QUIET CONTRIBUTIONS: RE-EXAMINING THE BENEFITS OF A RESTORATIVE APPROACH TO SENTENCING IN THE ABORIGINAL CONTEXT

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Restorative justice challenges the traditional outcomes and processes of the criminal justice system. While as a unified theory of punishment restorative justice is notably problematic, elements of it have been incorporated within sentencing regimes around the world. Responding to increasing incarceration rates and disproportionate Aboriginal incarceration rates and in articulating the fundamental purpose and principles of sentencing, Parliament included principles of restorative justice, thanks in part to a belief in its particular application to Aboriginal offenders.

The Canadian approach to restorative justice is focused entirely on securing non-custodial outcomes. However, other principles of sentencing, Canadian appellate jurisprudence, further legislative amendment, and the growth of penal populism demonstrate that the Canadian sentencing regime, taken as a whole, precludes this very goal. The author demonstrates that the statutory adoption of restorative justice through the Criminal Code has not had its intended effect: Aboriginal offenders are just as likely to face a term in custody as they were prior to the 1996 amendments.

That said, there remains a role for restorative justice. The author argