members.

Banishment as a form of punishment has traditional significance among many First Nations as one of a range of severe and effective treatments for offenders. Other punishments included "spiritual consequences (ie. psychic manipulation resulting in illness or death), or family 'revenge'."¹⁶ Specifically with regard to the regulation of

¹² *R v. Moses* [1992] 3 C.N.L.R. 116, 71 C.C.C. (3d) 347.

¹³ The proceedings of *R. v. Moses* describe how "a change in the physical arrangement of the courtroom produced a major change in the process." *R v. Moses* [1992] 3 C.N.L.R. 116, 71 C.C.C. (3d) 347

¹⁴ Judge Cunliffe Barnett. In: *Canadian Native Law Reporter* [3] at 1&2. Judge Barnett notes that Frank Brown's story forms part of the Knowledge Network "Images of Indian Reality" Series and the video can be purchased by writing to Frank Brown in Bella Bella. Judge Barnett also cites other cases which utilized alternative sentencing measures.

¹⁵ Judge Cunliffe Barnett. In: *Canadian Native Law Reporter* [3] at 1&2.

¹⁶ Emma LaRocque. 1997. Re-examining Culturally Appropriate Models in Criminal Justice In: *Aboriginal and Treaty Rights in Canada*. Vancouver: UBC Press pp. 75 - 96 at 84.

sexual relations “all original cultures exercised strict mores and taboos.”¹⁷ Antonia Mills describes the significance of the punishment of banishment or ostracism for the Wet’suwet’en in British Columbia.

Ostracism was another powerful sanction used to enforce adherence to Witsuwit’en [sic] law. A person’s life depended upon having the good will of his or her own clan, his or her father’s clan, his or her spouse’s clan, and his or her spouse’s father’s clan. If a person were ostracized he or she had no territory to go to. He or she was without help or support. He or she was, in fact, socially and figuratively dead. Clearly ostracism was a powerful sanction.¹⁸

Mills describes how such “forms of punishment have been liberalized”; however, it seems the sentiment of this traditionally severe punishment underlies its current application.¹⁹ Today banishment, with little more than basic provisions, is proposed as a more severe and rehabilitative penalty than “...sitting in a nice warm jail...” and “...having your meals cooked for you....”²⁰ Banishment may be sanctioned by First Nations communities even without the influence of the RCMP and the court. Hugh Brody tells the story of three teen aged-boys who had injured two older women and a young man.²¹ The police came, but for whatever reason took no action against the boys. Instead the boys were taken by an elder out to the trapline, which was considered “something of a local correctional institute,” for three months “to keep out of trouble and learn the right ways to live.”²²

The examples cited above focus on reparation and restoration or learning to do things the right way as a response to violation of Aboriginal societal norms, or legally determined criminal behavior. British Columbia’s justice system now promotes a

¹⁷ Emma LaRocque. *In: Aboriginal and Treaty Rights in Canada* at 84.

¹⁸ Antonia Mills. 1994. *Eagle Down is Our Law: Witsuwit’en Law, Feasts, and Land Claims*. Vancouver: UBC Press at 149.

¹⁹ Antonia Mills, *Eagle Down is Our Law* at 148.

²⁰ Joan Ryan. 1996. Prison and Its Alternatives. *In: Ideas*. Toronto: CBC Radio. [Transcript at 78]

²¹ Hugh Brody. 1988. *Maps and Dreams*. Vancouver: Douglas and McIntyre at 113.

²² Hugh Brody. *Maps and Dreams* at 179.

restorative justice paradigm which provides the framework for sentencing alternatives such as banishment.²³

Restorative justice reform is driven by a number of generative forces that have challenged governments to take a long hard look at the criminal justice system and operation of the criminal courts. The criminal justice system focuses on protection of property and persons through enforcing legislated limits on behaviour. This retributive focus of the justice system contributes to alarmingly high rates of incarceration, overloaded and expensive institutions of justice, as well as high rates of offender recidivism.²⁴ The justice system is also criticized for being too unwieldy and complex and for its failure to "take into account the interests of those who may not be immediately involved in the justice process but who have a legitimate interest in outcomes such as victims, families and members of the community."²⁵ Some of these concerns are particularly problematic for Aboriginal people, as already mentioned. Criticism regarding these failures of the justice system rest on the shoulders of governments who are increasingly interested in changing the status quo. Restorative justice is optimistically viewed as having the potential to rectify some of the problems with the criminal justice system.

Also contributing to the momentum of the restorative justice enterprise with respect to Aboriginal peoples is the self-government agenda provided for in *Section 35* of the *Constitution Act, 1982*. *Section 35* recognizes and affirms Aboriginal peoples' inherent right to self-government and "encompasses the right of Aboriginal nations to establish and administer their own systems of justice, including the power to make laws within the Aboriginal nation's territory."²⁶

²³ For more information about reforms to both the Civil and Criminal Justice System refer to: Ministry of Attorney General, 1997, *Strategic Reforms of British Columbia's Justice System*, British Columbia.

²⁴ For example in "1995/96, correctional institutions were running at 123% of their designed capacity" and the estimated annual cost for keeping in inmate was \$61,000. Cited in Ministry of Attorney General, *Strategic Reforms of British Columbia's Justice System* at 4.

²⁵ Ministry of Attorney General, 1997, *A Restorative Justice Framework: Draft*, British Columbia at 1.

²⁶ RCAP, *Bridging the Cultural Divide* at 310.

Restorative Justice

Contemporary restorative or reparative justice initiatives are characterized by three fundamental elements. (1) The offender's actions are viewed as an offence against the victim rather than the state. Therefore, the offender is directly accountable and responsible to the victim for his/her actions. There is generally a requirement that the offender admits responsibility for the offence before proceeding with these more victim-centered alternative measures. (2) Active participation of the victim, offender and a familiar and meaningful community is encouraged "in a search for solutions which promote repair, reconciliation, and reassurance."²⁷ (3) The focus is on reparation -- repairing the harms caused by the offence -- and through this process contributing to the healing of the victim, the offender and their community. Thus remedies for making amends to the victim or community will generally be included in sentencing decisions, as well as specific actions the offender should take to reduce the likelihood of future offences.²⁸

Most restorative justice programs also have an objective of diverting offenders away from the traditional court system, particularly from prosecution *or* imprisonment. Programs that divert offenders from prosecution are generally targeted at young offenders or first time adult offenders. Circle sentencing endeavours to divert offenders from imprisonment through encouraging a creative search for sentencing alternatives, but does not preclude a jail sentence if the circle finds this appropriate. Section 718.2 of the *Criminal Code* provides for this activity:

A court that imposes a sentence shall also take into consideration the following principles:

²⁷ Howard Zehr, 1990. *Changing Lenses*. Waterloo, Ontario: Herald Press at 181. For more information regarding victim's interests in restorative justice initiatives in B.C. refer to Sandra A. Goundry, 1997. *Restorative Justice and Criminal Justice Reform in B.C. - Identifying Some Preliminary Questions and Issues: A Draft Discussion Paper*. Available from BC Ministry of Attorney General or BC Association of Specialized Victim Assistance and Counselling Programs.

²⁸ For more information about restorative justice initiatives proposed for British Columbia refer to Ministry of Attorney General, 1997. *A Restorative Justice Framework: Draft*. British Columbia.

(e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

Australian criminologist Braithewaite's model of reintegrative shaming, based on a study of systems of justice of the indigenous people of Australia, has gained currency as the theoretical basis for many restorative justice initiatives. Braithewaite maintains that:

shame plays a key role in the regulation of social behavior. It does this in two ways. It puts pressure on individuals both from without and from within. First, social disapproval deters offending behaviour by threatening a loss of status and affection. ... Second, pangs of conscience also deter offending behavior....

*The shame of social disapproval, however, is much more painful than is the pain caused by pangs of conscience.... The threat of a loss of status and affection is the really significant threat. And this is not a threat that can be made by state officials. It can only be made by those who have a significant personal relationship with the person whose behaviour is in question. [emphasis added]*²⁹

Judge Barnett's description of circle sentencing, which highlights the powerful effect of coming in front of a group of people in one's own community where there is a significant personal relationship, supports Braithewaite's theory.

In the regular court system many times a person who's to be sentenced can sit there like a bump on a log and be shielded behind a lawyer. And the lawyer will do all the talking, and in many courtrooms and in many cases the offender or the person who is being sentenced will not be expected or required to say anything. In circle sentencing that's just unthinkable. It just doesn't work that way. The person may have a right to remain silent, but it never happens and inevitably the person is going to be drawn into the process. It may take 2 or 3 hours but it will happen. And while the Judge can't sit there and say 'what's your excuse?' the people in the circle can, and do. As a result, some offenders would rather not endure that.³⁰

Rupert Ross stresses how the focus with reintegrative shaming is on shaming the act rather than the person who has committed the offence.³¹ In my opinion this is an

²⁹ J.M. McDonald, T.A. O'Connell, D.B. Moore & E. Bransbury. No date. *Convening Family Conference: Training Manual* at 5 & 6. Braithewaite's theory is the basis for Family Group Conferencing being utilized in Australia and New Zealand, especially for juvenile offenders. Family Group Conferencing has been compared to circle sentencing in Canada as there are a number of similarities. For more about Braithewaite's theory and how it relates to circle sentencing see Carol LaPrairie, 1995, *Conferencing in Aboriginal Communities: Finding Middle Ground in the Canadian Justice System*, unpublished.

³⁰ The Honourable Judge Cunliffe Barnett of the Provincial Court of British Columbia (personal communication, August 6, 1996)

³¹ Rupert Ross, 1996, *Returning to the Teachings: Exploring Aboriginal Justice*, Toronto: Penguin Books at 21.

important distinction. Another important component of the reintegrative shaming theory is the focus on reintegrating the offender into the community. The Unlocking Aboriginal Justice Program of the Gitx̱san-Wet'suwet'en is an example of a culturally appropriate alternative justice program based on principles akin to reintegrative shaming. Of course, their program is grounded in their nation's history. Established in 1990, and still in operation, this program utilizes a shame based premise and facilitates reintegration of the offender into the community by providing information about the individual's kinship connections.³² I include this description of Unlocking Aboriginal Justice because of its longevity, its success, its similarity to Braithwaite's contemporary theory, and because one of the women interviewed for this thesis was a participant in the program. Her experience is relevant to this discussion for reasons which will become apparent in *Chapter Two* and *Chapter Three*.

Individuals are referred to Unlocking Aboriginal Justice by the community, government agencies and house groups. In suitable cases the individual may be diverted from the courts and the house, or clan, that the individual is a member of may be responsible for developing a course of action for him or her.³³ The Gitx̱san and Wet'suwet'en house groups or clans are matrilineal. "All members of a clan are thought to be related through their mother's side....In terms of kinship, a house is a matrilineage of people so closely related that the members know how they are related. In other words, one's closest relatives on one's mother's side are in one's house."³⁴

³² Gitx̱san-Wet'suwet'en Education Society, no date. *Unlocking Aboriginal Justice Program*. [Brochure]

³³ *RCMP Operational Manual*. Hazelton. 1992. Referrals to Unlocking Aboriginal Justice System.

³⁴ Antonia Mills. *Eagle Down is Our Law* at 102 & 107.

In Gitksan and Wet'suwet'en societies, control is effected largely by forms of social censure which range from casual counseling to formal events such as the shame feast. On these occasions the emphasis is on compensation of the victim and his or her relatives rather than punishment of the offender. The responsibility for the action and the compensation for it is taken on by the extended family (House or Clan)....Such a system of social control requires the *existence of true community of the type that comes from a society small enough to permit face-to-face relations and with well-recognized kinship ties to allocate responsibilities.* [emphasis added]³⁵

Similar shame based methods of maintaining social order have existed since time immemorial in many traditional cultures. The success of Unlocking Aboriginal Justice is attributed to its sophisticated design and the commitment and cooperation among many agencies -- both First Nations and Western. Now under the auspices of the Gitksan Health Authority, Unlocking Aboriginal Justice is a component of the comprehensive *Peace and Justice: Gitksan Five Year Plan*.³⁶ There appears to be much optimism regarding the potential of circle sentencing and alternative measures, like Unlocking Aboriginal Justice, to emulate traditional Aboriginal justice systems and better meet the needs of Aboriginal people.

The Road is Long: Countervailing Forces

Critics are cautious of the optimistic response to alternative justice measures. Some suspect that such alternatives, purported to be more victim-centered than the formal justice system, tend to consider the needs of the offender over the victims and their families. This fact has not gone unnoticed by Judge Barnett who cautions that :

Some persons believe that the real purpose of alternative sentencing endeavors is to shelter native offenders (usually male) from the full force of the law. They believe that alternative sentencing thereby fails to protect victims (usually native women). There is sometimes too much truth to these beliefs and *it is fundamentally important that the interests of victims not be overlooked during circle/alternative sentencing sessions.* [emphasis added]³⁷

³⁵ Gitksan - Wet'suwet'en Education Society, 1989, *Unlocking Aboriginal Justice: Alternative Dispute Resolution for the Gitksan-Wet'suwet'en People* at 20.

³⁶ Gitksan Health Authority, 1997, *Peace and Justice: Gitksan Five Year Plan*, Hazelton, B.C.: Gitksan Health Authority. This document is recommended for those interested in the design of alternative justice measures.

³⁷ Judge Cunliffe Barnett *In: Canadian Native Law Reporter* [3] at 4.

It is especially important that the interests of victims of sexual violence are not overlooked, as the problem of sexual violence, pervasive in our society, is a complicated and serious one. The Ministry of Attorney General's policy *Violence Against Women in Relationships* cites that "In Canada during 1990, an average of two women every week were killed by their partners" an estimated "one in eight women, living in a relationship with a man, will be assaulted" each year and "as many as 35 violent episodes may have occurred before a woman seeks police intervention."³⁸ The policy also relates the tendency of the justice system to minimize "spouse assault" as a "domestic or social problem...best handled outside the criminal justice system" which has been "ineffective in reducing the incidence of violence against women in relationships and inadequate in terms of protecting women."³⁹ This problematic is a result of the structural origins of the generally diminished status of women in our society. For Aboriginal women this problematic is further complicated by the complex interaction of the history of colonization and the variables of ethnicity, gender and class.

Teressa Nahanee of the Squamish Nation gives a sense of the serious situation of violence in First Nations communities. "Aboriginal women already have their bodies on the line and they are being beaten in incredible numbers by Aboriginal men in their homes and their communities."⁴⁰ A 1989 study of the Ontario Native Women's Association found that "eighty percent of Aboriginal respondents had been victims of family violence, compared to ten percent for Canadian women as a whole."⁴¹ A survey of First

³⁸ Ministry of Attorney General, 1993. *Violence Against Women in Relationships Policy* In: *Policy on the Criminal Justice System Response to Violence Against Women and Children*. Victoria, B.C.: Queen's Printer at 2.

³⁹ Ministry of Attorney General. In: *Policy on the Criminal Justice System Response to Violence Against Women and Children* at 2.

⁴⁰ Teressa Nahanee, 1993. *Dancing with a Gorilla: Aboriginal Women, Justice and the Charter*. In: Royal Commission on Aboriginal Peoples. *Aboriginal Peoples and the Justice System: Report on the National Round Table on Aboriginal Justice issues*. Ottawa: Canada Communication Group pp. 359-382 at 377.

⁴¹ Royal Commission on Aboriginal Peoples, 1993. *Exploring the Options: Overview of the Third Round*. Ottawa: Canada Publishing Group at 10.

Nations communities in BC, conducted by the Helping Spirit Lodge in 1990, revealed that "Eighty-six percent of respondents had experienced or witnessed family violence."⁴²

Nahanee identifies two major concerns with regard to alternative justice systems which are proposed as a response for family violence:

First, women are enraged with the Justice pilot projects which allow Aboriginal male sex offenders to roam free of punishment in Aboriginal communities after conviction for violent offences against Aboriginal women and children. Second, Aboriginal women oppose lenient sentencing for Aboriginal male sex offenders whose victims are women and children.⁴³

Emma LaRocque, a Métis woman and professor at the University of Manitoba, suggests the lenient sentencing of offenders is often a result of the:

popular advancement of the notion that men rape or assault because they were abused or are victims of society themselves. The implication is that as 'victims', rapists and child molesters are not responsible for their actions and that therefore they should not be punished - or, if punished, 'rehabilitation' and their 'victimization' must take precedence over any consideration of the suffering or devastation they wreak on the real victims!⁴⁴

LaRocque cautions against focusing on the healing and rehabilitation of the offender at the expense of the victim. "Those involved in gross and willful crimes should receive very lengthy jail sentences and, in specific cases, should also be permanently removed from their communities....Removal may be the only effective measure of protection for victims and their families, especially in small, and or remote settlements."⁴⁵

With regard to community programs that promote reconciliation between offenders and victims, LaRocque raises the following questions which have helped shape this research:⁴⁶

What is the nature of the violence?
Are victims agreeing to these models as a result of social pressure and lack of other choices?
How are [victims] being affected by all this?

⁴² Sharlene, Frank. Task Force on Family Violence. 1992. *Is Anyone Listening?* Victoria: Ministry of Women's Equality.

⁴³ Teresa Nahanee. In: *Aboriginal Peoples and the Justice System* at 360.

⁴⁴ Emma LaRocque. 1993. Violence in Aboriginal Communities In: *The Path to Healing: Report of the National Round Table on Aboriginal Health and Social Issues*. Ottawa: Canada Communication Group at 72.

⁴⁵ Emma LaRocque. In: *The Path to Healing* at 84

⁴⁶ Emma LaRocque. In: *The Path to Healing* at 86.

Do [victims] have enough political and social awareness to be able to make a choice with such programs?

Concerns such as the above spur on the fight of Aboriginal women to affirm their equality rights, to ensure the protection of their rights under self-government, and to recommend the cautious implementation of alternative justice measures.

Research Objective

Given the momentum gathering in favor of implementing circle sentencing initiatives, the project of this thesis is to *consider whether the victims' needs can be met through circle sentencing*. What is meant by *circle sentencing* has already been discussed. By *victims* I mean *Aboriginal women who reside in reserve communities, and who have experienced sexual violence and who have participated in circle sentencing*.⁴⁷ I pondered for the longest time whether to use the label 'victim' to describe the women who are the focus of this discussion. I wondered if this term was disempowering, connotating an image of the 'helpless victim'. This is not the case nor the impression I want to convey. However, victim is a commonly used term and I respectfully use it hereafter.

Throughout this paper the term *sexual violence* refers to '**physical or sexual assault**, or the threat of physical or sexual assault of women by men with whom they have, or have had ongoing or intimate relationships. Other behaviour, such as intimidation, mental or emotional abuse, neglect, deprivation and financial exploitation must be recognized as part of the continuum.'⁴⁸ In my opinion, the term sexual violence brings to the forefront the violent nature of any of the means by which men control and dominate women in relationships. Finally, with regard to sexual violence, in an

⁴⁷ At times I use the term victim in a general and broader sense. I think these exceptions are obvious.

⁴⁸ This definition has been used by the Ministry of Attorney General to describe "violence against women in relationships" Ministry of Attorney General. *In: Policy on the Criminal Justice System Response to Violence Against Women and Children* at 4. Sexual assault is defined in the *Criminal Code* at s. 271. Sexual assault is used in this paper to refer to this specific offence. For an analysis of the discourse of legal judgements in cases of sexual assaults see Linda Coates, Janet Beavin Bavelas and James Gibson. *Anomalous Language in Sexual Assault Trial Judgements*. *In: Discourse and Society* 1994. Sage: London. 5(2) 189-206.

overwhelming number of cases this is violence by men against women and I use the pronouns that reflect this reality.

Critical to this discussion is a better understanding of the circle sentencing process and the victim's perspective of the power relations in First Nations communities and beyond. I had resolved to rely on the narratives of Aboriginal women who were victims of sexual violence and had participated in circle sentencing to help me understand what it is about the complex power relations that influence their everyday lives such that they cannot speak out about violence. But, these women remained silent.

I learned to respect the silence of these individual women:

the silence speaks loudly.

Theory and Methods

Institutional ethnography which begins from a woman's standpoint, as described by Dorothy E Smith, inspired my method of inquiry for this thesis.⁴⁹ Standpoint theory proposes that research which begins from women's experience --or *standpoint*-- identifies "the social organization and determinations of the everyday world as a *problematic*" thereby entering "an actual aspect of the organization of the everyday world ... into a systematic inquiry."⁵⁰ Standpoint theory is a fitting framework for this thesis as there is little evidence that the experiences of Aboriginal women who are victims of sexual violence and who have participated in circle sentencing have been entered into discourse, and then considered through a systematic inquiry. However, because of the silence of these women I could not represent their experiences first hand. Instead I utilized multiple methods of investigation including: interviews (with both women and men), review of court transcripts, media reports and other secondary sources to develop a *composite standpoint* -- a sense of the experience of women who had interacted with

⁴⁹ Dorothy E. Smith, 1987. *The Everyday World As Problematic: A Feminist Sociology*. Toronto: University of Toronto Press.

⁵⁰ Dorothy E. Smith, 1987. *The Everyday World As Problematic* at 110.

circle sentencing.⁵¹ This composite standpoint provided a point of entry for another level of research into the “institutions which appear to be both neutral and independent” to reveal how society’s institutions, larger structures and complex power relations actually operate to shape the everyday experience of Aboriginal women.^{52 53} *Institutional ethnography*, which utilizes multiple methods of investigation including interviews with individuals working as part of these institutions, guided this research.

The institution I focus on here is the institution of justice. This includes but is not limited to the courts, the representatives of the court, the *Criminal Code* and other jurisprudence, the practices, and the legalese of this established institution. Of course, the justice system is inextricably linked to the larger structures and power relations which govern even the most trivial of our everyday activities. Institutional ethnography serves as a method for gaining a sense of these larger structures and power relations, especially as they relate to important issues of marginalization and oppression. In this case, helping to reveal the gap between womens’ actual lived experience and what the justice system purports to do.

By helping to expose the power relations that sustain this ‘gap’, in particular the structural origins of the systemically induced inequities which create and sustain conditions of disadvantage, perhaps they can be altered.⁵⁴ I believe this is critical for all women, including Aboriginal women, particularly because it is primarily men, including

⁵¹ Some would probably criticize my reliance on both Aboriginal and non-Aboriginal women and men to help establish my composite standpoint which is said to represent the experience of Aboriginal women. However, this was the only means available to me and I maintain that this method did enable me to gain *some understanding* of the lives and activities of Aboriginal women, of their experience and the power relations that order their experience – goals which are consistent with a feminist ethnography. However, I do not suggest in any way that I can truly understand the experience of these women. For a fuller discussion of contemporary feminist ethnography see Shulamit Reinharz, 1992, *Feminist Methods in Social Research*, New York: Oxford Press at 46-75.

⁵² Michel Foucault, 1984, *Foucault Reader*, (1/ed.) Paul Rabinow, New York: Pantheon at 6. Dorothy E. Smith, *The Everyday World As Problematic* at 185.

⁵³ Dorothy E. Smith, *The Everyday World As Problematic* at 157. The concept of *power relations* comes from Michel Foucault, 1984, *Foucault Reader*, (1/ed.) Paul Rabinow, New York: Pantheon.

⁵⁴ Michel Foucault, *Foucault Reader* at 6.

contemporary Aboriginal men, who establish and maintain the structures and institutions of ruling and overlook the needs and concerns of women.

I formally interviewed sixteen individuals, whom I refer to as key and general advisors, to help establish my composite standpoint and to provide some insight into the complex power relations affecting Aboriginal women.⁵⁵ Two key advisors were Aboriginal women who were selected for *in-depth interviews* because of their specific experience with circle sentencing. One woman is the relative of the victim of a violent crime. The other woman is a victim of a crime where an alternative measure other than circle sentencing was used.⁵⁶ I include the women's experience with the latter alternative measure because it is a relevant and strong contribution to this work. Both of these women were referred to me by individuals who knew of my research project.

With prior permission I contacted each woman by telephone to provide a brief description of the research project. They both agreed to participate. The next step was to arrange a mutually convenient time to review the consent form which provided more information about the purpose of the research project, how the research material would be used, and the degree of anonymity promised in the study. Advisors were also reassured that they could withdraw from the project at any time.

Key advisors were asked to, "*please tell me about your experience with circle sentencing.*" Additional interview questions were prepared in advance, but the women interviewed were exceptionally eloquent and described their experiences so clearly there was little need to rely on prepared questions. The in-depth interviews described here are similar to phenomenological interviews which are a minimally structured, "interviewee - guided investigation of a lived experience."⁵⁷

⁵⁵ I find the term 'advisors' truly depicts the relationship of a researcher reliant on the advice and information of people with experience in a particular subject area.

⁵⁶ I can only offer this vague description of these two women in the interests of protecting their identity. I also wish to stress again that these women did not participate in circle sentencing because they were victims of sexual violence. I was unable to speak to any women with this direct experience.

⁵⁷ Shulamit Reinharz. 1992. *Feminist Methods in Social Research*. New York: Oxford Press at 21. Also cited is Shulamit Reinharz, "Phenomenology as a Dynamic Process," *In: Phenomenology and*

Once the consent to proceed with the taped interview was given the interviews were tape recorded. The advisor could ask that the tape recorder be turned off at anytime -- neither did. The tape was turned off when it was clear the discussion germane to the topic was exhausted.

Full transcripts of the taped interviews, both the questions and the responses, were produced. Transcriptions were verbatim with the exception of information which was changed or omitted to minimize the possible identification of individuals, communities or events. Advisors were mailed their transcripts and invited to review them and to provide their feed-back in order to minimize errors and possibilities of mis-interpretation.

Tapes, handwritten notes, consent forms and transcripts were kept in a locked file drawer. Upon completion of the thesis all handwritten notes, tapes, and consent forms will be destroyed. Interview transcripts are preserved in password protected documents on my personal computer.

Information interviews were conducted with general advisors who sit on all sides of the issue of circle sentencing. These advisors included: three native court workers, two judges, two crown prosecutors, a probation officer, an aboriginal justice committee member, two victim's advocates, two community members who were participants in a circle sentencing, and one Aboriginal male academic who was familiar with circle sentencing. Through my research efforts I identified these individuals as those who might provide some understanding into the power relations organizing the everyday experience of Aboriginal women victims.

Information interviews were conducted in person and by telephone, sometimes by prior arrangement, sometimes not. These interviews were open-ended in structure, although the theme of the interview was focused on revealing the power relations that

Pedagogy, 1983, 1(1):77-79. Also refer to *Feminist Methods in Social Research* for further information about contemporary ethnography at 46-75.

shape the experiences of victims. While the specific interview questions depended on the role of the individual being interviewed, some of the questions consistently asked were: how do you feel about circle sentencing being used in cases involving sexual violence?, are there possible repercussions for the female victim who speaks out in the circle?, and how are the conditions of the circle monitored?

As in the in-depth interviews, individuals were asked if the interview could be taped or recorded in notes. Although confidentiality was not as critical an issue in the information interviews, in most cases the name of the advisor and other details were omitted to preclude the possible identification of a particular victim, community or offence. With one exception I secured either verbal or written permission to use material from information interviews in my thesis report. In this thesis I only used material from interviews where I was given explicit permission.

In addition to interviews, many secondary sources were analyzed in order to develop an understanding of the historical, contextual, and technical background relevant to this topic. Secondary sources included, but were not limited to, writings of academics and other learned individuals regarding the criminal justice system, Aboriginal self-government, Aboriginal women and the law, alternative justice systems, sentencing and alternative sentencing, and alternative dispute resolution. Text describing specific alternative justice projects, and newspaper and journal articles about these projects were reviewed, as well as court transcripts and proceedings of circle sentencings. The jurisdictional focus of this paper is British Columbia, however, individuals from other jurisdictions were interviewed and secondary source material referred to many jurisdictions.

I did not attempt to “develop a highly technical analysis of the narratives.”⁵³ I reviewed the text from both in-depth and information interviews for passages and language which revealed some sense of Aboriginal women’s lived experience and how

⁵³ Dorothy E. Smith, *Everyday World as Problematic* at 190.

power relations shaped their experience.⁵⁹ I particularly relied on the women who were the two key advisors to help me to establish my composite standpoint and to give me a sense of some of the power relations that determine their experience. Pertinent information was marked in bold in all the transcripts. I was not looking to identify generalizeable themes, rather to identify an entry point into the general features of the larger structures. For this reason, a particular experience may be idiosyncratic but still illuminate the structural features within which one's experience arises.

I'm committed to preserving the voices of those I interviewed to reduce the reader's reliance on my interpretations and to allow for further interpretation of the interview data. For these reasons, in *Chapter Two*, I have included some long passages of interview material. This is a writing strategy that will allow the reader to gain a better understanding of how I arrived at a composite standpoint and identified the issues which emerged through my research.

The primary strength in the design of this research project comes from selecting institutional ethnography which begins from a women's standpoint as the method of sociological inquiry. Focusing on women's everyday experience as the starting point for the research helps to break the silence which is so often imposed on a marginalized group by the ubiquitous power and strength of the dominant group.

A specific limitation of the research outcome is that the voices of the women who are the focus of this work are silent. The meaning of their silence becomes clearer through secondary sources.

Perhaps speaking directly with victims of sexual violence who have participated in circle sentencing would have led to other conclusions for my research. Perhaps not. However, I sense that speaking with these women directly would not necessarily have provided answers to the questions posed in this work, because of what I have found to be a well-justified *conspiracy of silence*. Some of the reasons for this silence become

⁵⁹ Dorothy E. Smith. *Everyday World as Problematic* at 190. Also refer to Shulamit Reinharz. *Feminist*

more apparent later. Fortunately, the focus of my work is to bring to life some of the ways in which the everyday world, specifically the circle sentencing process, might be problematic for Aboriginal women victims -- rather than to answer questions, develop theory or to consider this paper's theoretical implications. For, as Michel Foucault says "it is not theory but life that matters."⁶⁰

What I specifically seek to understand through this analysis is the complex power relations that influence the everyday lives of the Aboriginal women who are victims of violence, such that they cannot speak out publicly, directly, and safely about violence. Gaining an understanding of this dynamic positions me to comment on the fundamental concern of this paper -- *whether the victim's needs can be met through circle sentencing.*

The remainder of this introductory chapter is dedicated to an overview of the paper and to a personal statement about why I have chosen to write on this topic. In *Chapter Two* I present my findings by relating excerpts from the narratives of those I interviewed who were experienced with circle sentencing. This chapter establishes the basis for the secondary analysis in *Chapter Three*.

Chapter Three explores the devastation of colonization, the influence of community and culture, and the law as the multiple sites of power and control which emerged through this work as those that shape the everyday experience of Aboriginal women, specifically those who are victims of sexual violence. Note that these factors also shape the experience of their predominantly male offenders. Early in the chapter I introduce the Power and Control Wheel as the conceptual framework for my secondary analysis.⁶¹ The Power and Control Wheel framework facilitates the explication of the dynamics of violence, particularly through identifying all the means by which institutions situate men to establish and maintain power and control over women. Often violence in

Methods in Social Research at 46-75.

⁶⁰ Michel Foucault, 1980. *Power/Knowledge: Selected Interviews and Other Writings 1972-1977*, (ed.) Colin Gordon. Toronto: Random House of Canada at 81.

⁶¹ Domestic Abuse Intervention Project, 206 West Fourth Street, Duluth, Minnesota 55806. Telephone: 212-722-4134.

relationships manifests through a number of individual and discrete incidents. The power and control framework is particularly useful in depicting how a series of individual incidents can reveal an entire abusive pattern.⁶² In this work the power and control framework is also applied to help reveal and explicate how the dynamics of power and control that shaped the historical landscape set the stage on which the everyday lives of contemporary Aboriginal women victims unfold.

To demonstrate the effectiveness of the power and control model as an analytical tool I employ a typographical style of Jacques Derrida.⁶³ Through a seemingly parallel analysis I demonstrate how similar tactics of power and control established and now maintain the marginalized status of Aboriginal people generally, and Aboriginal women in particular. I then discuss how the multiple sites of power -- colonization, community, culture and the law -- shape the everyday experience of Aboriginal women. The final section of *Chapter Three* introduces another important site of power: the power of the Aboriginal women who are the victims of sexual violence. Despite the violence that Aboriginal women tolerate in their communities they are resistant and resilient and their strength is a key factor in the enduring character of Aboriginal Nations.

In *Chapter Four* I present some ideas that I hope are useful for First Nations communities, and members of the institutions of justice interested in meeting the needs of victims through circle sentencing. This chapter provides a summary and some analysis of the valuable points raised in relevant literature, in case law and in interviews with advisors.

A Personal Note

I conclude this introduction with a personal note in an attempt to locate myself as the author of this work. I am motivated to understand a complex and important

⁶² Martha R. Mahoney, 1994. Victimization or Oppression? Women's Lives, Violence, and Agency. In: Fineman, Martha Albertson & Mykitiuk, Roxanne. *The Public Nature of Private Violence: The Discovery of Domestic Abuse*. New York: Routledge. pp. 59-92.

contemporary issue -- *whether the victims' needs can be met through circle sentencing.*

As a non-Aboriginal person I feel that I should explain my interest in this topic.

I grew up in a household where there was a very strong commitment to justice, fairness and the law. This experience fueled my interest in the field of employment equity where I worked prior to my graduate studies. Through my work I developed a better understanding of the material disadvantage of sexism and racism, confronted intolerable ignorance and stereotyping, and learned for the first time some of the complicated history of Aboriginal people. Through my work I also met my husband who is a member of the Gitinmaax Band in Hazelton, B.C. Finally, the University of Northern British Columbia has a strong First Nations focus. Thus, I find my life experience has somehow directed me to this topic.⁶⁴ The following quote helps to convince me that my effort may be worthwhile.

Now Native womens' work is taken for granted and ignored, and we have become sexual toys and punching bags for unemployed and despondent men in our communities.... Whenever we try and get our band councils to do something about this, we are pushed back down by leaders who use their version of "tradition" - a questionable interpretation of some mythical time when women were seen but not heard. And in these times of so-called 'political correctness,' it is very unlikely that non-Natives will question whatever interpretation of "tradition" our leadership comes up with.⁶⁵

As an 'outsider' perhaps I can say some things that members of First Nations communities cannot, or would not. However, I do recognize that my life experience may influence an ethnocentric shaping of my research findings: I hope not. I hope this work may be of value for people interested in circle sentencing. And, my greatest hope is that I

⁶³ Jacques Derrida. 1991. *A Derrida Reader: Between the Blinds*. (ed) Peggy Kamuf. New York: Columbia. This idea came from reading Julia Emberley. 1993. *Thresholds of Difference: Feminist critique, native women's history, post-colonial theory*. Toronto: University of Toronto.

⁶⁴ I think my desire to understand the history of Aboriginal people may also be rooted in a childhood experience. I spent virtually all of my young life in the Northern British Columbia communities of Ft. St. John and Dawson Creek and became familiar with the disadvantaged social and economic situation of Aboriginal people. Hugh Brody, *Maps and Dreams* (at 142-143) writes about Ft. St. John. He explains how "Indians" needed a place where they could "be in town without being directly under the disapproving eyes of the Whites." He describes these places as "patches of urban bush." I vividly remember one of these patches a few blocks from my family home. I have only recently come to understand some of the complexities that inspired the retreat to these places.

show respect to the people whose feelings and thoughts, in the form of words, are represented in this work.

I remind the reader that while this paper offers some analysis of the law, specifically legislation and case law, these interpretations are those of a lay person rather than someone who is legally trained.

⁶⁵ Irene James. 1996. Women's concerns about treaty process. *In: Native Issues Monthly: The Comprehensive Research Report on Native Affairs & Issues*. Volume 4. No. 2 p.8-9.

Chapter Two: Some Reasons For The Silence



This chapter features excerpts from narratives related by a cross-section of people with experience with the justice system and circle sentencing including: victims, relatives of victims and offenders, judges, lawyers, Native court workers, victim's advocates, and a probation officer. Advisors shared the opinions that incarceration of offenders does not generally lead to their rehabilitation, and that healing victims, offenders, and communities is important. In this respect advisors recognize the potential of circle sentencing to achieve more positive outcomes than typical sentencing methods. This sentiment is apparent in the excerpts provided below.

However, I make no pretense of approaching this research from a neutral place. My intention is to consider a gendered analysis of circle sentencing in order to assess ways in which circle sentencing might be problematic for Aboriginal women who are victims of sexual violence, to try to understand their everyday experience, and to reveal how their experience is inextricably bound by the power relations within which their experience arises, as well as that of their offenders. In this way I hope to make some contribution to improving the circle sentencing process so that it will better meet the needs of Aboriginal women.

This chapter is organized to provide an understanding of how circle sentencing works, to preserve the voice of the people interviewed, and more importantly to highlight the everyday experience of Aboriginal women victims and the important issues which emerged out of the interviews. Throughout this chapter names of advisors are generally omitted. Similarly, specifics of offences or locations of offences are generally omitted. These precautions are required in order to conceal information that may compromise the

identification of an individual or of a particular offence or community. For the sake of clarity words of advisors are italicized.

Tell Me About Circle Sentencing

The Honourable Judge Cunliffe Barnett provides this insight about circle sentencing.

Its impetus was from people in the First Nations communities and judges working in First Nations communities where many times people feel very distant and alienated from the traditional justice system.... People have been charged with serious offences, the case gets heard hundreds, sometimes thousands of miles away even, and the community has no understanding of what happened.

Circle sentencing was an initiative to give people a real role in the process as a more satisfactory way of dealing with individual cases, and also, hopefully, a way of increasing community confidence in the justice system.

In the regular court system many times a person who's to be sentenced can sit there like a bump on a log and be shielded behind a lawyer.... In circle sentencing that's just unthinkable. It just doesn't work that way. The person may have a right to remain silent, but it never happens and inevitably the person is going to be drawn into the process. It may take 2 or 3 hours but it will happen. And while the judge can't sit there and say 'what's your excuse' the people in the circle can, and do. So some offenders would rather not endure that. It's a pretty searching process.⁶⁶

A Native court worker who is a Native woman with 19 years of experience with the justice system describes the value of the circle proceedings.

At the circle sentencing usually the judge likes to have everybody in the plain clothes so that the elders, the people in the community... don't get intimidated by the uniform. 'Cause some people can be like that you know. But this way with the plain clothes everybody sits around talking and it makes it more easier for them to talk...

[It's] "a better way of healing at a circle sentencing rather than in jail... I think it's more or less that they realize that the whole community is involved or partial community involved ... and they will be reminded down the road...."⁶⁷

⁶⁶ The Honourable Judge Cunliffe Barnett of the Provincial Court of British Columbia (personal communication, August 6, 1996)

⁶⁷ Advisor's identity withheld (personal communication, May 9, 1997)

Judge Barnett comments about circle sentencing being used for cases of sexual violence.

Well, there are pitfalls, but then if you're dealing with some sexual cases and some wife assault cases, my experience has been that you may get a lot of women there and for the first time they're in a setting where they feel they can say some things and be listened to. And, I really have seen that, where there's a lot of suffering in silence in some of these communities and if [circle sentencing is] done properly it may really provide a valid opportunity for people to say things that they've been afraid to say before. And I don't say that that happens easily, but it does happen....

The above descriptions highlight some of the benefits of circle sentencing as it is intended to work. Note that both advisors mentioned the importance of the offender being accountable to their community, and the value of other community members participating in the process. These aspects of circle sentencing are viewed as particularly beneficial in aiding with the healing process in communities. But whether this process makes it easier for victims to talk, or whether it contributes to their healing is unclear.

Two circle participants describe their experience in the circle.

We had a feather...

Everyone's in the circle.

You take the feather and say what you want.

you take your time and pass it to the other person... there's a lot of crying, so it's good. [The circle took] the whole day 'til about 6:00 pm.⁶⁶

Another circle participant compares the circle process to the regular court process.

It's better because everyone can say what they feel or think -- in court the only one who talks is the witness. Both families didn't say anything....everyone's sitting in the circle when it comes to you, he's sitting right there and you can talk to him... this is what I think, this is what you should do.⁶⁷

These comments of circle participants who are not victims, describes how the process should ideally work for all participants, including victims.

Very successful outcomes of circle sentencing are reported. A probation officer, describes a case which was “... an unbelievable success -- a complete turnaround. If you

⁶⁶ Advisor's identities withheld (personal communication, November 1, 1996)

look at the offender's circumstances and the serious problems of alcohol abuse and violence you can hardly believe he is the same person. He has become a role model for the community and to his own children."⁷⁰ In this case and in others there is reason to celebrate the positive outcome for the offenders who participate in circle sentencing.

Too Many Victims

As described above, the long sorrowful history of Aboriginal people since the time of European contact has left an alarming number of victims in its path. Often male offenders, the victimizers, have low self-esteem and a truly lamentable past, themselves victims of sexual abuse and substance abuse. Rampant alcoholism and pervasive violence has been attributed to the effects of colonization, particularly the residential school experience. Regrettably, this is a common history of many people in First Nations communities. Because of this history it seems that sometimes there is too much focus on the offender and the needs of the victim and others impacted by the offence are overlooked -- however unintentionally. The following narrative excerpt describes the situation of one offender.

*And how it turns out is that it comes from his childhood... he was raised without a father and they were very poor. And he grew up in an alcohol abuse home. And he left home ... around 13 years old to go out and work and see if he could get some money for his Mom. And, I guess he was lost sort of in his own mind, he didn't know what was love and he sort of felt alone. He sort of felt like he was alone on this earth. So when he turns to drinking it all comes out in the negative way.*⁷¹

Often the offender's actions are attributed to his personal history of poverty, alcoholism and abuse which tend to absolve him of responsibility, and result in the community focusing on his healing. A crown prosecutor comments with respect to this situation, but stresses that her experience with circle sentencing is limited and her comments should be considered in this context.

⁷⁰ Advisor's identity withheld (personal communication, October 8, 1996)

I felt that the Elders were so caught up in the enthusiasm of the moment, wanting to do something good for the offender, they sometimes forgot the big picture...I thought there was a danger there...We were in his community, the elders were his clan. Basically, people in the justice system -- Native court workers, Crown Counsel, the judge -- try to equalize the power. However, this is difficult unless there are equally large number of elders from the victim's side.⁷⁰

The probation officer involved in the same case recalls:

... the emotion surrounding the offender and everyone in the circle sentencing. The victim was very quiet and timid -- if even there. She really didn't want to be there and it may have been against her better judgment to be there. The circle was very emotionally charged. Defence, and I think Crown, was in tears, I was choked up. Because of this high emotion which all seemed to be focusing on the offender I almost felt as though the victim was being pressured to go along with "let's help the offender."

[The victim] was under-represented. I think I spoke up because I felt no one was in her corner. She was kinda like an island on her own and the offender was getting more attention. This may not have been so much a dynamic of the circle rather a result of her status in the community. In these communities there seem to be political factions based on family. It seems like she had no status in the community -- I may be wrong, I don't think she was from there. It seemed no one really cared for her in [the community].

Herein lies the gap between the victim's experience and the process by which justice is intended to be carried out. The two previous quotations reveal how the powerful emotions which surface through the circle process may operate to silence the victims since the emphasis is on supporting and understanding the offender. This dynamic is particularly harmful in a sexual assault case. The over-concern for the offender tends to result in under-concern for the victim, thereby invalidating the reality and concerns of the victim, and reinforcing an existing power imbalance. The victim is re-victimized despite the good intentions of those involved in the circle sentencing.

Also contributing to the silence of victims is the discourse of healing. Healing Aboriginal people and their communities is considered a critical step for Aboriginal

⁷⁰ Advisor's identity withheld (personal communication, February 27, 1997)

⁷¹ Advisor's identity withheld (personal communication, May 9, 1997)

Nations to successfully take on the challenge of self-government. Because of its potential to help heal communities circle sentencing has become inextricably linked with both the discourse of healing and self-determination. Victims who speak out against circle sentencing may be viewed as jeopardizing these important goals.

Pressured to Participate

Advisors stressed that the victim should be a willing and meaningful participant in the circle sentencing. However, advisors indicated that victims often do participate in circle sentencing proceedings against their wishes. When the process goes ahead with the agreement of the offender, but not the victim, once again the power imbalance inherent in violent relationships is reinforced. A victim's advocate comments about her experience:

*"The other criteria was that the victim needed to be a willing participant.... It was basically pushed ahead. It was her life - she felt pressure to participate, because it was going to go ahead even though she said no."*⁷²

Relatives of a victim also felt pressured to participate in circle sentencing.

*You want me to talk to ya about what I experienced in the circle sentencing?
Umm, I wouldn't say it's the greatest thing. I was actually put on the spot, not myself... the whole family were put on the spot.*

We went through a week of court and things weren't looking as good as they should. So one day the prosecutor and the RCMP told us that you guys should consider negotiating with the offender, whatever.... Yes, I was very very upset there too ... when we had the circle sentencing, we were in a circle, and it seems like the prosecutor, the judge and the offender and his [the offender's] lawyer all got together and made decisions before us - that's how I felt and that's exactly what I told them in the circle... I said, it seems that you guys all got together and made the decision before you even involved us, the family, ...

⁷² Advisor's identity withheld (personal communication, July 30, 1996)

⁷³ Advisor's identify withheld (personal communication, January 31, 1997)

Even then - it was really hard for me actually to decide... is this circle sentencing really gonna work? Like I was really really frustrated and I was just like sort of in a crisis. I didn't really know where to turn... my mind was just overworking and it was just overloaded. And nobody listened to us.

... I really don't have any faith in the justice system, or the circle sentencing... they just don't have the time to do it right because you know they made us wait over a year to have a preliminary hearing. And, then after that they put us on a spot where I was very very uncomfortable, I was very very angry, because, they were trying to make me come to a decision the same day.⁷⁴

This passage shows how the victims and their families can experience some pressure to participate in circle sentencing and as a result may not be willing participants. Yet, Judge Barnett suggests, *"If the circle sentencing process is going to work effectively, I think, pretty well everybody is agreed you need to have a measure of participation or at least cooperation from the victim."*⁷⁵ Unfortunately, the power relations within some communities might make it impossible for victims to speak out against the holding of a circle.

Recent pressures on the justice system may also influence victims and their supporters to participate in circle sentencing. As previously mentioned, section 718.2 of the *Criminal Code* stresses "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 victim may be pressured into considering circle sentencing and other alternatives in order that the court shows that they are giving due consideration to s. 718.2. Other pressures, such as the time constraints associated with an overloaded court system, may also be inadvertently passed on to the victims and their families.

⁷⁴ Advisor's identity withheld (personal communication, October 8, 1996)

⁷⁵ Judge Barnett also writes that the victim must agree to participate in the circle sentencing, or at least "endorse the process." The Honourable Judge Cunliffe Barnett *In: Canadian Native Law Reporter* [3] at 4.

Victims who participate in an alternative process because they feel coerced or intimidated are in a sense re-victimized. This discussion offers us a view of some of the tensions which determine the silence. A process designed to support victims, may actually do the opposite.

The Cost of Speaking Out

Advisors agreed that it might be difficult for victims of violence to speak out in the circle. Sometimes the cost of speaking out can be very high. The crown prosecutor who participated in a circle sentencing observes: *"Perhaps she [the victim] is a bad mother, but it seems the final straw for this poor girl - who seemed very weak, he seemed to be the stronger of the two - is that he beats her then she is the one who loses her home and the kids."*

A Native court worker describes how victims who speak out (although not necessarily in a circle sentencing) risk upheaval of close relations:

I think they're more or less afraid of their own close relationships, especially if they're spousal probably, and probably the spousal's family. If it goes out into the media, if it's written on paper and if they recognize the circumstance, they know who did it and the family of the husband would probably go after the wife or something like that. Maybe that's what they are afraid of.⁷⁶

A victim's advocate suggests the cost of speaking out about family violence is even higher: the cost can be a life.

Victims often finally come forward because they see the offender around their children or grandchildren. They finally realize the cycle has to be broken so they give a disclosure to the police. If the courts let the offender off then the victims are really at risk. They're afraid of being killed. In the native community you have the accused and the accuser's family. Often the family won't comply with the terms of a court order, for example, for the offender not to see the victim or children. And many offenders have no remorse. If, for the purposes of the pre-sentence report, you ask how did this impact on the victim? they don't know, they

⁷⁶ Advisor's identity withheld (personal communication, May 9, 1997)

*can't articulate it. By assuming some offenders are rehabilitable the public isn't being protected.*⁷⁷

While the previous two excerpts describe the situation of family violence generally, rather than a specific circle sentencing, there is no indication that circle sentencing or alternative sentencing offers protection from powerful family dynamics. Infact, families might pressure the victim to participate in the circle sentencing or families might effectively silence the victim who does participate in the circle in hopes that the offender may avoid a jail sentence. This illustrates how the power relations in the larger community can be reproduced in the circle sentencing process.

Another concern that may silence victims is that information given in the form of victim impact statements, which they believe is given in confidence, is not infact confidential. *"I wrote my impact letter to the program.... The lady at the [program] told the accused what I said. And then he came back at me and was pretty angry...."* A similar concern was raised by another advisor:

*Two ladies that came to the reserve told us it was confidential -- later the offender called and knew what was said 'you guys said...' then the ladies called and they wanted more information. I said I wouldn't give it to them. They went back and told him everything... now the offender feels that nobody wants him at all... that was what he was told. Now you have to watch what you say.*⁷⁸

Surely the victims and their representatives in these examples were informed that s. 722.1 of the *Criminal Code* provides that a copy of the statement prepared by the victim be given to the offender or his counsel and to the prosecutor. However, one can imagine that this information may pressure the victim to temper their statements because they realize the offender will learn what is in them, or no statement will be given at all and there will be silence again. Advisor's felt that this practice of sharing information from the victim impact statement with offenders could put victims at further risk. This shows

⁷⁷ Advisor's identity withheld (personal communication, June 18, 1996)

⁷⁸ Advisor's identity withheld (personal communication, November 1, 1996)

the gap between the victim's experience and the standpoint from which the law is written. It sometimes seems the law operates more effectively in protecting the rights of the offender than the victim.

Alienated by the Justice System

The above discussion introduces the notion of how intimidating and inaccessible the apparatus of justice is to the lay person generally, and to Aboriginal people specifically. Language difficulties, confusing legal jargon, difficulties related to remote locations of Aboriginal communities, cultural difference and distrust of non-Aboriginal authority figures are cited as some of the factors that are problematic for Aboriginal people.⁷⁹ Circle sentencing attempts to minimize some of these problems by establishing a less formal courtroom setting and dynamic in First Nations communities rather than holding court in a distant and formal courtroom. However, the fact that circle sentencing remains very much entrenched in colonial Western jurisprudence means that the complicated law and many of the related confusing practices of the Western legal system are inherent in circle sentencing.

To further illustrate this point, I turn to the following example where advisors reported how misunderstanding the terms of jail sentences sanctioned in a circle sentencing caused concern for both the members of a victim's family and the offender's family. "...That's a problem everyone had -- one thing that wasn't explained to us... the whole family thought he would do the two years...now people are concerned. How come he's getting out so soon?"⁸⁰

A victim's advocate expressed similar concerns:

⁷⁹ Wes Charter, 1992, Justice: The Myth of Serving Native Culture. In: *Northern Perspectives: Practice and Education in Social Work*. Winnipeg, Manitoba: University of Manitoba Printing Services at 35-42. For further discussion on this topic I suggest: Marion Buller, 1994, *A Review of Legal Services to Aboriginal People in British Columbia*. Victoria: Ministry of Attorney General also Anthony Sarich, 1993, *Cariboo Chilcotin Justice Inquiry (B.C.): Report on the Cariboo-Chilcotin Justice Inquiry*. Ministry of Attorney General, British Columbia: Communications Education Branch.

⁸⁰ Advisor's identity withheld (personal communication, October 8, 1996)

When we were waiting for the sentence we thought it would be about 5 years. But if he goes to the 'pen' for 5 years he can be ordered to receive counseling for sex offenders, but he may not get it. Too, if he's sentenced usually they do a third of their time. Why does the judge say 5 years if they only get a third of the time? It's a strange system.⁸¹

Similar confusion exists with existing sentencing methods and is not necessarily eliminated by the circle sentencing process. Briefly, I will attempt to provide some clarification about early release and access to treatment because of its relevance to this discussion. With regard to early release, offenders sentenced to *two years less a day* are sent to provincial correctional centers. Provincial inmates are eligible for full parole release (this means with community supervision) after serving one-third of their prison term, and for mandatory release after serving two-thirds of their term unless exceptional circumstances arise, such as being charged with a new offence or a consecutive sentence is added.⁸² Offenders sentenced for any term *in excess of two years* are sentenced to federal time. Federal inmates are eligible for day parole after serving one-sixth of their sentence, full parole after one-third, and statutory release after serving two-thirds of their sentence (with community supervision until the end of the sentence).⁸³ Thus, a sentence of *two years less a day* or *two years and over* mean a lot more than is implied, and rarely means the full sentence will be served. This represents a breach between the safety believed to be offered by the system versus the experience of the community vis a vis protection from an offender.

With regards to access to treatment, if the offender goes to jail he does not necessarily get treatment. Once in the institution he is classified and a decision is made there regarding whether he will receive treatment. Furthermore, *it is against the*

⁸¹ Advisor's identity withheld (personal communication, January 31, 1997)

⁸² Family Violence Prevention Division of Health Canada, 1996. *What You Should Know After the Verdict*. London, Ontario: London Family Court Clinic Inc. at 35 & 36.

⁸³ Family Violence Prevention Division of Health Canada. *What You Should Know After the Verdict* at 37 & 38.

offender's constitutional rights to be ordered into treatment, but a judge can recommend that he attend and complete treatment.

A victim assistance worker offers her opinion regarding jail sentences and probation.

Often jail sentences for assault cases are short, but 2 years less a day is sometimes a benefit because under provincial jurisdiction you can attach up to a 3 year probationary period. On the other hand with 2 years and over - federal time - release is mandatory after 1/2 or 2/3 and you can't attach probationary conditions to a federal sentence so there is no community supervision... unless granted early release with parole.³⁴

In some cases a shorter sentence, 2 years less a day which falls under provincial jurisdiction and allows for a significant period of probationary supervision, can improve offender accountability. One advantage of a probationary order is that the offender can be ordered to attend and complete programs dealing with his substance abuse and violence problems. If the offender is deemed in breach of the provisions of the probationary order he can be brought back to court. This is an important consideration as there is some preference that cases that come before the circle should be limited to those where the nature of the offence is such that two years less a day would be the maximum term of imprisonment. Thus, the offender would most likely be subject to a probationary period. One would hope that the victim who participates in circle sentencing could expect as a minimum the same kind of offender accountability as offered through a probation order. Victim's could clearly benefit from having a representative to help them navigate the confusing apparatus of justice.

Offender Accountability

Advisors felt victims may be more comfortable participating in circle sentencing if there was more focus on offender accountability. They raised two expectations with regard to circle sentencing and offender accountability. First, the offender must admit

³⁴ Advisor's identity withheld (personal communication, June 18, 1996)

responsibility for the offence. Second, the offender must comply with the conditions of the circle. A victim's advocate comments with respect to the offender admitting responsibility for the offence.

One of my impressions was that sentencing circles are usually for more minor offences where guilt is admitted and the offender wants to make restitution to the victim and the community. That did not happen in this case. [The offender] had denied the sexual assault in the court, but all the evidence was there to prove his guilt. So that was one criteria that was broken.⁸⁵

In a different case an advisor voiced concerns about the lack of accountability of the offender in the Unlocking Aboriginal Justice Project.⁸⁶ As already discussed, with this program the house typically assumes responsibility for developing a course of action for the offender. At the time of writing the offender had not followed through on the house recommendations because he had left the country. For these reasons, the victim suggests the continued involvement of judges and probation officers in alternative measures would assist in improving offender accountability.

Because then if the house doesn't follow through the court system will... This is what the house recommended-- anger management, treatment and restitution-- and this is what the judge agreed to as well. ... Then the court system will be contacting the house system saying 'is he following through? ... And if he didn't well then we're gonna give him another three months... then we will have a recourse of sending you back and putting you into the court system where he ends up in jail....

I think working with probation would really help them, ...because they have to report every month... in the house system there was nothing... There was no control, no accountability.⁸⁷

The above passage suggests the mainstream system may offer a viable recourse for victims if alternative sanctions do not meet their expectations. Judge Levis has similar views. He sees a continued role for the Western justice system at this time, specifically

⁸⁵ Advisor's identity withheld (personal communication, January 31, 1997)

⁸⁶ It is not my intention, nor do I believe the intention of this Advisor, to criticize the intent of Unlocking Aboriginal Justice. The purpose of this discussion is to highlight some of the potential problems with such programs, as well as suggestions for improvement.

probation officers, in working together with First Nations communities to ensure offenders comply with the conditions of the circle, or other alternative sentencing models, and do not breach probation.

Recommendations for treatment, restitution, those types of things should be incorporated into a probation order which will result in sanctions if the offender fails to comply. First Nations should have their own system of dealing with matters, but decisions about these matters have to be incorporated into an order that's enforceable both inside and outside of the community.

I believe that cases should first be assessed for their suitability for circle sentencing by a probation officer completing a pre-sentence report. Then the charge proceeds in the ordinary courts, and the sentencing is conducted under the circle sentencing principle. The sentence should be incorporated into a probation order and be monitored by a probation officer in cooperation with the elders and other members of the community. Should the offenders fail to comply within or outside of the community they will be subject to the same sanctions that apply to anyone who comes in contact with the justice system.

Provisions of conditional sentencing could be used to the advantage of the First Nations community. In keeping with the wishes of the community perhaps the court could conduct a circle sentencing proceeding, and grant a conditional sentence that the offender would have to comply with, on the understanding that if he does not comply he could be required to serve his sentence in jail.

The probation officer needs to be available to take the necessary steps if there is a problem with compliance.⁸⁸

When I questioned whether it was reasonable to expect the probation officer to know what is going on in the First Nations community, Judge Levis suggested:

If the elders realize the offender cannot be rehabilitated within the community then they need to be able to rely on the probation officer for assistance. Surely, if the offender commits a further offence or there is a breach of the conditions of the circle the community would not tolerate this. I expect the community would want the option of returning the offender to the court.

⁸⁷ Advisor's identity withheld (personal communication, November 6, 1996)

⁸⁸ The Honourable Judge David M. Levis of the Provincial Court of British Columbia (personal communication, February 15, 1997)

It seems in *some* cases that there may be a gap in expectations of the mainstream, communities, victims and offenders. Infact, *some* communities may tolerate the offender as suggested by the following description of Judge Barnett's experience.

The case ... that I mentioned to you was a very clear example of where they tried to stack the deck. It was a wife assault case. A very powerful man in the community ... the band really relied on him, ... But, he has a serious record for violent offences and had nearly killed his wife This wasn't really as serious an assault, but then it wasn't the first time. I had a pre-sentence report prepared by a probation officer who put some time into it and that pre-sentence report spoke of differences in the community. And then when we did the circle I realized that everybody there had his last name or a variant of it. It wasn't really too hard to figure out that something might not be right here. And, I said that.

I commented on the fact that everyone here tonight appears to be a friend or relative of the offender and there are no members of the victim's family here. Why not? And then it was adjourned. And I learned that during the adjournment period a very very powerful woman in the community... had gone and spoken to people, to one man in particular who had made some fairly forthright comments at the circle and she had ordered him never to attend another court session again. And his job responsibilities have been changed and downgraded significantly. I asked about what happened and I said well that's the end of that. If that's what is happening in this community...

This passage reveals the potentially powerful influence of family dynamics and power relations and the impact they can have on the outcome for the victim and offender in a case. With reference to this example it is important to note that Judge Barnett stressed: "... there are some situations where family groupings and people may gather the wagons to protect offenders. That's not just a feature of Native communities." Judge Barnett recommends, "You need a Judge with some understanding of the situation in the community and some ability to pick up on things as they're happening.... somebody who had never been there before might not have picked up on this."

This begs the question of whether a community -- by community I mean both the First Nations community and the members of the local Western justice system -- should be assessed for their readiness to take on responsibility for justice.

Community Readiness

There can be incredible pressure for First Nations communities to assume responsibility for aboriginal justice. Sometimes the motivation is related to the circumstances in a particular case where power relations come in to play and, or, because of the fact that responsibility for aboriginal justice is closely linked with healing communities and with self-determination. Regardless of the motivation, a victim's advocate indicates that some communities are not ready to assume this responsibility.

"Sometimes what we're seeing here is the people within the circle aren't that healthy."

Another advisor shares her perspective:

Ya, it is, and maybe another reason [the house system] is not working is because the people aren't healed. They're not really ready to deal with some of the problems that they have to deal with because it's happening in their own homes and in their own families...How can someone else in the house system who has alcohol as a problem tell another person in that home, that offender, you're going to treatment? How much respect is there? Knowing that maybe the house chief was a sexual abuser and you have a sexual abuser sitting in front of you. You tell me then that house is gonna follow-through....They're not gonna wanna really help unless they have helped themselves first.

When indeed there's a lot of other problems. ...The band council concerns are about the housing, doing the sewers, or roads, land claims, but [tell them]... we've got a lot of problems on this reserve when it comes to social issues, we have family violence here. What are we going to do about it? ... Oh well, that's not important, that's always on the back burner. They don't want to deal with those things. Why? Because maybe your chief councilor happened to be on the take or maybe another councilor is a sexual abuser, or maybe your house chief is a sexual abuser. And everyone knows it but no one says nothing.... You get hushed and fired.

When communities assume responsibility for self-justice for political reasons only, and without a sound foundation for their justice program, the risk of victims being re-victimized is significant. Furthermore, such communities may not have the commitment or adequate resources to monitor the terms of the circle, and this also puts the victims of sexual violence at risk. A Native court worker describes a situation where an offender:

...was ordered to stay away from the person [victim] and he knew it and he did but he was a chronic alcoholic, and he needed to be monitored really close and no one was volunteering and I think towards the end finally someone volunteered, but still it fell through the cracks and he was breached, he went back to jail.⁸⁹

While inadequate monitoring of offenders is not unique to First Nations communities this example shows how the required resources, commitment, and infrastructure for following-through with alternative justice initiatives must exist in both the First Nations communities and Western justice system in order for them to succeed. This point will be supported through discussion in the remainder of this work.

Summary

Despite some of the drawbacks for victims circle sentencing is clearly a positive, although small step, down the path towards First Nations reclaiming responsibility for justice. However, it is important to remember that colonization has left behind many victims in Aboriginal communities and women seem to have suffered immensely the combined effects of their race, class and gender. With respect to this discussion about circle sentencing the needs of Aboriginal women victims are argueably less important than the needs of the offenders.

Why do many Aboriginal women not speak out? Why do they remain silent? This chapter highlights the primary issues that emerged through interviews as the presenting reasons for the silence of victims. These include: there are too many victims, including the offenders; victims and their families can be pressured to participate in the circle sentencing, or alternative, process; the cost of speaking out can be very high in terms of social, economic and personal security; the justice system tends to alienate its users; some offenders are not held accountable; and communities are willing, but not necessarily ready, to assume the responsibility for aboriginal justice. However, the silence is much bigger than this. These issues are part of the sub-text of a much larger landscape.

⁸⁹ Advisor's identity withheld (personal communication, May 7, 1997)

On the larger landscape some factors which operate to silence women are: the discourse of healing communities, particularly for the community to heal as a whole; the extensive reach of the community and the severe repercussions of severed relationships; and the pressure for circle sentencing and other alternative measures to succeed. Pressure for alternative measures to succeed is derived partly from the fact that responsibility for aboriginal justice is inextricably linked with the success of self-government, and partly because governments are under pressure to lighten the load on the justice system.⁹⁰ I believe the silence is also larger than this. Identification of these issues serves as the point of entry for further research into how the institutions, the larger structures and power relations influence the everyday experience of Aboriginal women. This, then, is a summary of the issues that inform the following analysis.

⁹⁰ For further discussion regarding these pressures and over-representation in the justice system refer to RCAP. *Bridging the Cultural Divide* at 28-32 also Ministry of Attorney General. *Strategic Reforms of British Columbia's Justice System* at 4 & 5.

Chapter Three: Multiple Sites of Power

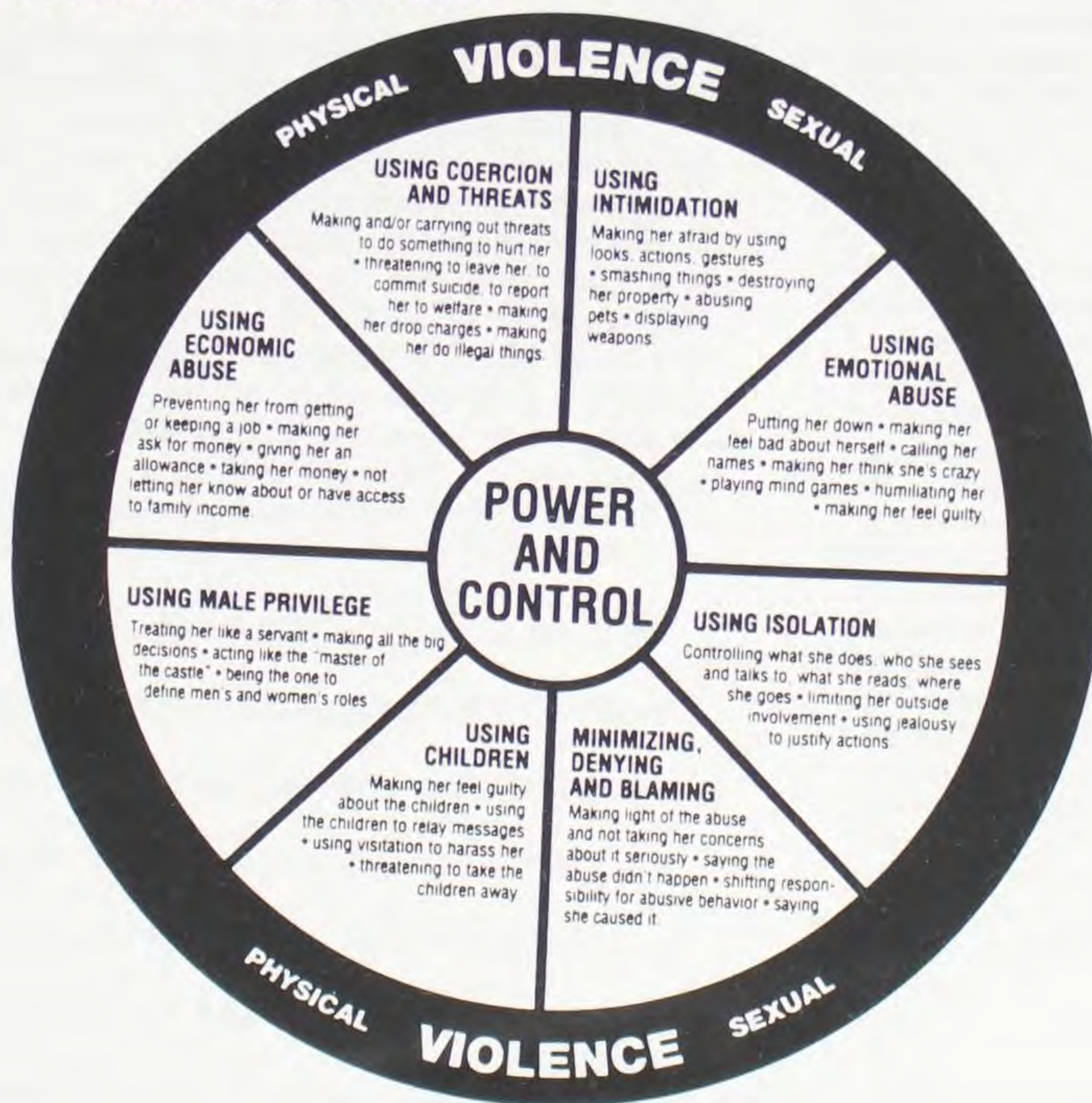


In this chapter I discuss what I have learned from this research project. I asked myself again: *“What might prevent women victims from speaking out in a circle sentencing, as well as speaking out to me in interviews?”* and *“What conditions underlie the social relations and practices organizing the everyday experience of Aboriginal women?”* In response to these questions I identified colonization, community, and culture as three of the multiple sites of power which shape the everyday experience of Aboriginal women. Discussion of the influence of colonization, community, and culture is the focus of the first part of this chapter. Then I asked *“What recourse does the law offer Aboriginal women who are the victims of sexual violence in their communities?”* To answer this question I considered the law as another site of power and I briefly discuss the experience of Aboriginal women who have turned to the law for assistance in pursuing their individual rights. Finally, I remind readers of the significant power of the victims of sexual violence: their acts of resistance demonstrate the resilience and strength of women who endure violent relationships.

The Power and Control Wheel, pictured on the following page, provides a feminist context for analyzing relations of power and domination. Generally, this model is used to describe the dynamics of abusive relationships between men and women, specifically men’s means of exercising power and control which enables their domination of women. Their strategies involve: coercion and threats, intimidation, emotional abuse, isolation, economic abuse, children, male privilege, and finally, minimizing, denying and blaming. The manifestation of each of these strategies is depicted by the Power and Control Wheel below. I submit that these strategies and dynamics of power and control have operated on two levels to influence the everyday experience of Aboriginal women.

First, the colonizers employed similar strategies to regulate and prescribe the behaviour of Aboriginal people. Second, the lingering effects of colonization exist to this date and continue to order the everyday experience of Aboriginal people, and these effects are compounded for Aboriginal women who are victims of violence. The power and control framework guides the analysis below which attempts to explicate the everyday experience of Aboriginal women. However, *beginning with the sidebar on the next page*, I first demonstrate the effectiveness of the power and control framework as an analytical tool for elucidating the colonizer's methods of controlling "Indians." Italics are used in this parallel analysis to emphasize the use of the power and control framework.

Figure 1: Power and Control Wheel



The narrative below describes the harsh reality of many victims of violence.⁹¹

She lives by the dictates of what is typically unwarranted, unpredictable and explosive violent conduct. She may have learned from childhood to live with her daily dose of fear and abuse. To cope, she wraps her fears in a cloak of fairytale hope, assuring herself that the coming days will heal family wounds and offer a peaceful tomorrow. All the while, in her heart lies a harbour of shame, humiliation, resentment, denial, yet with it, the strength to endure. As time passes and the violence mounts, she accumulates memories of attempted escapes that would have declared her stand against a cycle that began before her time, and in all likelihood, will persist into her children's generation.

It is often recurring realism of the children's future that eventually breaks the spell of her opiate dream. She is rattled with the understanding that her submission and passive obedience is never enough to appease the patriarchal authority to which she has been subservient and dependent for what seems like endless years. She no longer perceives violence as a normal part of family life. She acknowledges that she can no longer blame alcohol for the fits of rage. Nor does she feel the need to indulge in alcohol to be a worthy companion or to numb the anguish and the physical pain. And ultimately, it is the growing fear of violence in the extreme, perhaps death, that causes her to cross the threshold of tolerance.

The theme apparent in this passage is one of an intergenerational pattern of unpredictable and explosive violence. *Making, intimating, and/or carrying out threats to do something to hurt her are tactics of coercion and intimidation.* Family violence has invaded many First Nations communities.⁹² The abuse of alcohol, introduced

It is through relations of domination that Aboriginal people, particularly women, are silenced, oppressed and kept on the *margins*.^a The means of establishing and maintaining male supremacy include using: male privilege, economic abuse, coercion and threats, intimidation, emotional abuse, isolation, children, minimizing, denying and blaming.

However, in considering the context in which violence occurs in First Nations communities, we recognize the dynamics of the power and control wheel (*in italics below*) operating at a macro level. A closer look reveals that the Europeans used similar if not identical strategies to establish power and control over Aboriginal people.

First, Aboriginal people were *isolated* and forced to become *economically dependent* on the colonial government. Reserve communities were often established in remote areas far from traditional hunting, fishing or gathering areas and with limited natural resources. Furthermore, through implementation of a pass system, the government *confined the movement and economic activities of Aboriginal peoples to restricted areas*. Through this tactic the colonizers ensured that Aboriginal people would no longer be able to support themselves.

^a This typographical style inspired by Derrida "who deploys two columns side by side on the page, [a]lthough Derrida never explicitly refers to the [content on the right] it incessantly crosses over the minimal barriers set up to its left and intrudes on the space reserved for the introductory discourse", helps emphasize how relations of domination have operated to keep Aboriginal people generally, and Aboriginal women in particular, on the *margins*. Jacques Derrida. *A Derrida Reader* at 147.

⁹¹ Canadian Council on Social Development and Native Women's Association of Canada. 1991. *Voices of Aboriginal Women: Aboriginal Women Speak Out About Violence*. Ottawa, Ontario at 1.

⁹² RCAP. 1996. *Report of the Royal Commission on Aboriginal Peoples. v.3 Gathering Strength*. Ottawa Canada. Canada Communication Group at 57.

by Europeans, is now rampant among many First Nations people and a bout of drinking often seems to be the prelude to incidents of violence.⁹³ "Before their contact with Europeans, the northern peoples of North America neither made nor used intoxicants of any kind."⁹⁴ *The offender probably minimizes the abuse by shifting responsibility for abusive behavior onto his personal history of violence and abuse as well as the abuse of alcohol*. Alcohol may be used by the victim as well to diminish the reality of the violence and also the shame, humiliation, resentment, and denial that are part and parcel of *the emotional abuse that accompanies violence*.

Very likely the woman is *economically dependent on the male*, and the male is economically dependent on the state, because of the abject poverty prevalent in First Nations communities. Regardless of his dependent state, the male, like many other Aboriginal men, has probably internalized the once imposed patriarchal values of the colonizers and *using male privilege has established himself as the "master of the castle"*.

The woman may indeed cross the threshold of tolerance and decide to speak out about the violence or leave her community. But "... for many the barriers are insurmountable, says psychologist Sandra Douglas-Tubb,

Second, the government *emotionally abused* Aboriginal peoples by *constructing them and their way of life as inferior* and *prohibiting them from speaking their language, practicing their traditional forms of government and by sending their children away* to residential school. The residential school system, operated by Churches in collusion with government, was the critical element in the government's plan to civilize and assimilate First Nations people by robbing them of their language and their culture. Furthermore, parents were *restricted from freely visiting their children* at residential school.

Third, the colonizers imposed a system of patriarchal rule on First Nations by declaring that adult males would henceforth elect male chiefs and band councils. This robbed Aboriginal women of the important role they played in making decisions about leadership in many Aboriginal communities. In this way the Europeans used their *male privilege* and imposed their patriarchal values on First Nations people and *defined men's and women's roles* to correspond with European custom and law.

Fourth, *Coercion and threats* were used to ensure that Aboriginal people did what they were told. One of the primary methods of exercising control over Aboriginal people was through creation of a classification system. Two categories of Indian were

⁹³ Edna Rose Leask. 1993. *Hear First Nations Women Speak*. Vancouver: Association of First Nations' Women at 13.

⁹⁴ Hugh Brody. *Maps and Dreams* at 250.

executive director of the Victoria Native Friendship Centre.

Tubb describes how "There is almost a psychology of enslavement....The life support system is the band, the reserve, the family, the extended family. They are dependent for their housing, their food, their utilities, even their clothing. *If you break the silence, there is a price to pay.*" [emphasis added]⁹⁵

The complex dynamics of power and control affecting violent relationships are a product of a larger landscape of power relations that govern how things operate in the everyday world. The root cause of the societal problem of violence against women is the diminished social and economic status of all women. However, because of the marginalized status of all Aboriginal people, stemming from racist policies and attitudes, this situation is more complicated for Aboriginal women.

This chapter identifies and explores the multiple sites of power which underlie and inform the everyday experience of Aboriginal peoples, with a focus on the experience of Aboriginal women who are the victims of violence. I draw on the power and control framework to assist in elucidating the tangle of structures and power relations that make up these multiple sites of power.

created: Status and non-Status. The label *status* entitles Indians to certain benefits such as the right to live on the reserve and collect government allowances. However, government was intent on eliminating the 'Indian problem' by assimilating Aboriginal people. *An ever-increasingly long and creative list of reasons for which an Indian could lose status was developed.* This strategy - which still has implications today - was an extreme form of intimidation for Aboriginal peoples and forced their *dependence on government assistance.*

These devastating effects of colonization keep Aboriginal people, moreso Aboriginal women, *in the margins.* The intersection of the variables of race, gender and class have become the subtext of colonization. Prior to colonization First Nations are generally reported to have been gynocentric and egalitarian in structure. Colonization shaped a political community with a common ethnicity^b by constructing the white European patriarch as normative.^c The notion of patriarchy is now entrenched in many First Nations communities. The power and control framework helps us understand the impact of patriarchy, particularly the dynamics of power and control as they affect Aboriginal peoples, and Aboriginal women who are the victims of violence.

^b Roxanna Ng. 1993. Sexism, Racism, Canadian Nationalism. In: Bannerji, H. (Ed.) *Returning the Gaze: Essays on Racism, Feminism and Politics* at 230.

^c Chandra Talpade Mohanty, 1991. Cartographies of Struggle. In: *Third World Women and the Politics of Feminism*, Mohanty, C.T., Russo, A., Torres, L. (Eds.) Bloomington: Indiana University Press at 15.

⁹⁵ *Times Colonist* July 26, 1992, Nightmare of the Shadow People: Native women, victims of male sexual terror, just starting to break the silence. A1

Colonization

The Historical Terrain

*The colonizers' revisions of our lives, values, and histories have devastated us at the most critical level of all - that of our own minds, our own sense of who we are.*⁹⁶

Prior to colonization, most Aboriginal societies were egalitarian in structure. The roles of women, who were generally the caretakers of the language and the children, and men, who were generally the warriors and the hunters, were interdependent and complimentary. These distinct roles were considered equally important to ensuring the survival of the community. Often women were involved in the selection of chiefs and in participating in other important decisions regarding their communities.⁹⁷ Women were also revered for their ability to "bring vital beings into the world" because of the belief in a continued cycle of life, so important in First Nations cosmology.⁹⁸ This recognition of and respect for women is evident in the prevalence of traditional societies which were matrilineal, passing on property and descent along the female line; and matrifocal, with the women as the head of the household.⁹⁹

Initially, the fur traders and early colonizers were comfortable with the powerful role of Aboriginal women. Often Europeans were encouraged to enter into relations with powerful women in order to strengthen trading and military alliances and marriages were seen as beneficial to the newly forming country.¹⁰⁰ However, the attitudes towards Aboriginal peoples began to change throughout Canada when the Europeans became

⁹⁶ Paula Gunn Allen. 1992. *Sacred Hoop: Recovering the Feminine in American Indian Tradition*. Boston: Beacon Press at 192.

⁹⁷ Royal Commission on Aboriginal Peoples. 1996. *Report of the Royal Commission on Aboriginal Peoples*, v.4. *Perspectives and Realities* at 8. Ottawa: Canada Communication Group.

⁹⁸ Paula Gunn Allen. *Sacred Hoop* at 27.

⁹⁹ Paula Gunn Allen. *Sacred Hoop* at 3.

¹⁰⁰ Kathleen Jamieson. 1978. *Indian Women and the Law in Canada: Citizens Minus*. Ottawa: Advisory Council on the Status of Women at 44.

interested in settling. By this time Aboriginal people were no longer required as trading partners or military allies.¹⁰¹

Acquiring land for the new settlers became the focus of the European powers, and Aboriginal people were clearly in the way. Colonial governments engaged in a process of securing the lands of First Nations through various means, generally deceitful, including negotiated agreements with terms that have never been honoured. However, European governors realized "that as long as women held unquestioned power of such magnitude, attempts at total conquest of the continents were bound to fail."¹⁰² They proceeded to develop "a body of common law emphasizing the importance of legitimacy and the legal ownership by a husband of a wife's generative capacity."¹⁰³ Thus the government imposed a system of patriarchal rule to ensure that men were doing the business, suppressing the rights of Aboriginal women, subjugating them to the rule of their husbands, thereby introducing the concept of male privilege to Aboriginal people. I have already mentioned how government policy also created a reserve system and a pass system which isolated Aboriginal people and restricted their travel, established a classification system for Aboriginal people who would henceforth be known as Indians, *with or without status*, displaced hereditary chiefs in favour of elected band councils, and forced Indian children to attend colonial schools.¹⁰⁴ Most devastating of the colonial school system were the residential schools which are discussed below.

The oppressive, racist and sexist legislation designed to destroy the traditional Indian way of life became part of the 1876 *Indian Act*. While the *Indian Act* was devastating for all Aboriginal people, it was particularly devastating for Aboriginal

¹⁰¹ Lilianne Krosenbrink-Gelissen. 1991. *Sexual Equality as an Aboriginal Right: The Native Women's Association of Canada and the Constitutional Process on Aboriginal Matters, 1982 - 1987*. Saarbrücken; Fort Lauderdale: Breitenback at 22.

¹⁰² Paula Gunn Allen. *Sacred Hoop* at 3.

¹⁰³ Kathleen Jamieson. *Indian Women and the Law in Canada* at 13.

¹⁰⁴ For further information regarding the implementation and impact of these government policies refer to Royal Commission on Aboriginal Peoples. 1996. *Report of the Royal Commission on Aboriginal Peoples*, v. 1, *Looking Forward, Looking Back*. Ottawa: Canada: Canada Communication Group at 180-187. Also a detailed account about residential schools can be found in *Chapter 10*.

women. For example, through the *Indian Act* a woman who married a non-status Indian man would lose her status (as would her children), and her right to own property or live on her reserve, she was excluded from participating in elections, and the government representative on the reserve could recommend the discontinuation of government allowances.¹⁰⁵ Indian men did not face these same consequences.

Hegemonic and patriarchal values are still evident in Indian legislation which continues to order the everyday lives of Aboriginal peoples. Of course, the Federal Government proclaimed that Indian legislation served to protect Indians. In point of fact, there can be no question their policies promoting assimilation and civilization were designed to eliminate the 'Indian problem'.

Churches colluded with government in encouraging assimilation and civilization of Aboriginal people and were instrumental in establishing one of the primary institutions for achieving this goal -- residential schools.¹⁰⁶ Indian children were separated from their families at a very early age and were required to attend residential schools far away from their parents and extended families. Here they were forbidden from practising their cultural traditions and speaking their language. Most were treated poorly, and many children were severely punished and sexually abused. Some died running away, others killed themselves. Many died of tuberculosis which was rampant because of the terrible living conditions in the schools.¹⁰⁷ Residential schools are now viewed as the root cause of the pervasive violence and alcoholism which has devastated families, threatened the

¹⁰⁵ For a detailed history refer to: Kathleen Jamieson, *Indian Women and the Law in Canada*.

¹⁰⁶ Note that the situation of residential schools has become a major political issue for First Nations, particularly with regard to healing. The recent *Report of the Royal Commission on Aboriginal Peoples* describes how it is critical for governments and churches to take appropriate remedial action to "relieve conditions created by the residential school experience", including apologizing to First Nations' people for the travesty of residential schools. RCAP, *Report of the Royal Commission on Aboriginal Peoples*, v. 5, *Renewal: A Twenty-Year Commitment* at 143.

¹⁰⁷ RCAP, *Report of the Royal Commission on Aboriginal Peoples*, v. 1: *Looking Forward, Looking Back* at 357 & 373.

culture and damaged the spirit of many Aboriginal people.¹⁰⁸ Jo-Anne Fiske explains how the lived reality of many of these young boys and girls who attended residential schools resulted in confusing contradictions about the power of god and men, and the abuse of power. Male power in churches and residential schools was 'close to godliness'. Even the department of Indian Affairs and other government officials were reluctant to address problems at the residential schools because they "feared church influence."¹⁰⁹ Young male students were most often sexually violated by these men of the church and the girls took on the role of protecting the boys.¹¹⁰ These influences are evident today in the reluctance of many Aboriginal women to deal harshly with their male offenders, or to report incidents of sexual violence. Furthermore, "religious institutions in Canada tend to support and reinforce the dominance of men over women" and promote the concept of forgiveness.¹¹¹ These two conditions also contribute to the contemporary condoning of violence and tolerance of offenders.

The combined effects of residential schools and restrictive government legislation shaped communities of individuals robbed of their traditional way of life and their language -- central to their culture. "Government policy upset the balance maintained by egalitarian principles by defining the role of Aboriginal men as dominant.... This process introduced the concepts of sexism and domination into Aboriginal reality, and established the foundation of abuse and violence that exists in our communities today."¹¹² Aboriginal people struggle with an incredible loss of identity. Sociologist Emile Durkheim maintains that "when you reach into a culture and pull out the values, rituals and societal norms" and you attempt to replace them with a new set "you risk creating a society that suffers

¹⁰⁸ Maggie Hodgson, 1992. *Rebuilding Community After the Residential School Experience* In: Diane Engelstad and John Bird (eds.) *Nation to Nation: Aboriginal Sovereignty and the Future of Canada*. Concord Ontario: Anansi Press, pp. 101-112 at 109.

¹⁰⁹ RCAP, *Report of the Royal Commission on Aboriginal Peoples*, v. 1: *Looking Forward, Looking Back*, at 371.

¹¹⁰ Jo-Anne Fiske (personal communication, January 1998.)

¹¹¹ RCAP, *Report of the Royal Commission on Aboriginal Peoples*, v. 3: *Gathering Strength* at 70.

¹¹² Native Women's Association of Canada, no date. *The Rights of Treaty Aboriginal Women Within First Nations Self-Government: A Discussion paper* at 4.

from *anomie* -- disorientation and absence of values.”¹¹³ The introduction of alcohol and other substances compounded problems for Aboriginal people and resulted in communities of impoverished, victimized and oppressed individuals. First Nations communities, across Canada, have the highest rates of family violence, including child sexual abuse, alcoholism and drug abuse, violent death, unemployment, illness and suicide.¹¹⁴

The power and control framework reveals these government policies as strategies which enabled the colonizer's domination of Aboriginal people. Unfortunately, certain male-dominated band councils have internalized European patriarchal values which sustain relations of domination now entrenched in First Nations communities. Nahanee refers to leaders of First Nations communities as “... patriarchs who abuse power”¹¹⁵ and contribute to the violence against Aboriginal women and children through their inaction, ineptness, ineffectiveness or neglect.”¹¹⁶ Paula Gunn Allen explains how this can occur. “When a people finds itself living within a racist, classist, and sexist reality, the oral tradition will reflect those values and will thus shape the people's consciousness to include and accept racism, classism, and sexism, and they will incorporate that change, hardly noticing the shift.”¹¹⁷

Community

Kin Connections

In many First Nations communities the factors of isolation, extensive kin connections and the power of band councils intersect and make it difficult, if not

¹¹³ Maggie Hodgson, 1992, *Rebuilding Community After the Residential School Experience*. In: Diane Engelstad and John Bird (eds.), *Nation to Nation: Aboriginal Sovereignty and the Future of Canada*, pp. 102-112 at 109.

¹¹⁴ Terry Wotherspoon and Vic Satzewich, 1993, *First Nations: Race, Class and Gender Relations*. Scarborough, Ontario: Nelson Canada at 42 & 47.

¹¹⁵ Teresa Nahanee, In: *Aboriginal Peoples and the Justice System* at 363.

¹¹⁶ Teresa Nahanee, In: *Aboriginal Peoples and the Justice System* at 361.

¹¹⁷ Paula Gunn Allen, 1993, *Kochinnenako In Academe*. In: Warhol, R. Robyn & Herndl, D. Prince (Eds.) *Feminisms: an anthology of literary theory and criticism*. New Brunswick, NJ: Rutgers University at 715.

impossible, for Aboriginal women to speak out about violence or abuse in relationships.

Beverly Sellars, past Chief of the Soda Creek Indian Band near Williams Lake, describes community.

My community is my family. I'm a Shuswap from the interior of British Columbia. Most of the people in my community are related; they are my parents, my grandparents, my cousins, brothers, sisters, and that extends to other communities. My grandmother is from another tribe, so my relations extend there to the seventeen bands of the Shuswap area and then we're related to tribes around us, so my community is a big family.¹¹⁸

Because of such extensive kin-connections among First Nations, the community has significant power to regulate violence. Judge Barnett's experience with a "stacked deck" reported earlier in *Chapter Two* bears some repeating.

It was a wife assault case. A very powerful man in the community ... But, he has a serious record for violent offences and had nearly killed his wife ... when we did the circle I realized that everybody there had [the offender's] last name or a variant of it.

.... I commented on the fact that everyone here tonight appears to be a friend or relative of the offender and there are no members of the victim's family here. Why not? And then it was adjourned. And I learned that during the adjournment period a very very powerful woman in the community who was the band's ... had gone and spoken to people, to one man in particular who had made some fairly forthright comments at the circle and she had ordered him never to attend another court session again. And his job responsibilities have been changed and downgraded significantly. I asked about what happened and I said well that's the end of that.

This example is particularly instructive in providing a sense of the powerful influence of the community. Again, I note that Judge Barnett stressed this kind of rallying of support is not typical of only First Nations communities. However, I propose this dynamic is particularly acute in isolated reserve communities.

These accounts suggest there may be little community support available for women who are victims of violence especially when a woman "marries into a close-knit kin network but has no relatives of her own nearby."¹¹⁹ There is a very real possibility that a woman in a violent relationship will have to leave her community in search of a safe

¹¹⁸ Mary Louise Fellows and Sherene Razack, 1994. Seeking Relations: Law and Feminism Roundtables. In: *Signs*, Vol. 19, No. 4 at 1062.

¹¹⁹ RCAP. *Report of the Royal Commission on Aboriginal Peoples*, v. 3, *Gathering Strength* at 69.

place. She may or may not be able to take her children with her. If she does, both she and her children will "often find themselves in a culturally alienated environment in which their traditional lifestyle and skills are not relevant."¹²⁰ Apart from their communities women and children may suffer loss of their language and culture as well as separation from their extended family, which may be their only support network. As "off-reserve Indians" victims are also likely to encounter difficulties in obtaining benefits to which they are entitled, such as medical, housing and educational benefits, but which require the cooperation of the band council to access.

Isolation

By design, First Nations communities are often in isolated areas. Lack of basic Western services such as health facilities, banks, government offices or counseling services and protective services, such as women's shelters, are common in addition to "immense barriers of distance and transportation preventing access to urban based facilities."¹²¹ Thus, it may be logistically difficult for women to seek assistance either within or outside of the community.

Often limited personal and financial resources prevent women either from seeking assistance outside the community or from leaving the community. Securing a restraining order, a legal requirement for her partner to stay away from her, will require the assistance of a lawyer. Most "private lawyers will not represent people until legal aid has approved the application and made [a] referral. Red tape often results in adjournments."¹²² A woman may find herself in a very vulnerable situation which necessitates travelling back to her reserve where she has no protection from the individual (not that a restraining

¹²⁰ Andrea Kamin & Romeo Beatch. Summer 1991. A Community Development Approach to Mental Health Services. In: *The Northern Review: A Multidisciplinary Journal of the Arts and Social Sciences of the North*. Whitehorse, Yukon: Yukon College at 96. Kamin and Beatch discuss further implications of spousal assault and present ideas for a community development approach for dealing with spousal assault.

¹²¹ Royal Commission on Aboriginal Peoples. 1992. *Discussion Paper I: Framing the Issues*. Ottawa: Canada Communication Group at 12.

¹²² Marion Buller. 1994. *A Review of Legal Services to Aboriginal People in British Columbia*. Victoria: Ministry of Attorney General at 7.

order *guarantees* safety). She could choose to remain in the urban community in a transition house. While this may be a good short-term solution, and generally this is only a short-term solution due to a shortage of second stage housing, there is also a good chance that the woman has never lived off the reserve and this presents special challenges.¹²³ Women may lack the knowledge and support needed to access systems and services in the urban community. Chances of finding lucrative employment are slim and when Aboriginal women do manage to find work, statistics show that their median income will be very low.¹²⁴

Some women who seek assistance through the urban centers have negative encounters with available support services, including the police, social services, the courts and community workers, who demonstrate racist behavior and blame the victim.¹²⁵ Often the support agencies in urban centers do not include Aboriginal people on their staff, and services are not culturally appropriate for Aboriginal people.¹²⁶ Their healing may be defined as family-oriented healing while many support agencies focus only on empowering women.¹²⁷ Ongoing discrimination, loss of identity and alienation in an urban community based on race, gender and class are also likely. Marlee Kline describes how judges will often discredit urban Aboriginal women who come before the courts in custody cases by not acknowledging the legitimate role of extended family members as supportive care givers, as is typical in First Nations child welfare cases.¹²⁸

¹²³ Regarding the importance of places of refuge and a culturally based supportive environment for Aboriginal women see RCAP, *Report of the Royal Commission on Aboriginal Peoples*, v. 4: *Perspectives and Realities* at 63.

¹²⁴ In 1991 the average total income for Aboriginal women was about \$11,900.00 while for Canadian women overall the figure was about \$17,600. Participation of Aboriginal women in the labour force was 53.4%, unemployment rate was 21.1%." RCAP, *Report of the Royal Commission on Aboriginal Peoples*, v. 4: *Perspectives and Realities* at 9.

¹²⁵ Sharlene Frank, 1992, *Family Violence in First Nations Communities*, Victoria: Ministry of Women's Equality at 16.

¹²⁶ Sharlene Frank, 1992, *Family Violence in First Nations Communities* at 10.

¹²⁷ Barbara Isaac (personal communication, February 16, 1998).

¹²⁸ Marlee Kline, Complicating the Ideology of Motherhood: Child Welfare Law and First Nation Women, *In: Queen's Law Journal* [18] pp. 307-342 at 332.

Furthermore, there may often be confusion when applying to institutions for assistance related to jurisdictional confusion between many levels of service providers, federal, provincial, community, band, and inter-agency. A woman in the desperate situation of seeking escape from an abusive relationship does not have time to contend with confusion between agencies over who is responsible for provision of services. Yet, this will often be her reality.

This discussion of the complicated logistics of seeking assistance with violent situations must be framed within a broader discussion of power relations that exist in First Nations communities which may prevent victims from seeking assistance at all. Many women "fear retaliation, even from those charged with public trust to lead and protect Aboriginal citizens" if they do speak out about violence.¹²⁹ This is the focus of the next section.

Power of Band Councils

Stemming back to the colonizer's introduction of legislation stipulating that only adult *males* participate in the election of all *male* chiefs and band councils, most contemporary First Nations community leadership is male-dominated. Male-dominated band councils have a broad range of authority, including the authority to allocate housing and education subsidies, and to hire and fire employees, among others. Moreover, often the elected chiefs and band councils represent family clusters, and these family clusters can benefit from favourable relations with community leaders.¹³⁰ Because of the power of band councils, there can be significant risks to women who report violence in the home. Most significant is the risk of child apprehension. "The threat of child apprehension comes not only from the ...provincial child care agencies. Today that threat also comes from Chiefs, Councils and Indian Child Care Agencies controlled by Aboriginal men who view children as community property."¹³¹ The view that children are 'community

¹²⁹ RCAP, *Report of the Royal Commission on Aboriginal Peoples*, v. 3: *Gathering Strength* at 65.

¹³⁰ Jo-Anne Fiske (personal communication, January 15, 1998)

¹³¹ Teresa Nahanee, *In: Aboriginal Peoples and the Justice System* at 361

property' is often supported by court decisions made in the interest of maintaining family units, even in cases of abuse.¹³² Jo-Anne Fiske describes the "tendency in law to uphold community needs as children's cultural rights against women's rights as mothers" such that if the mother leaves the community it may be without her children.¹³³ Victims also face not being believed or taken seriously and being "ostracized from their communities" and by their families if they report violence.¹³⁴ Often if a situation gets into the courts "witnesses are afraid to testify because of "family flack" and unwillingness to face offenders in the courtroom."¹³⁵ This discussion would apply to the traditional court setting or circle sentencing. Therefore, fear of losing children contributes to silencing victims.

Another consequence of reporting violence in the home is the possible loss of the matrimonial property. Generally in cases of abuse the police remove the victim from the home, rather than the abuser. This situation is especially likely in many First Nations communities because of Section 20 of the *Indian Act* regarding "Possession of Lands in Reserves." Certificates of Possession (for the "right to possess reserve land and occupy that land") are issued with the authority of band councils, usually to men: "The cumulative effect of a history of legislation that has excluded women and denied them property and inheritance rights, together with the sexist language embedded in the legislation ...has created a perception that women are not entitled to hold a certificate of possession."¹³⁶

There are a number of factors which can disqualify an individual from being eligible for a certificate or result in loss of a certificate. For example, Indians who have

¹³² Emma LaRocque, 1996, Re-examining Culturally Appropriate Models in Criminal Justice Applications In: *Aboriginal and Treaty Rights in Canada*, Vancouver: UBC Press at 81 & 82. LaRocque describes her concerns with this argument about maintaining families.

¹³³ Jo-Anne Fiske (personal communication, January 1998); Teresa Nahanee, In: *Aboriginal Peoples and the Justice System* at 361.

¹³⁴ Royal Commission on Aboriginal Peoples, *Exploring the Options* at 37.

¹³⁵ RCAP, *Exploring the Options* at 37.

¹³⁶ RCAP, *Report of the Royal Commission on Aboriginal Peoples*, v.4, *Perspectives & Realities* at 51.

lost status and or band membership privileges, mostly women, are not eligible.¹³⁷ Of more serious consequence to Aboriginal women is the fact that they have no recourse under provincial family law or federal legislation for access to the family home.¹³⁸

The outcome of two Supreme Court cases decided in 1986, *Derrickson* and *Paul*, was that Indian women who tried to maintain possession of their home after marital breakdown could not because provincial family law regarding division of matrimonial property could not override the federal *Indian Act*.¹³⁹ "An aboriginal woman who resides in a home on a reserve with her spouse [or partner] cannot make an application under provincial legislation for occupation or possession of the home upon marriage breakdown or in the event of physical and emotional abuse from her spouse."¹⁴⁰ This is the case even if the couple holds a joint Certificate of Possession.¹⁴¹ The Royal Commission on Aboriginal People has identified this as a serious problem and discuss how this problem could be remedied if the Federal and provincial governments would allow First Nations communities to legislate in this area.¹⁴²

This discussion illustrates how the dynamics of power and control manifest on two levels to affect Aboriginal women. Through the colonial government's relocation strategies First Nations communities became physically and logistically isolated and economically dependent on government. The economic dependence of Aboriginal peoples generally is a result of institutionalized discrimination which has an even greater impact on Aboriginal women. Economic disadvantage is a powerful form of control because it closes off other options. Aboriginal women who are victims of violence are trapped by their economic and social dependence. Government, its institutions, and its

¹³⁷ RCAP, *Report of the Royal Commission on Aboriginal Peoples*, v.4, *Perspectives & Realities* at 51.

¹³⁸ Mary-Ellen Turpel, 1993, Home/Land. In: Dawson, B.T. (ed). *Women, Law and Social Change: Core Readings and Current Issues*, 2(ed). North York, Ontario: Captus Press, pp. 133-141. This article provides a fuller discussion of this situation.

¹³⁹ *Derrickson v. Derrickson*, [1986] 1 S.C.R. 285; *Paul v. Paul*, [1986] 1 S.C.R. 306 as cited in Mary-Ellen Turpel, 1993. In: *Women, Law and Social Change* at 136.

¹⁴⁰ Mary-Ellen Turpel. In: *Women, Law and Social Change* at 138

¹⁴¹ Mary-Ellen Turpel. In: *Women, Law and Social Change* at 138

¹⁴² Mary-Ellen Turpel. In: *Women, Law and Social Change* at 138

representatives have betrayed Aboriginal people many times, so for many victims their community is the only support network they have. "There is also the possibility that Aboriginal people face special pressures not to involve the police, for with them comes the exposure to the untrusted outsiders, with all their adversarial ways and punitive powers."¹⁴³

Clearly, the systemic and institutionalized discrimination that sustain male privilege, both outside and within First Nations communities, result in significant material costs of speaking out about violence --- loss of children, loss of matrimonial property and connections with community. The cost of breaking the silence could increase once a broad range of responsibilities, including full responsibilities for child protection, are transferred under self-government, further increasing the power of governing band councils. In fact, as Aboriginal governments are given the flexibility to codify customary laws and develop new laws, the potential for abuses of power increases. This fact has not gone unnoticed by those who speak out against certain First Nations communities prematurely assuming responsibility for alternative justice measures like circle sentencing.

Culture

I suggest that there are three grounds of cultural difference which work to protect offenders and to silence Aboriginal women who are the victims of violence. *First*, offenders are also victims. *Second*, the discourse of healing. *Third*, the discursive positioning of collective versus individual rights. Another cultural factor which can be a very powerful silencer for Aboriginal women is bad Indian works or bad medicine.

¹⁴² RCAP, *Report of the Royal Commission on Aboriginal Peoples*, v.3, *Gathering Strength* at 92.

¹⁴³ Rupert Ross, *Returning to the Teachings* at 202.

The following excerpt taken from proceedings of a circle sentencing provides the backdrop for this exploration of how cultural difference defence can protect offenders and silence victims of violence in First Nations communities.¹⁴⁴

The Court: Robert ... pleaded guilty to assaulting Shirley and the Crown accepted that plea. It is a serious matter. It is a matter called an indictable offence. It's the sort of offence for which a man might very well go to jail.

I was told that Shirley and Robert had been walking home. I think it was late at night, and they had been out drinking. Robert had been drinking more than Shirley and as they were walking home with their children Robert accused Shirley of fooling around and cheating on him. He hit her. He knocked her down and he dragged her around on the ground. He kicked her. He ripped off her sweater, he ripped off her bra, he ripped off some other clothing.... and the children were there to see it all happen.

After it was stopped Shirley drove all the way to and told Constable ...that she was afraid that some day Robert was going to kill her.

This isn't the first time that Robert has been in court for beating on Shirley and also his children. Robert was sentenced for assault causing bodily harm to Shirley and assaulting the children....but Robert, while he was on probation beat up on Shirley....another assault....

When we were here in October; Robert was here, he pleaded guilty, but I was told that Shirley was living in... and I was told that things had gone very badly for Shirley in[This] is not her home. I was told that Shirley is a band member here, but she had, I suppose, run away ... because she was afraid. The judge had released -- or a justice of the peace had released Robert and told him that he had to stay away from ... and that he could not drink, but I was told that Robert came back here and was drinking. He paid no attention to the Judge's order or the justice's order. He came back here and then Shirley felt she had to leave because she was afraid. When she got to ..., perhaps she was lonely, but I understood that Shirley was drinking and the social workers came along and took the children away from her.

When Robert heard what had happened he went down to ... and the Judge down there ... returned the children -- not to Robert himself, but to perhaps Robert's mother. But the children came back supposedly to live with Robert's mother but then he was living there also, although he wasn't supposed to be. I understood, and the result of it was that after beating Shirley up Robert wound up with the children and Shirley wound up living on her own under pretty tough circumstances down in ¹⁴⁵

Reading this passage from the victim's perspective illustrates how over-concern for the offender can have a negative impact on the victim. The victim has been assaulted,

¹⁴⁴ As reported in *R v. T.* 1994, Pr.C. (B.C.) McKenzie Registry #4097T. All names and revealing details have been changed or omitted in respect of the privacy of the individuals involved.

¹⁴⁵ *R v. T.* 1994, Pr.C. (B.C.) McKenzie Registry #4097T.

has left her community out of fear, and has lost custody of her children. The offender's offences are numerous yet he remains in the community with access to the children. I return to this vignette in the following analysis.

Offenders are Victims Too

As discussed, several generations of Aboriginal people have been victims of violence, largely a circumstance of residential schools, and subsequently are perpetrators of violence. "Violence in the home is like a contagious disease. It moves from one victim to another spreading fear, destruction and pain. Children who grow up exposed to the disease of domestic violence may themselves later fall victim to it."¹⁴⁶

Alcoholism is also a problem among Aboriginal peoples and is attributed to contact and the influence of colonization. Often offenders have a personal history of both violence and alcohol abuse. Thus, we can understand the following remarks regarding an offender who "was not actually drinking when he assaulted" his spouse "but clearly alcohol abuse has contributed very substantially to [his] difficulties.... abusive behavior such as [his] assaults on [his spouse] is a "learned experience...."¹⁴⁷

In some assault cases, male offenders who commit violent acts are posited as victims of violence themselves and this may be presented as a mitigating factor.¹⁴⁸ In addition, there may be an assumption that assaults would not have occurred if the accused did not have an alcohol problem. Pasquali questions this practice when there has been no professional assessment of whether alcohol was a contributing factor.¹⁴⁹

In the existing justice system, as well as in circle sentencing, problems of alcoholism and abuse become cultural arguments deployed in defense of male offenders.

¹⁴⁶ Native Court Worker and Counselling Association of British Columbia. 1993. *A Safer Place*. Victoria: Ministry of Women's Equality at 3.

¹⁴⁷ *R. v. C.* 1993. Pr.C. (B.C.) Williams Lake Registry #13658.

¹⁴⁸ It is important to note that this perception is not unique to cases involving Aboriginal people.

¹⁴⁹ See Paula E. Pasquali. 1995. *No Rhyme or Reason: The Sentencing of Sexual Assaults*. Ottawa: Canadian Research Institute for the Advancement of Women at 31. In the case example used there is no indication whether there was a professional assessment to determine if alcohol was a contributing factor in this or previous charges.

shifting the responsibility for one person's behavior onto the lingering effects of colonization.¹⁵⁰ This in turn directs the focus of violence in First Nations communities away from the needs of the victims out of the concern for healing the offenders. While I am not suggesting that healing offenders and communities should not be a priority, it is clear that the interests of the offender must not be put ahead of victims' interests.

The Discourse of Healing

Because circle sentencing is credited with the potential to heal some of the imbalances in communities, it constitutes part of the subtext of the discourse of healing Aboriginal people. Healing Aboriginal people is viewed by many as a first step before First Nations communities can successfully take on self-government. Also success with alternative justice initiatives is seen as an important step towards this goal. These factors contribute to women's silence as many do not feel they can jeopardize these important goals. Furthermore, the discourse of healing promotes a holistic approach to healing -- that is communities healing together. One of the purported benefits of circle sentencing is that it promotes community healing, but what sometimes happens in practice is that the community is so focused on healing the offender that the victim ends up leaving *her* community. In the case of Shirley and Robert we learn "Shirley felt she had to leave because she was afraid."

The male Chief describes how Robert has asked for help from the community, but Shirley has not. This begs the question, *why not?* The Chief affirms that "she has a home here and if she let us know what ...kind of help she wants. Yes, you know, I am sure we can do something for her, but right now I am at a loss."

What the Chief means by "right now I am at a loss" is not clear. Does this comment suggest that the Chief has neither the expertise nor the motivation to support the victim? Does he recognize or understand the dynamics of violence? Perhaps he has no interest in questioning the privileges and rewards of male dominance. As quoted earlier,

¹⁵⁰ Note this same defence often applies to non-Aboriginal offenders.

sometimes community Chiefs and Elders are part of the problem -- condoning and even participating in violence against women. This allegation is reinforced in the words of an individual I interviewed confidentially. "What is it that makes people think they can get drunk and do this kind of thing to people? Where did they learn that from, the missionaries? Lots of people in [the community] beat up their wives including the Chief who has been convicted for the same offence."¹⁵¹

During the circle sentencing many people speak on Robert's behalf, including Robert himself; Shirley speaks only to offer a brief response to direct questions.

Someone from *outside the community* speaks on Shirley's behalf:

... it's my personal opinion that there has to be some equality, something equal between Robert and Shirley, and Robert seems to have done a lot of very good steps to improving his behavior. And I -- people in the community seem to think that Robert is doing that truly from his heart and not just to look good.... but I feel like he is getting more support from the community than is Shirley."

Another speaker, not from the community, agrees:

I know that my sense in speaking to some people is that perhaps there ... is some negative pressure being put on Shirley, and I'm wondering, ... what can be done to make Shirley feel welcome here, if that is true.

Robert has assaulted Shirley *at least four times*. Shirley has serious concerns for her personal safety. Yet the concern of the community members seems to be for Robert's healing, for Robert's staying in the community, and for Robert's chance to prove himself. Ironically, the cultural argument regarding the importance of the community healing together does not appear to be as relevant to the victim. This example provides a sense of the pervasiveness of patriarchy, and how it manifests in this small Aboriginal community.

Emma LaRocque criticizes the reliance on cultural defences which result in the delivery of offender-centered justice. For example, she maintains that "generalizations and typologies" which inform "Aboriginal mediation programs generally operate in the following way: the 'offender' is also seen as a 'victim,' and his 'needs' must also be met

¹⁵¹ I have no information to determine whether or not this statement regarding the Chief is factual.

for 'healing' to occur."¹⁵² In many cases, the offender's story is seen as a legitimately woeful tale of a family history of violence and alcoholism. The defence puts these factors forward as mitigating factors, along with the offender's show of remorse.¹⁵³ These factors may not be taken into consideration by the court. However, they have the potential to affect the courts' decisions. LaRocque criticizes any justice system which justifies leniency based on the premise that: "it is good for the community (social harmony), it is good for the family (unity), it is good for the victim ('forgiveness' is healing'), and it is good for the offender (rehabilitation)."¹⁵⁴

In the case of Shirley and Robert, Shirley has previously indicated to officers of the court, outside of the court and circle proceedings, that she plans to leave the community, *which is her home*, that she fears that Robert will kill her and that the community is not supporting her. Meanwhile, Robert, with the overwhelming support of the circle participants avoids a jail sentence. The judge's summation reveals his 'reluctance to adjourn the case for so long.' He recognizes Shirley's situation is difficult. In the end, as reluctant as the judge is to adjourn the case, his decision supports the sentiment of the circle.

I now turn to the case of *R. v. Taylor* which provides another example of the power of cultural difference defence. The offender was convicted of sexually assaulting the victim, threatening to kill her should she report the occurrence, and assaulting her on the same occasion. A sentencing circle was held. The community recommended healing the offender which would be achieved through a one-year period of banishment to an island. The trial judge adjourned the sentencing proceedings for one year during which the offender was banished to the island, after being ordered to undergo a psychiatric

¹⁵² Emma LaRocque. *In: Aboriginal and Treaty Rights in Canada* at 80.

¹⁵³ Paula E. Pasquali. *No Rhyme or Reason* at 33, noted that there is no empirical evidence that apologies or demonstrations of remorse predict rehabilitative potential or reduced risk for re-offending. However, I am not sure of the ethno-cultural background of the offenders that were the subjects of this study and whether that would be a factor.

¹⁵⁴ Emma LaRocque. *In: Aboriginal and Treaty Rights in Canada* at 80.

assessment of his ability to cope with this exile.¹⁵⁵ Ironically, the trial judge's order included 14 conditions, *all but the last one concerned the offender*. The final condition of the order reads: "The Justice Committee and Probation Services shall give assistance to the victim in finding programs which may help the victim to deal with the trauma caused by the offences committed by Mr. Taylor."¹⁵⁶ Once again, it seems the needs of the victim are secondary to those of the offender.

The victim's concerns with the court decision have been reported by the media, by the victim's advocate and in *R v. Taylor*.¹⁵⁷ The victim did not agree that the circle sentencing should go ahead, she was concerned that the offender made no admission of guilt, and she questioned the appropriateness of the punishment of banishment.¹⁵⁸ The trial judge found that "A circle may be held even if the victim is opposed to it.... The primary purpose of the circle is to help an accused change lifestyles."¹⁵⁹ His reasoning was as follows:

In respect to whether a circle should be held when an accused has pleaded not guilty, the Crown contended a guilty plea signifies remorse and a willingness to change lifestyle, while a not guilty plea signifies neither. *The plea is irrelevant to the issue of sentencing. [emphasis added]*¹⁶⁰

The victim suggested that banishment would be more like a holiday than a punishment. Other circle participants shared this sentiment. "Some of the women in the circle walked out for part of the second day's deliberations because [they suggested the offender] will not be isolated....[his] friends and relatives will consider it recreational to visit him...."¹⁶¹

¹⁵⁵ This decision was later appealed (see *R. v. Taylor* [1995] Sask C.A. reported CNLR 1996 [2] at 208) and the Appeal Court found that the trial judge "...was simply not empowered to adjourn the sentencing proceedings for this length of time and this purpose." at 214.

¹⁵⁶ *R. v. Taylor* [1995] 3 C.N.L.R. at 167.

¹⁵⁷ CBC Radio and CBC National News reported on *R. v. Taylor* [1995] 3 C.N.L.R. at 167. I draw my information partly from my memory of these reports.

¹⁵⁸ Victim's advocate -- identity withheld (personal communication, January 1997)

¹⁵⁹ *R v. Taylor* [1995] 3 C.N.L.R. at 167.

¹⁶⁰ *R v. Taylor* [1995] 3 C.N.L.R. at 167.

¹⁶¹ *British Columbia Report*. Justice Takes a Vacation: A year at the lake is not traditional Indian punishment. June 26, 1995. pp. 28 & 29.

The trial judge maintained the victim would not be re-victimized through the court proceeding, but this is exactly what happened. Both the trial judge and the community justice committee contributed to her re-victimization by going ahead with the circle sentencing when this was not what the victim wanted. Here we witness the delivery of offender-centered justice. Also at work are cultural generalizations about the punishment of banishment resulting in what some viewed to be a lenient sentence.

I argue that the above examples reveal how the influence of colonization, community and culture manifest in the interests of the male offender coming before those of the female victim. The victim has been silenced through the realities and ideologies of patriarchy and cultural difference which have operated on the offender's behalf.

Individual vs. Collective Rights

During negotiations over the new constitution and the place of Aboriginal peoples in Canada a debate developed between Aboriginal women and Aboriginal men over self-government. The Native Women's Association of Canada argued that the equality protections in the *Canadian Charter of Rights and Freedoms* [hereafter *Charter*] should apply to self-government. "Their position is premised on four issues: first, freedom of political expression as females; second, sexual equality rights under section 15, 28 and 35(4); third, equal Aboriginal and treaty rights with men; and fourth, possession of an equal right to self determination under international law."¹⁶² Aboriginal leaders, most of whom are men, argued that models of self-government should not be subject to federal and provincial laws and that Aboriginal women should not hold out for protection of their individual rights at the cost of the collective rights of all status Indians. Furthermore, Ovide Mercredi then national chief of the Assembly of First Nations publicly criticized "the idea that individual rights are superior to collective rights -- an idea we learned from White society -- this idea is creating imbalance and confusion in our communities."¹⁶³ The

¹⁶² Teresa Nahanee, 1993. In: *Aboriginal Peoples and the Justice System* at 364.

¹⁶³ Lilianne E. Krosenbrink-Gelissen. *Sexual Equality as an Aboriginal Right* at 110.

discursive positioning of individual versus collective rights frames a struggle over political identity.

The Native Women's Association of Canada recognized that an entrenched oppositional position on the issue of rights would not work to their benefit as they had to rely on the Assembly of First Nations to represent their position in the constitution talks in these matters.¹⁶⁴ The reason for this was because the Federal government had not funded the First Nation's women's organizations or allowed them to participate in the constitutional process. Instead they supported and consulted primarily four male-dominated national organizations, including the Assembly of First Nations, regarding amendments to the sex discrimination aspects of the *Indian Act*.¹⁶⁵ However, women were not prepared to compromise their individual equality rights. They developed the traditional motherhood strategy to advance their position that the equality provisions of the *Charter* should apply to any form of aboriginal self-government and to "hide the fact that Indian women had problems with their own men."¹⁶⁶

The following characteristics of the traditional motherhood argument reflect its use as an opposition ideology, shared by all aboriginal peoples. First, aboriginal men and women are by tradition equal, but have different roles in society. Secondly, women's primary concern is with their families, which is the fundament of traditional aboriginal cultures. Thirdly, they are traditionally responsible for transmitting the culture to younger generations. In doing so, they provide for cultural continuity. Fourthly, the colonization process and the inherent import of western notions of femaleness degraded aboriginal women.¹⁶⁷

This strategy allowed Aboriginal women to temporarily transcend the struggle over identity politics. Jo-Anne Fiske describes how "the political agenda for constitutional reform in 1992 once again found the NWAC [Native Women's Association of Canada] and AFN [Assembly of First Nations] locked into oppositional struggle, and

¹⁶⁴ Lilianne E. Kroesenbrink-Gelissen. *Sexual Equality as an Aboriginal Right* at 131.

¹⁶⁵ Jo-Anne Fiske, 1996. The Womb is to the Nation as the Heart is to the Body: Ethnopolitical Discourses of the Canadian Indigenous Women's Movement. *In: Studies in Political Economy* [51] pp. 65 - 95.

¹⁶⁶ Lilianne E. Kroesenbrink-Gelissen. *Sexual Equality as an Aboriginal Right* at 141.

¹⁶⁷ Lilianne E. Kroesenbrink-Gelissen. *Sexual Equality as an Aboriginal Right* at 127.

the motherhood discourse displaced by an earlier and more combative articulation regarding constitutional protection of sexual equality as an Aboriginal right."¹⁶⁸

In 1992 the Native Women's Association of Canada went to court to argue that the federal government's decision to fund "primarily male-dominated groups had the effect of leaving out the voices of Aboriginal women in the constitutional process" and "violated their freedom of expression and right to equality" guaranteed by the *Charter*.¹⁶⁹ The District Federal Court ruled against the Native Women's Association of Canada but the Federal Court of Appeal ruled in their favour and acknowledged that the Assembly of First Nations had failed to adequately represent the equality concerns of Native women.¹⁷⁰ However, their case was lost before the Supreme Court of Canada in 1995, with the effect of validating the role of the Assembly of First Nations and the Federal government in suppressing the equality rights of Aboriginal women.

Recently, the Royal Commission on Aboriginal Peoples "concluded...that *the Canadian Charter of Rights and Freedoms* applies to Aboriginal governments..."¹⁷¹ The *Charter*, based on the classic liberal notion of the rule of law, promotes the "individual property basis of human rights."¹⁷² Even so, some suggest that women would not be supported in taking forward individual rights based claims under the *Charter*, because of the challenge this would present to the fundamental principle of Aboriginal identity and Aboriginal customary legal order based on collective rights.

Turpel suggests "... this notion of rights based on individual ownership is antithetical to ...Aboriginal peoples.... There is no equivalent of 'rights' here because there is no equivalent to the ownership of private property. The collective or communal bases of Aboriginal life does not really have a parallel to individual rights. They are

¹⁶⁸ Jo-Anne Fiske. In: *Studies in Political Economy* [51] at 66.

¹⁶⁹ Thomas Isaac, 1995. *Aboriginal Law*. Saskatoon, Saskatchewan: Purich at 404 and 436.

¹⁷⁰ Jo-Anne Fiske. In: *Studies in Political Economy* [51] at 68.

¹⁷¹ For a discussion regarding the *Charter* with respect to Aboriginal self-government refer to RCAP, *Report of the Royal Commission on Aboriginal Peoples*, v. 2. *Restructuring the Relationship* at 226-234.

incommensurable.¹⁷³ Turpel outlines two ways in which a *Charter* challenge can “weaken the cultural identity of the community”:

...either a member of the community would challenge Aboriginal laws based on individual rights protections in the Charter arguing that they have not been respected by their government ...; or a non-Aboriginal person could challenge the laws of an Aboriginal government on the basis that they do not conform with charter standards.¹⁷⁴

This debate finds its way into the circle sentencing venue, again pressuring victims to participate in a circle sentencing because it is good for the community, therefore the collective, thereby compromising victims' individual rights. The discursive positioning of individual rights as threatening the rights of the collective justifies the tyranny over women and pressures them to remain silent even if their personal safety is at risk. Jo-Anne Fiske explains how customary legal orders are “a discourse or public conversation that tells people how to think of themselves. To challenge a legal discourse is to challenge how individuals conceptualize themselves and their social order. To create a new of alternative discourse is to generate alternative self-conceptions.”¹⁷⁵ Furthermore, Fiske argues that “invoking a notion of competing collective and individual rights, masculinist discourse performs a sleight of hand that essentially conceals the fact that the collective right under defense is the right of individual men.” Fiske also suggests that this debate belies another important difference between organizations/ associations that represent primarily Aboriginal women and primarily Aboriginal men. While both share concern over “Core issues...such as self-government, land entitlements, identity and economic well-being...” women's associations “...grant priority to social concerns: family harmony, child welfare, health care, and education, all of which are seen as the foundation for community healing.”¹⁷⁶

¹⁷² Mary Ellen Turpel. 1994. Aboriginal Peoples and the Canadian Charter of Rights and Freedoms. *In: Canadian Women's Studies* Volume 10, No. 2&3 at 152.

¹⁷³ Mary Ellen Turpel. *In: Canadian Women's Studies* [10] at 152.

¹⁷⁴ Mary Ellen Turpel. *In: Canadian Women's Studies* [10] at 153.

¹⁷⁵ Jo-Anne Fiske. 1995. The Supreme Law and the Grand Law: Changing Significance of Customary Law for Aboriginal Women in British Columbia. *In: BC Studies* 105-10, 1995 at 185.

¹⁷⁶ Jo-Anne Fiske. *In: Studies in Political Economy* [51] at 71.

In the circle sentencing venue the discourse regarding individual and collective rights can operate to silence women from pursuing protection of their individual rights by speaking out about violence. This discourse can also benefit the male offender by keeping him in the community to heal as part of the collective rather than sending him to jail.

Bad Indian Works

Finally, the power of bad Indian medicine or bad Indian works "...a dimension of oppression in the native culture that white society is not likely to understand..." has also deterred victims and their families from speaking out against violence.¹⁷⁷ "... [F]amilies will place hexes on native women who dare to speak of their abuse and on those who are perceived to be doing a family wrong...."¹⁷⁸

Mr. Justice Dohm acknowledges the influence of the accused, strong kin-connections and bad Indian works on a victim testifying in the Supreme Court Case of *R. v. G.*¹⁷⁹

... apart from the usual anxiety associated with the giving of evidence in court, the complainant has expressed a fear that if the persons in the accused's family and, perhaps, others establish eye contact with her in court, that through works, or through spiritual powers, or whatever... that she, the complainant, will suffer from "bad Indian works" and that her tongue will be tied.

In addition, she has expressed through [her counselor] that she has received physical threats from persons associated with the accused. Actually, I think the evidence is that the complainant did not say who the threats were made by, but threats have been made that if she testified, her parents would be killed.

The witness also told us of the usual anxiety that is experienced when she sees the accused, whether at the preliminary hearing, or whether it be at canoe races, or whether it be when he visits near where she resides.

The additional factor here is that the complainant herself believes in Indian works - bad Indian works, I suppose, as well as good Indian works ...

It is for that reason and that reason alone that the Crown's application should be allowed, and that a screen be placed between the complainant and the accused.

This passage illustrates how powerful the influences of the offender, family, culture and bad medicine can be, and how these influences can work to silence a victim in

¹⁷⁷ *Times Colonist*, July 27, 1992, Rites for wrongs: Bad medicine prescription for silence. A7.

a formal court setting. Yet, the law acts in favour of the offender in stipulating that the accused has the right to face the accuser. This means that the accused can only be absent or removed from the court by order of the judge pursuant to the provisions of *section 650 of the Criminal Code*. I argue that the offender, family, culture and bad medicine can have just as profound an influence in a circle sentencing.

The point of the analysis in this chapter, thus far, is to demonstrate how the influence of colonization, community, and culture constitute a problematic in the everyday lives of Aboriginal women victims. The colonizers isolated Aboriginal peoples, created a situation of economic dependence, introduced the concept of racism by constituting difference as inferiority, and introduced sexism by forcing the sex roles of Aboriginal men and women to align with European norms. This notion of inferiority of Aboriginal people was reinforced in many different ways, particularly through residential schools. As a result of colonization, Aboriginal people generally experience social and economic disadvantage. Aboriginal women experience double jeopardy in their communities because of their gender and the colonized minds of many predominantly male-dominated band councils. Aboriginal women, once respected and revered for their important roles as the givers of life, and the transmitters of the culture and the language, have become one of the most marginalized groups in Canadian society. Many Aboriginal women have lost their legal status, their identity, many of their rights (both legal and basic human rights) and are incredibly disempowered. For some women, their low self-esteem contributes to their inability to avoid or leave abusive relationships, *even though they often fear for their lives*. As well they may engage in self-destructive behaviours, such as alcohol and drug abuse.

The power and control framework helps us to recognize the tactics of power and control apparent in this analysis are as inextricable as the links between colonialism -- with its inherent, racism, sexism, classism, -- community, and culture. These factors in

¹⁷⁸ *Times Colonist*, July 27, 1992. Rites for wrongs: Bad medicine prescription for silence. A7.

combination, determine the contemporary power relations that oppress and marginalize Aboriginal women. With so many mitigating factors in favour of the male offender, a dominant position is retained. This power imbalance must be recognized as one that also exists in circle sentencing.

Emma LaRocque suggests:

As Native people we are caught within the burdens and contradictions of colonial history, but nonetheless, we cannot use colonization or culture to excuse violence; we are challenged to meet our responsibilities in a manner that is consistent with international human rights standards. I would like to think our traditions and cultures do not contravene such standards.¹⁸⁰

The Law: Friend or Foe?

Surely the law and international human rights standards provide some recourse for women whose individual rights have been trammled. The purpose of this next section is to consider what recourse the law provides for Aboriginal women who are victims of violence in their communities. I begin by surveying how international human rights standards and the law have served Aboriginal women thus far.

The struggle of Aboriginal women to regain equality began with force in 1951 as “Aboriginal people became more aware of their legal rights and as a result organized to address their concerns.”¹⁸¹ Their initiative gained strength and momentum from the white women’s movement and from international attention to issues of human rights raised as a result of the Lavell/Bedard court challenge and finally the controversial Sandra Lovelace case, discussed below.¹⁸² These women challenged the sex discrimination in the *Indian Act*.

Lavell contested the deletion of her name from the band list upon marriage to a non-Indian man through a claim that s.12(1)(b) of the *Indian Act* contravened the

¹⁷⁹ *R. v. G.* SC (B.C.) 18 October 1993. Justice Dohm. (Duncan Registry) File no. 15198.

¹⁸⁰ Emma LaRocque. *In: Aboriginal and Treaty Rights in Canada* at 92.

¹⁸¹ RCAP. *Report of the Royal Commission on Aboriginal Peoples*. v. 4. *Perspectives and Realities* at 68. Also in this volume see the Rise of Aboriginal Women’s Organizations page 68-71.

¹⁸² In 1968 the Royal Commission on the Status of Women recommended elimination of the sex discriminatory clauses in the *Indian Act*. See Krosenbrink-Gelissen, Lilianne E. 1991. *Sexual Equality as an Aboriginal Right*.

equality provisions of the 1960 *Canadian Bill of Rights*. The Federal Court ruled in favour of Lavell.¹⁸³ Because of this ruling male Indian leaders feared an amendment to the *Indian Act* based on sex discrimination. They argued that this action would interfere with a more general reconsideration of the *Indian Act*, and would jeopardize their claims to the special status and collective rights of all Aboriginal peoples.¹⁸⁴ The Attorney General and the National Indian Brotherhood colluded to launch an appeal to the Supreme Court *against* Lavell who had been joined by Bedard. Bedard contested being evicted from her home which had been willed to her by her mother, despite the fact she had separated from her non-Indian husband.¹⁸⁵

In 1973 Lavell and Bedard lost their challenge before the Supreme Court of Canada as the Court “held that s.12(1)(b) did not constitute a violation of equality before the law.”¹⁸⁶ “But the consequences were far reaching....[t]he case created a united Indian front on the untouchable nature of the *Indian Act*” and demonstrated the willingness of government and the male-dominated Indian organizations to collude to protest the basic human rights of Aboriginal women, argueably for the benefit of the collective.¹⁸⁷

In 1977 Sandra Lovelace filed a complaint with the United Nations Human Rights Committee (UNHR) regarding the sex discriminatory clause in the s. 12(1)(b) of the *Indian Act* because all avenues open to her in Canada had been exhausted.¹⁸⁸ In July 1981 The UNHR Committee found Canada in breach of the *International Covenant on Civil and Political Rights* signed by Canada in 1976. The Committee made this ruling on the basis that Mrs. Lovelace had been denied cultural rights guaranteed by the Covenant because she had been forcefully separated from her community. The Committee did not

¹⁸³ Kathleen Jamieson. *Indian Women and the Law in Canada* at 81

¹⁸⁴ For further discussion refer to Thomas Isaac. *Aboriginal Law* at 413.

¹⁸⁵ Kathleen Jamieson. *Indian Women and the Law in Canada* at 81-84.

¹⁸⁶ *Attorney General of Canada v. Lavell & Bedard; Isaac et al v. Bedard*, 7 C.N.L.C., 236 (S.C.C.), Fauteux C.J.C., Abbott, Martland, Judson, Ritchie, Hall, Spence, Pigeon, and Laskin JJ., August 27, 1973.

¹⁸⁷ Kathleen Jamieson. *Indian Women and the Law in Canada* at 2

rule on the sex discrimination aspect of the case, specifically “the actual loss of status”, as this discrimination occurred prior to 1976 when the Covenant became applicable in Canada.¹⁸⁹ Though decisions of the UNHR Committee have no compulsory power this was nevertheless a very embarrassing decision, as Canada had ratified the *United Nations Convention on the Elimination of All Forms of Discrimination Against Women* in December of 1981.

Bill C-31 entitled *An Act to Amend the Indian Act* came into force on 17 April 1985, with the purpose of eliminating the sex discrimination in the *Indian Act*. It was “no coincidence that [Section 12(1)(b) of the *Indian Act*] was repealed by Parliament in Bill C-31 effective the day s. 15 of the *Charter* came into force.”¹⁹⁰ Section 15 of the *Charter* guarantees the right of every individual under the law equality without discrimination.

Bill C-31 was purported to eliminate sex discrimination in the *Indian Act* and to reinstate women and children who had lost their status and associated benefits.¹⁹¹ However, through Bill C-31 the government also appeased male interests by granting “male-dominated band councils ...the right to determine their own band memberships.”¹⁹² Other relevant amendments were included in Bill C-31, specifically: abolishment of the concept of enfranchisement, and separation of status and band membership (meaning status would no longer guarantee band membership as it had prior to the amendment).¹⁹³ The problem with Bill C-31 is that it still perpetuates a racist-sexist classification system that oppresses Aboriginal women. Women have fewer rights than men when it comes to securing band membership and the benefits of membership, and when passing on status to their children. Moreover, other discriminatory sections of the *Indian Act* remain such

¹⁸⁸ In 1977, government removed the *Indian Act* from the reach of the new *Human Rights Act*, some sources indicate this was done intentionally to avoid controversy related to the discriminatory nature of the *Indian Act*.

¹⁸⁹ Thomas Isaac, *Aboriginal Law* at 417.

¹⁹⁰ Thomas Isaac, *Aboriginal Law* at 431.

¹⁹¹ Native Women's Association of Canada, no date, *The Rights of Treaty First Nations Women Within First Nations Self Government: A Discussion Paper* at 7.

¹⁹² NWAC, *The Rights of Treaty First Nations Women Within First Nations Self Government* at 7.

¹⁹³ NWAC, *The Rights of Treaty First Nations Women Within First Nations Self Government* at 7.

as those already described regarding entitlement to matrimonial property. Thus, discrimination still exists in the *Indian Act* -- it impinges on the rights of women and contributes to their disempowerment. This institutionalized discrimination provides little incentive for victims to speak out about incidents of violence.

Another carryover from British colonial law, and still very much a part of the Canadian ethos, is the distinction between the realm of private and public. This topic warrants discussion here as it helps situate the issue of sexual violence. Common law developed around a distinction between public and private. Injustice that occurred in the public world was sanctionable by law. Injustice that occurred in private was dealt with in private and did not warrant state intervention, or governing law. Thus violence by men against women was condoned in the home and, in fact, law and custom such as traditional Christian marriage vows which required that the wife "honor and obey" her husband, sanctioned this violence. To this day the severity of the problem of violence that occurs in "private" is often minimized or discounted because of the patriarchal values of society and our legal institutions. Although increased public awareness has encouraged the state to take a more active role in regulating violence, "[p]rivacy justifies the refusal of the state to intervene, of judges to issue restraining orders, of neighbors and friends to intervene or to call the police, of communities to confront the problem and of social workers to act."¹⁷⁴ This distinction has a particularly profound affect on Aboriginal women residing in reserve communities. Because of their extensive close-knit kin-connections there can be a significant extension of the private sphere in which violence is tolerated, and more silence.

Can the law, specifically the Canadian Charter of Rights and Freedoms, protect the individual rights of Aboriginal women? Sharon McIvor has faith in the potential of the *Charter* to act as an instrument for addressing the discrimination in the *Indian Act*.

¹⁷⁴Elizabeth M. Schneider. 1994. The Violence of Privacy. In: *The Public Nature of Private Violence*. Martha Albertson Fineman & Roxanne Mykitiuk eds. Routledge: New York. pp. 36-58 at 53.

McIvor believes the *R. v. Sparrow*¹⁹⁵ decision which affirmed existing Aboriginal and treaty rights “provides a framework within which to make this argument.”¹⁹⁶ In *Sparrow* the court found that if an aboriginal right has not been extinguished it exists, even if the right has previously been controlled and regulated by the State. Sharon McIvor maintains that women’s civil and property rights as they existed prior to colonization have not been extinguished. Therefore, Aboriginal women’s civil and property rights are part of their inherent right to self-government under section 35(1) of the *Charter*.¹⁹⁷

McIvor believes that remedies for these inequities are possible under the *Charter*, and in view of *Sparrow*. I have already discussed the logistical barriers to women in taking forward a *Charter* challenge, including, how challenging legislation through the courts is a long, arduous and expensive process, and how Aboriginal women are discouraged from pursuing their individual rights through the courts. The courts tend to uphold the right of individuals in favour of the collective.

Cases involving *Charter* challenges to Aboriginal justice systems might be framed as conflicts between the rights of the Aboriginal individual and those of the Aboriginal collectively. If this happened, the Supreme Court might, in light of its track record, come down on the side of protecting the rights of the individual accused.¹⁹⁸ A series of such decisions could have a crippling effect on the development of Aboriginal justice systems.¹⁹⁹

One questions the potential of the *Charter* to ensure women who do not have access to traditional power structures do not have their individual rights trammled? Furthermore, it must be noted that the law and the *Charter* are often criticized for the many ways in which they serve the interests of the offender over the victim. I provide a few examples to illustrate this point. The criminal justice system is founded on the principle that one is innocent until proven guilty. This puts a huge burden on Crown to

¹⁹⁵ *R. v. Sparrow* (1990), 70 D.L.R. (4th) 385 (S.C.C.).

¹⁹⁶ Sharon D. McIvor, 1995, Aboriginal Women’s Rights as “Existing Rights” In: *Canadian Woman Studies*, Volume 15, Nos 2 & 3, at 35.

¹⁹⁷ Sharon D. McIvor, In: *Canadian Woman Studies*, [15] at 35.

¹⁹⁸ see Mary Ellen Turpel, In: *Canadian Women’s Studies*, [10] Nos. 2 & 3 at 153 for a discussion re: Boverly, Canada [1986] 35 N.R. 305. Justice MacGuigan writing took the view “in the absence of legal provisions to the contrary, the interests of individual persons will be deemed to have precedence over collective rights. This must be as true of Indian Canadians as of others.

prove guilt beyond a reasonable doubt. Often this results in acquittal of the accused -- invalidating the experience of the victim.

The *Charter* states the various legal rights of a person in Canada. It applies equally to everyone. The following are some of the legal rights of an accused person, some of which have a direct impact on victims.

- Section 9: The right not to be arbitrarily detained or imprisoned.
- Section 11: Any person charged with an offence has the right
 - (a) to be informed without unreasonable delay of the specific offence;
 - (b) to be tried within a reasonable time;
 - (c) to be presumed innocent until proven guilty according to law in a fair and public hearing;
 - (d) not to be denied reasonable bail without just cause; and
 - (e) to remain silent (persons charged with an offence have the right not to be compelled to be a witness against themselves).

Depending on the circumstances for victims the *Charter* can be interpreted as providing no means to legally report a violent partner without suffering possible repercussions (as per s. 11(a); and providing little reassurance that the accused will be restrained from committing further assaults (as per s. 9 & s. 11 (b&d).

So is the law a friend or foe? The above analysis suggests both. Arguably, laws have not protected women against violations of their rights. The everyday world *is* problematic --plagued by racism and sexism -- and legislation will not change that. In the cases examined, Aboriginal women bringing challenges before the Canadian courts have faced defeat. Government has colluded with male-dominated Indian organizations in these court challenges. The colonial distinction of private versus public spawned development of law that did not concern itself with violence in the home. To this day the severity of violence in the home is minimized, validating the abuser and invalidating the victim. It seems, victim's experiences with circle sentencing also tend to result in the validation of the male offender, sustaining male privilege in the relationship.

Many Aboriginal people desire to have *Charter* protections apply to self-government. In this paper I argue that the law and the *Charter* do not necessarily serve

¹⁹⁹ RCAP. *Bridging the Cultural Divide* at 261.

the interests of victims, in particular, the women who are the victims of sexual violence. Despite this position I strongly believe in the power of legislation, like the *Charter*, that has as its object the protection of rights. Appeal to international human rights standards and related mechanisms for redress helped pressure the Canadian government to introduce Bill C-31 to eliminate the sex discrimination in the *Indian Act*.

While substantial effort is required to alter institutionalized discriminatory social practice, decreeing progressive human rights legislation *is* instrumental in establishing and in continually raising the bar with respect to acceptable human rights standards, in raising awareness, and in contributing to the discursive construction of women as deserving of rights. This in itself is empowering. I am mindful of Razack's reference to Robert Williams who "advises minority groups to take rights aggressively, using them as a primitive weapon loaded with myths until they 'perfect new weapons'..."²⁰⁰

Victims: Resistant and Resilient

"...alongside each history of violence and oppression, there runs a parallel history of resistance".²⁰¹

Aboriginal women are resistant and resilient and their strength is a key factor in the enduring character of Aboriginal Nations. Many women tolerate violence in their homes and their communities to maintain their families. They have struggled for 30 years for equality, they have formed alliances in order to challenge the strategic deployment of hegemonic, cultural narratives which sustain exploitive power relations and they have created and deployed some of their own narratives.²⁰²

As Aboriginal Nations collectively struggle toward decolonization and models of self-government that create a third order of government, not subject to Federal and Provincial laws and institutions, Aboriginal women argue for protection of the *Charter*.

²⁰⁰ Sherene Razack, Revolution From Within: Dilemmas of Feminist Jurisprudence. In: *Queen's Quarterly* Vol. 97, No. 3, 1990 at 403.

²⁰¹ Allan Wade, 1995, *Resistance to Assault and Abuse*. Paper presented at Triumphs and Challenges: Victim Services in the 90's. Unpublished at 5.

²⁰² Mary Louise Fellows & Sherene Razack. In: *Signs*. Vol. 19, No. 4 at 1061.

Without this protection Aboriginal women fear that their . “Without sexual equality rights for Indian women, the primary transmitters of Indian cultures, Indian nationhood will be further endangered.”²⁰³ Traditionally Aboriginal women carried the responsibility for imparting language and culture to future generations. Language and culture are central to identity. Identity is critical to the strength and survival of a nation. This is a concept that the majority of Aboriginal people support.

Summary

The summary of *Chapter Two* highlights what emerged from interviews as the primary presenting reasons for the silence of Aboriginal women who live in reserve communities, are the victims of sexual violence, and have participated in a circle sentencing. This first level of findings established the basis for this secondary analysis which reveals colonization, community, culture and the law as the multiple sites of power which helped to establish, and now sustains, sexual violence against women in First Nations communities, and prevents them from speaking out.

Colonization introduced racism and gender discrimination to Aboriginal peoples and established the structural causes of violence in First Nations communities. Community is integral to Aboriginal people, and because of its importance and extensive reach the community has incredible power to regulate violence. Culture is sometimes used as a defence to excuse or minimize the violent actions of offenders. Finally, the law provides limited recourse for women. Infact, the law helped to establish and continues to re-affirm male privilege. These factors continue to influence the circle sentencing process, although it is intended to be more victim-centered than existing sentencing methods. Because of this many victims remain silent.

It is presumptuous for me to recommend solutions to this problem. The construction of solutions is a project for Aboriginal women and men of First Nations

²⁰³ Krosenbrink-Gelissen, Lilianne E. *In: Frideres, J.S.(Author). Native Peoples in Canada* at 358.

communities -- although this paper highlights the potential problems with community driven programs given the practicalities of power in many First Nations communities.

However, I am compelled to move beyond this academic exercise of analysis. With this in mind I have taken what I have learned from this research and offer some ideas with respect to the concepts of circle sentencing and restorative justice as relevant to women in First Nations communities and protection of their individual rights. This is the focus of the next chapter.

Chapter Four: Empowering Victims



In this chapter I respectfully present four criterion which include ideas that I feel may improve the chances of victims' needs being met through circle sentencing. I stress that I am not recommending a process to be used by First Nations communities -- that is not my place. In addition, there clearly is no "one size fits all" solution for Aboriginal justice. However, I trust that some of these ideas may be useful for individuals working in the area of circle sentencing. I remind the reader that most of the ideas presented here are not mine, they are compiled from information collected through interviews and a literature review.²⁰⁴ The reader will note a change in the style of writing in this chapter. Because I feel that the ideas below may have practical applications as a whole or individually I present them as somewhat succinct and autonomous points. I hope that my interpretation and arrangement of the information will allow this chapter to stand alone and serve as a potential tool for those working in the field of circle sentencing.

The first of the four criterion suggests activities to be carried out far in advance of a circle sentencing and is related to ensuring the community has achieved a state of readiness required to implement circle sentencing. Criterion number two focuses on assessing which cases are suitable for circle sentencing. Criterion number three stresses the importance of adequate preparation for a circle sentencing session. Criterion number four refers to how the results of the circle will be monitored and evaluated. This chapter offers an examination of these four criterion. Note that consideration of any or all of the ideas here may guide the user to the conclusion that *it is in the victim's best interests not to hold a circle sentencing*.

²⁰⁴ Many of the sources I reviewed have excellent information and recommendations relevant to circle sentencing, including Judge Cunliffe Barnett. *Circle/Alternative Sentencing In: Canadian Native Law Reporter* [1995] 3 at 1-7. Mary Crnkovich. *Report on the Sentencing Circle in Kangiqsujuaq*. Prepared for the Department of Justice Canada. Gitsxan Health Authorities. *Peace and Justice: Five Year Plan*; Rupert Ross. *Returning to the Teachings*; Judge Barry Stuart. *Circles into Squares Systems RCAP. Bridging the Cultural Divide*.

Three assumptions underlie the discussion in this chapter.

1. Circle sentencing will be adapted as a transitional measure prior to the possible development of distinct Aboriginal justice systems. Therefore, representatives of First Nations communities and the existing criminal justice system will work cooperatively to develop, implement and evaluate interim Aboriginal justice systems.²⁰⁵
2. The readers are mindful of the complexities of sexually violent offences and the power imbalances inherent in violent relationships.
3. Violence in contemporary First Nations communities is a byproduct of the devastation of colonization and the resulting disadvantaged social and economic situation of Aboriginal peoples. Efforts to remedy this situation are required to eliminate the structural causes of violence.

Meeting the Needs of Victims through Circle Sentencing

One: Assessing Community Readiness

1. Circle sentencing is agreed to be a viable alternative for the community.
2. Resources are available to ensure the successful implementation of circle sentencing, the safety and the healing of the victim, and the monitoring and healing of the offender.
3. Eligible people in the community are trained to facilitate and to participate in the circle sentencing process.
4. Standards and measures for evaluating the circle sentencing process are in place.

Two: Assessing Case Suitability

1. The nature of the offence lends itself to circle sentencing.
2. The offender admits responsibility for the offence.
3. The victim is a willing participant.
4. A knowledgeable and supportive victim's advocate is appointed to work with the victim. The assumption being that a Native Court Worker or Counsel will work with the offender.

Three: Preparing for the Circle Sentencing

1. Adequate preparations for the circle sentencing are made.

Four: Monitoring and Evaluating the Outcome

1. The offender must comply with the conditions set out by the circle.
2. There are consequences for the offender if the conditions set out by the circle are not met.
3. An appeal mechanism is in place.
4. The circle sentencing process undergoes a meaningful evaluation.

McDonald, J.M. and O'Connell, T.A. & Moore, D.B. & Bransbury, E. *Convening Family Conference with Carol LaPrairie. Conferencing in Aboriginal Communities.*

²⁰⁵ Also stated in RCAP, *Bridging the Cultural Divide* at 310-311, point 11 of the Major findings and Conclusions, is the view that "criminal law and procedure operative on Aboriginal territories is *concurrent* with federal jurisdiction over criminal law and procedure generally" and in the area of criminal law specifically, first securing agreements with other relevant orders of government would be advisable.

Meeting the Needs of Victims through Circle Sentencing

One: Assessing Community Readiness

Some means of assessing community readiness before increasing community responsibility over justice systems is important, especially for offences involving sexual violence. Perhaps an Aboriginal Justice Council, as proposed in *Bridging the Cultural Divide*, would determine “which Aboriginal initiatives would be funded and what the level of funding may be.”²⁰⁶

1. *Circle sentencing is agreed to be a viable alternative for the community.*

Bridging the Cultural Divide suggests a development period of one year to eighteen months prior to communities implementing Aboriginal justice initiatives.²⁰⁷ This recommendation was made in a report by consultants who evaluated two troubled alternative justice projects: the South Vancouver Island Tribal Council justice program and Attawapiskat Diversion program of the Sandy Lake First Nation. “One of the key recommendations was that each project have an explicit project development process consisting of three phases: a needs assessment phase; a project development phase; and a pre-implementation phase.”²⁰⁸ *Bridging the Cultural Divide* stresses the importance of *genuine community consultation* in the developmental process.

A genuine consultation process is one that allows all those affected by the development of the justice project to have meaningful input to the process. A process undertaken only as a formality and that ignores sectors of the community that want input is obviously not a true consultative process. Ultimately, of course, the process is a sham and will prove counter-productive, since without community support an Aboriginal justice project will not succeed. The hallmark of a meaningful consultative process is one where *not* proceeding with the project is always an option.

The consultative process must include elders, traditional teachers and clan leaders....

In addition, however, *the consultative process must reach out to the groups that are the most marginal in the community* - those whose views are most often ignored when important decisions are made. In many Aboriginal communities, as in the rest of the country, *women and young people are often among the most marginalized groups.* [emphasis added]²⁰⁹

²⁰⁶ RCAP. *Report on the Royal Commission of Aboriginal Peoples*, v.4 *Perspectives and Realities* at 67.

²⁰⁷ RCAP. *Bridging the Cultural Divide* at 169.

²⁰⁸ RCAP. *Bridging the Cultural Divide* at 170.

²⁰⁹ RCAP. *Bridging the Cultural Divide* at 171.

The project development approach recommended above will help establish whether circle sentencing is the most suitable alternative measure for a community. After all, a search for alternatives is intended to identify something more culturally appropriate than what the current justice system offers. If the people in the community -- and this includes members of the Western justice system -- are not supportive of the alternative this criteria has hardly been met.

2. *Resources are available to ensure the successful implementation of circle sentencing, the safety and the healing of the victim, and the monitoring and healing of the offender.*

Adequate resources are required to support the circle sentencing process otherwise there may be too much reliance on community volunteers. Mary Crnkovich describes how a circle run by volunteers was fraught with logistical problems and as such "can be of very little benefit to anyone."²¹⁰ Without adequate resources to implement and administer alternative initiatives, including sufficient resources to support the victims, and other's impacted by the families of violent offences, as well as the offenders, they will not succeed.

When a case goes before a circle usually the purpose is to consider alternatives to a jail sentence, or at least a shorter jail term. Often the offender remains in the community for healing. This "emphasis on healing presents different resource needs than a punishment-based system, which requires jails, guards and related resources. A healing orientation requires resources such as treatment facilities, counseling services, elders and healthy staff."²¹¹ The nature of the offence is also an important consideration here, because in cases of violence Crnkovich suggests "What is missing from the focus on 'healing' is the assurance that if the wrongdoer stays in the community the victim is protected from further assaults."²¹²

The safety and security of the victims of violence are tantamount. The victim and her family must be protected from further attacks and also entitled to some refuge from the offender's intrusion on her daily life. Emma LaRocque describes how "studies on sexual abuse also strongly indicate it is psychologically destructive for victims to be subjected to their

²¹⁰ Mary Crnkovich. 1993. *Report on the Sentencing Circle in Kangiqsujuaq* at 7-9. Prepared for the Department of Justice Canada.

²¹¹ RCAP. *Bridging the Cultural Divide* at 173.

²¹² Mary Crnkovich. *Report on the Sentencing Circle in Kangiqsujuaq* at 23.

attacker's presence. This is exacerbated in small communities, and, it must be emphasized, most Native communities are small...!"²¹³

The size of the community and the availability of places of sanctuary, shelters, or safety zones for the victim and her family must be considered by communities contemplating circle sentencing, with a view to keeping offenders out of jail. Failing to explicitly deny the offender access to the neighborhood where the victim resides, where she works, the feast hall, the Bingo hall, or elsewhere, will often have the effect of excluding the victim through her fear of being in the vicinity of the offender.

How to ensure that the offender will stay away from designated places of refuge for the victim is beyond the scope of this paper. The limited success of restraining orders in protecting victims from further harassment from offenders attests that this is difficult to enforce. However, one potential advantage of involvement of the community in developing and in monitoring sentencing alternatives combined with the generally small size of First Nations communities could be the ability to closely monitor offenders. Of course, there must be a will to do so and we have seen that this is not always the case. *Bridging the Cultural Divide* notes that with respect to family violence "These offences are not always viewed with the seriousness they warrant by all community members..."²¹⁴

As healing victims and offenders is critical to the success of alternative justice initiatives consideration of the resources required and the means of achieving this goal is critical. Whether an Aboriginal justice initiative can achieve this goal "depends on the availability of programs in the community to allow [victims and] offenders to begin their healing."²¹⁵ Andrea Kamin and Romeo Beatch describe a promising community based approach to developing the counseling and support services required for both victims and abusers. People

²¹³ Emma LaRocque. *In: Aboriginal and Treaty Rights in Canada* at 81. I rely heavily on Emma LaRocque as a source for this section as she is one of a few First Nations women to be so outspoken and specific about restorative justice initiatives as a response to sexual assault offences. In the articles cited LaRocque directs her criticism specifically at the Hollow Water Model, in Manitoba. For more information about the Hollow Water Model see Rupert Ross. *Returning to the Teachings. Chapter Two*.

²¹⁴ RCAP. *Bridging the Cultural Divide* at 269.

from professional agencies outside of the community were brought in to work with groups and to train members of the community as “paraprofessionals.” Paraprofessionals are identified as “people within the community who lack formal psychological training but who are involved within their society as community-type workers.”²¹⁶ While some positive indicators of this approach were observed, Kamin and Beach remind their readers that it will be sometime before the long-term success of such initiatives can be evaluated. They report that research has shown that importing professionals into First Nations communities on a short-term basis does not help individuals or the community — ongoing support is required.²¹⁷

The importance of adequate resources, particularly funding, was identified as an important issue by the Royal Commission on Aboriginal Peoples. The Commission recommended “at a minimum, funding for new initiatives should be guaranteed for at least the period required for serious and proper evaluation and testing.”²¹⁸ The Commission also suggests that these initiatives should not require a large amount of new money. They recommend re-allocating money that is already being spent to “process and in many cases warehouse a small segment of the population.”²¹⁹

3. *Eligible people in the community are trained to facilitate and to participate in the circle sentencing.*²²⁰

Circle sentencing will only be as good as the people that facilitate the process. I use the term facilitate, as in to assist or to make easier, to emphasize that organizational hierarchies which would give some individuals power *over* justice are not preferred for alternative justice systems. It is precisely this European imposed notion of hierarchies which is causing problems

²¹⁵ RCAP. *Bridging the Cultural Divide* at 173 as suggested in Pauktuutit, the Inuit Women’s Association of Canada, “Setting Standards First”, paper presented to a National Symposium on Care and Custody of Aboriginal Offenders, Correctional Service Canada, 1995. pp. 8-10.

²¹⁶ Andrea Kamin and Romeo Beatch. *In: The Northern Review*. Summer 1991 at 94.

²¹⁷ Andrea Kamin and Romeo Beatch. *In: The Northern Review*. Summer 1991 at 102. In doing the research for this paper I was told on a confidential basis that some First Nations people suspect that government initiatives of making professional psychologists available to First Nations communities on an intermittent basis actually resulted in an increase in suicides during the period following their community visits.

²¹⁸ RCAP. *Bridging the Cultural Divide* at 296.

²¹⁹ RCAP. *Bridging the Cultural Divide* at 291.

²²⁰ Mary Crnkovich also makes this recommendation. *Report on the Sentencing Circle in Kangiqsujaq* at 24.

in contemporary First Nations communities.²²¹ A method must be in place for determining who is eligible to facilitate and to participate in the circle sentencing initiative and people must receive adequate training for this role. Hopefully such preparation will help avoid the problem Judge Barnett encountered with a circle sentencing where the 'deck was stacked'. Val Napoleon, with the Gitksan Health Authorities, alluded to this potential problem with community justice initiatives.²²² She suggested that research issues in Hazelton related to Unlocking Aboriginal Justice are the power in formal and informal relationships, and how the program can withstand the pressures of family.

Irene James writing in *Native Issues Monthly* states that "women need input into the justice systems that will be revived in our communities to ensure that our abusers will not also be our judges."²²³ However, my thesis is that even if women are involved in alternative justice systems it may still be difficult for them to speak out. Aboriginal women have been involved in the development of the "Community Driven Holistic Circle Healing Program" at Hollow Water. The Hollow Water Program, which has received much praise, particularly from Rupert Ross in *Returning to the Teachings*, elicits the following criticism from Emma LaRocque.²²⁴

I have received many calls from concerned people expressing the view that Hollow Water is a travesty of justice and a cruel disregard for human dignity. In particular, Native women expressed shock, disgust, and outrage.... Even white journalists urged me to make a statement and told me they were not politically free to question the Hollow Water decision. All those Native women who called asked to remain anonymous because they too did not feel free to publicly challenge Hollow Water. I have not felt free either.²²⁵

As Rupert Ross's book appears to be thoroughly researched and written with great participation of Aboriginal people, including Aboriginal women, one wonders whether his positive evaluation of the Hollow Water program is based partly on the continued silences of Aboriginal women. Regardless, Aboriginal communities must grapple with this critical issue of

²²¹ Rupert Ross. *Returning to the Teachings* at 55.

²²² Restorative Justice Video Conference. June 19/20, 1997. Held in various locations of the Province of British Columbia. Primary sponsor the John Howard Society.

²²³ Irene James. In: *Native Issues Monthly*. March 1996. Volume 4. No. 2 at 9.

²²⁴ Rupert Ross. *Returning to the Teachings*. Chapter Two.

²²⁵ Emma LaRocque, *Aboriginal and Treaty Rights in Canada* at 210. Note that LaRocque's criticism of Hollow Water appears to be focused on one case that came before the circle. I was unable to contact Emma LaRocque to confirm whether my understanding is accurate.

how to select a meaningful community of people, equally supportive of the victim and the offender, to participate in the circle sentencing process.

Judge Barnett spoke of the value of the pre-sentence report in alerting the judge when the family dynamics in a community are working to protect the offender at the expense of the victim. Perhaps the pre-sentence report could be mandatory in determining whether it is appropriate to use circle sentencing in a case of sexual violence, and consideration of family dynamics could become a standard component of the pre-sentence report. This is problematic however, as it may be difficult for someone from outside the community to evaluate well.²²⁶ I also recognize the potential for this dynamic to establish the probation officer as having control over the process. There is an inherent danger there given the history of Aboriginal peoples and the justice system. It seems the probation officer would need to be very familiar with the community and the complicated issues related to sexual violence, and would need to work closely with community members in preparing the pre-sentence report.

4. *Standards and measures for evaluating the circle sentencing process are in place.*

Carol LaPrairie and Julian Roberts criticize statements like the following that "Circle sentencing and other community justice processes do spectacularly better than formal justice agencies," when there is no empirical proof.²²⁷ They stress that standards and measures must be developed to determine the relative success of circle sentencing to the criminal justice system.

The evaluation issues are relatively straightforward. It has been claimed that sentencing circles have the following benefits: they (a) reduce recidivism; (b) prevent crime; (c) reduce costs; (d) advance the interests of victims, and (e) promote solidarity among community members, however community is defined. In all these aims, *the assumption is that circles will achieve these goals to a greater degree than a conventional sentencing hearing*. These are all measurable objectives and they should be put to the empirical test.²²⁸

In terms of evaluation Judge Stuart suggests that rates of offender recidivism may not be the most important consideration in evaluation of circle sentencing. Stuart suggests "The impact of community based initiatives upon victims, upon restoring relationships injured by crime,

²²⁶ Antonia Mills (personal communication, February 16, 1998)

²²⁷ As quoted in Carol LaPrairie and Julian Roberts. 1996. Sentencing Circles: Some Unanswered Questions. *In: Criminal Law Quarterly*. Volume 39 pp. 69-83 at 73.

²²⁸ Carol LaPrairie and Julian Roberts. *In: Criminal Law Quarterly*. [39] at 83.

upon fostering harmony within the community” and other benefits “are in the long run more important than the immediate impact on offenders.”²²⁹ Whatever the evaluation criteria, some meaningful method of evaluating circle sentencing initiatives must be established prior to their implementation.

Two: Assessing Case Suitability

1. The nature of the offence lends itself to circle sentencing.

Debate over the question of whether cases involving violence, specifically sexual violence, should come before the circle seems to have resulted in the following opinion.

Indictable offences where there is a jail sentence being sought of *more than two years* are not suitable for circle sentencing, and *indictable offences* where the jail term will be *less than 2 years* and *summary offences* requiring *2 years less a day jail terms* are suitable for circle sentencing. This is unfortunate in the case of sexual violence as ‘sexual assault’ is a hybrid offence. Hybrid means that depending on the aggressiveness of the assault and previous history of the offender sexual assault may be deemed a summary or indictable offence. Many times these cases will be deemed a summary offence and under this general guideline suitable to a circle sentencing. This important issue requires further debate. Given the 1993 policy of the *Attorney General Violence Against Women in Relationships Policy*, which takes a zero-tolerance approach to violence against women, one wonders whether cases involving sexual violence should even go before a circle.

The introduction to the policy reads:

²²⁹ Yukon Territorial Court Judge Barry Stuart. 1995. *Circles into Squares Systems: Can Community Processes be partnered with the Formal Justice System?* unpublished at 5 & 6.

When abuse occurs, there is usually a power imbalance between the partners of the relationship. That power imbalance is perpetuated by societal and individual messages undermining the potential for women to gain control of their situations, and for men to be held accountable for their actions within a relationship. For example, a woman may receive constant indications from the abuser, and even family members, that it is inappropriate or futile for her to seek assistance with a "family problem" from outside agencies. When police comply with the victim's wishes and do not recommend charges, or when Crown Counsel refuse to approve charges because the victim is a reluctant witness, the abuser is reinforced in his belief that his behavior is acceptable and more importantly, the false message that is repeatedly conveyed to the victim, that no help is available, is fortified by this inaction.²³⁰

For Aboriginal women the threat that abuse is a "family problem" not to be brought to the attention of outside agencies is exacerbated. In many First Nations communities the private sphere extends from the Western concept of the nuclear household to a sometimes quite extensive community. There are powerful dynamics among and between victims and offenders and their respective families in First Nations communities. Complicating this dynamic is rampant and justified mistrust of government institutions such that there is no desire to bring these issues to the attention of outside agencies. But clearly, power imbalances are not desirable in circle sentencing, and an offender's abuse of power *over* the victim when sexual violence is involved must be considered. Criminal justice system personnel and Aboriginal justice system personnel must be familiar with the abuse of power and other dynamics which discourage victim's from taking steps to end abuse, as these may undermine the circle sentencing process.

R. v. Highway before the Alberta Court of Appeal addressed the issues of violence in relationships.

[T]he court should examine the circumstances which are peculiar because of the relationship. When a man assaults his wife or other female partner, his violence toward her can be accurately characterized as a breach of the position of trust which he occupies. It is an aggravating factor. Men who assault their wives are abusing the power and control which they can often have over the women with whom they live. The vulnerability of many such women is increased by the financial and emotional situation in which they find themselves, which makes it difficult for them to escape. Such women's financial state is frequently one of economic dependence upon a man. Their emotional psychological state militates against their leaving the relationship because the abuse they suffer causes them to lose their self-esteem and to develop a sense of powerlessness and inability to control events.²³¹

²³⁰ Ministry of Attorney General. 1993. Violence Against Women in Relationships Policy. In: *Policy on the Criminal Justice System Response to Violence Against Women and Children*. Victoria: Queen's Printer at 4.

²³¹ *R. v. Highway*. Alta C.A. May 14, 1992. reported [1993] C.N.L.R. 1 at 119.

In addition, one must consider that “It is well known that recidivism of sexual offenders is very high, and as yet there are no substantive studies as to the success of Native mediation programs in rehabilitating offenders,” thus again raising the question of whether cases involving sexual violence are suitable for circle sentencing.²³²

2. *The offender admits responsibility for the offence.*

Bridging the Cultural Divide considers how an Aboriginal justice system might respond when individuals do not admit their guilt or ‘deny responsibility.’²³³ They conclude that “Some Aboriginal nations and their communities, even as they develop their own Aboriginal justice systems, may decide that the most effective use of their energies and resources is to concentrate on cases where the individual is prepared to accept responsibility....”²³⁴

R. v. Taylor, discussed earlier, exemplifies how problematic it is for the victim if the accused does not admit guilt.²³⁵ The trial judge stated “The plea is irrelevant to the issue of sentencing.”²³⁶ Carol LaPrairie has a different view. She criticizes the fact that there is no guideline regarding whether there has been “an admission of guilt or... a finding of guilt...in order to institute the circle sentencing process.”²³⁷ She suggests this is an “important issue as it addresses one of the underlying objectives of circle sentencing - victim-offender reconciliation and remorse. The willingness of victims to believe in the remorse of the offenders and subsequently to “reconcile” may be dramatically influenced by how “guilt” is determined.”²³⁸

Some suggest that the offender who wishes to participate in circle sentencing should also have a sincere intention to rehabilitate himself. It seems such an intention would be difficult to assess.

²³² Emma LaRocque. *In: Aboriginal and Treaty Rights in Canada* at 93.

²³³ Guilt is a term of Western jurisprudence and many argue not so meaningful to Aboriginal people.

²³⁴ RCAP, *Bridging the Cultural Divide* at 198.

²³⁵ *R. v. Taylor* [1995] 3 C.N.L.R. 167 (Sask. Q.B). *R. v. Taylor* [1996] 2 C.N.L.R. 208 (Sask. C.A.)

²³⁶ *R. v. Taylor* [1995] 3 C.N.L.R. 167 (Sask. Q.B). *R. v. Taylor* [1996] 2 C.N.L.R. 208 (Sask. C.A.) at 167.

²³⁷ Carol LaPrairie. 1995. *Altering Course: New Directions in Criminal Justice and Corrections. Sentencing Circles and Family Group Conferences*. unpublished at 11.

²³⁸ Carol LaPrairie. *Altering Course* at 11.

3. *The victim is a willing participant.*

My research suggests that it is important for the victim to be a willing participant in the circle sentencing process. However, this analysis has shown that determining whether the victim is really a willing participant is more problematic than we can know.

Again with regards to *R. v. Taylor* the trial judge reasoned that “A circle may be held even if the victim is opposed to it.”²³⁹ With all due respect to the trial judge, while his rationale that the circle may be held if the victim is in opposition to it may be a legitimate point of law, this is not a commonly held view.²⁴⁰ It is also important to recognize that there are often *many victims* when an offence has been committed. “We’re really really close families, as people could see ... how close my family was until this whole thing came and then it just kind of destroyed a lot of our family, their lives, and kind of separated us all.”²⁴¹

Some consideration should also be given to whether the supporters of the direct victim agree to the circle sentencing. These people are undoubtedly victims as well and they *may* be better able to represent the concerns of the direct victim, especially in violent relationships where the personal safety of the victim could be compromised by breaking the silence. Of course I recognize it may also be too difficult for supporters of victims to break the silence.

4. *A knowledgeable and supportive victim’s advocate is appointed to work with the victim. The assumption being that a Native Court Worker or Counsel will work with the offender.*

The importance of an objective victim’s advocate was addressed by one of the women I interviewed. Her experience was that one counselor was appointed to work with *both* the victim’s and the offender’s family. The victim’s family perceived that the person who was supposed to work with both families, ended up working on behalf of the offender and closely with the chief of the offender’s band. A probation officer suggests “the victim needs an informed advocate -- someone who knows the dynamics of the issues in the circle or the court -

²³⁹ *R v. Taylor* at 167. With regards to this point Carol LaPrairie and her colleague Julian V. Roberts present the view that “...sentencing circles only proceed with the full co-operation of the victim...and this transfers “...an unacceptable degree of power to the individual victim.” *In: Criminal Law Quarterly*. [39] at 81. Consideration of this point is beyond the scope of this paper.

²⁴⁰ Carol LaPrairie and Julian V. Roberts. *In: Criminal Law Quarterly*. [39] at 81.

- a victim services worker "someone who understands their position."²⁴² While this recommendation is not specifically related to the example cited above it has merit as a means of helping to ensure the victim is not re-victimized through the circle sentencing process.

Three: Preparing for the Circle Sentencing

1. Adequate preparations for the circle sentencing are made.

Judge Barry Stuart outlines the significant preparation that should take place prior to a circle sentencing finding that "...the steps taken before a Circle Sentencing Hearing can substantially affect the success of the process".²⁴³ Stuart advises "A justice liaison person hired from the community to co-ordinate the pre-hearing process can make a remarkable difference."²⁴⁴ Mary Crnkovich also stresses the need for adequate preparation, suggesting the lack of preparation and organization of the circle sentencing process in *R. v. Naappaluk* contributed to an awkward and uncomfortable environment.²⁴⁵ The victim and other circle participants did not understand the purpose or proceedings of the circle, and were not comfortable speaking out. Crnkovich attributes the lack of organization to limited resources and reliance on community volunteers for the circle organization, "a common problem faced in the North."²⁴⁶ This example again shows the importance of adequate resources, both financial and human resources, for successful implementation of circle sentencing initiatives.

Four: Monitoring and Evaluating the Outcome

1. The offender must comply with the conditions set out by the circle.

Evident in the thesis findings is the concern of many advisors that the offender be held accountable for compliance with the conditions of the circle. Judge Stuart describes how

²⁴¹ Advisor's identity withheld (personal communication, October 8, 1996).

²⁴² Advisor's identity withheld (personal communication, February 27, 1997)

²⁴³ Yukon Territorial Court Judge Barry Stuart. 1995. *Circles into Squares Systems: Can Community Processes be Partnered with the Formal Justice System?* unpublished at 9.

²⁴⁴ Yukon Territorial Court Judge Barry Stuart. *Circles into Squares Systems* at 9. Also detailed preparatory guidelines for Family Group Conferencing many of which would be applicable with circle sentencing are found in: McDonald, J.M., O'Connell, R.A., Moore, D.B., & Bransbury, E. *Convening Family Conference: Training Manual*. Attached to Carol LaPrairie. 1995. *Conferencing in Canada: Finding Middle Ground in Criminal Justice?* Unpublished.

²⁴⁵ *R. V. Naappaluk*. May 4, 1993. Dutil, J.C.Q. (C.Q.) Reported 1994 2 [C.N.L.R.] 143.

²⁴⁶ Mary Crnkovich. *Report on the Sentencing Circle in Kangiqsujuaq*. unpublished at 9.

reviews after the circle sentencing are important in monitoring offender compliance. He cites a number of benefits of reviews, including: the review date serves as a milestone in working through the sentencing plan; the offender is made personally accountable at the review; reviews enable adjustments to be made to the sentencing plan; and the review keeps the community informed of what is happening.²⁴⁷ A review process might also encourage the community to be more committed to monitoring offender compliance and ensuring that the probation officer is informed regarding any breach of the conditions developed by the circle.

2. *There are consequences for the offender if the conditions set out by the circle are not met.*

Without exception the people I spoke with about this topic agreed that there must be consequences for the offender if the conditions developed by the circle are not met. Through the media we learn of the inherent difficulties in the criminal justice system with ensuring offenders comply with terms of probation orders. The same issues will arise in circle sentencing. Judge Stuart suggests that “Community support, and formal justice agency support, depends upon knowing the success stories, and knowing action will be taken if something goes wrong.”²⁴⁸ Judge Levis and others express their preference that the sanctions for non-compliance involve a return to the formal justice system. Note that the problem of people not reporting non-compliance is a conspiracy of silence of a different sort.²⁴⁹

3. *An appeal mechanism is in place.*

Bridging the Cultural Divide suggests “A complete and comprehensive justice system not only has the ability to resolve questions of fact and law at the trial level, but also has room for dissatisfied parties to appeal decisions they believe are wrong.”²⁵⁰ As long as the Western justice system plays a role in circle sentencing there will be a process of appeal. However, at such time that First Nations communities take on their own systems of justice then this would be a requirement.

²⁴⁷ Judge Barry Stuart. *Circles into Squares Systems* at 32.

²⁴⁸ Judge Barry Stuart. *Circles into Squares Systems* at 32.

²⁴⁹ Antonia Mills, (personal communication, February 16, 1998).

²⁵⁰ RCAP. *Bridging the Cultural Divide* at 179.

4. *The circle sentencing process undergoes a meaningful evaluation.*

It is critical that there be a meaningful evaluation of circle sentencing initiatives. As suggested in criteria one (4) of this chapter the standards and measures of evaluating the circle sentencing process should be in place prior to its implementation. Some of the individuals I interviewed reasoned that circle sentencing and other alternative justice measures be tested and systematically evaluated on their ability to deal with offences such as minor property offences, before experimentation in cases of violence, notably sexual violence.

Summary

The everyday experience of Aboriginal women who are the victims of sexual violence is shaped by complex power relations, structures, and institutions that make it unsafe for women to speak out about violence. I looked beyond the presenting reasons for the silence for some answers. Institutional ethnography, as the method of inquiry, provided some insight into the everyday experience of Aboriginal women victims and the inextricable links between the institutions, structures and power relations that inform their everyday experience.

I was unsuccessful in my attempts to speak personally with Aboriginal women who had experienced sexual violence and participated in a circle sentencing. In one case I had hoped to meet with a woman whose partner had pleaded guilty to assaulting her and harming her and their children, many times. The offender had even assaulted her while on probation for the same offence. Typically such a breach of probation would result in a jail sentence. Instead a circle sentencing was held. Community members attended the sentencing hearing and spoke favourably about the offender. He was given six months suspended sentence to determine whether or not he could meet the conditions developed by the circle of community members. By this time the victim had decided to move from the community. Her partner remained in the community with their children.

I contacted the woman by phone and asked her if she would be willing to meet with me and tell me about her experience with circle sentencing. She agreed. We arranged to meet the next day. Later an associate of the woman called and advised that we should not meet. I was told how the offender is now a “role model” in his community and “you never know what might happen if the victim talked to me and the information got out or was published.” I share this experience because it provides a sense of the difficulty in speaking with women about this topic. This victim, and others I learned of, would not break the silence because of the perceived risks. There is a bittersweet ending to the case described above because the offender has reportedly made such a dramatic turnaround. *But at what cost to the victim?*

As this analysis has shown there are many material reasons for the silence, and, the cost of breaking the silence can be very high. Even more powerful are the less visible,

ubiquitous pressures on the larger landscape which operate to silence Aboriginal women. This thesis names colonization, community, culture and the law as the multiple sites of power on the larger landscape which sustain the silence. *Colonization* introduced racism and gender discrimination to Aboriginal peoples and established the structural causes of violence in First Nations communities. And it must be stressed that family violence cannot be “addressed as a single problem.”²⁵¹ *Community* is integral to Aboriginal people, and because of its importance and extensive reach the community has incredible power to regulate violence. *Culture* enters the fora in the form of cultural difference defence sometimes used to excuse or minimize the violent actions of offenders. Finally, the *law* provides limited recourse for women because it is such a product of British colonial law. Imbued through and through with a patriarchal bent, the law helped to establish and now sustains male privilege. Note that the first three sites of power -- colonization, community and culture, and the way they influence the lives of Aboriginal people, are a product of the strategies of power and control that were employed by the colonizers to diminish the position of Aboriginal peoples. As the parallel analysis in *Chapter Three* so clearly demonstrates the tactics of power and control used by the dominant group or person can impart incredible fear in the marginalized group or individual victims and this is often the ultimate reason for their silence.

Alternative measures such as circle sentencing will do little to alter the pervasive and complex power relations which silence Aboriginal women victims. However, if victims are confident their personal safety needs can be met through alternative measures perhaps they will at least be more comfortable in breaking the silence. And even though there are problems with the existing justice system “...as bad as it is, [it] should not simply withdraw until it is known how “community-courts” might *use* their new-found jurisdiction.”²⁵²

Three themes emerge repeatedly with respect to implementing Aboriginal justice initiatives, such as circle sentencing. First, “Reinstatement of community standards... is

²⁵¹ RCAP. *Report of the Royal Commission on Aboriginal Peoples*. v.4. *Perspectives and Realities* at 66.

²⁵² Rupert Ross. *Returning to the Teachings* at 200.

essential to securing a safe environment” for women and their families.²⁵³ Second, Aboriginal women must have meaningful involvement in the design, implementation and evaluation of Aboriginal justice systems. Albeit, there will clearly be special challenges in ensuring that women have full-participation given the practicalities of power in many First Nations communities. Third, the initiative for alternative justice systems must come from the First Nations community. Hopefully, when First Nations communities are ready to proceed with Aboriginal justice initiatives they will find a cooperative partner in the Western justice system.

²⁵³ RCAP. *Report of the Royal Commission on Aboriginal Peoples*. v.4. *Perspectives and Realities* at 66.

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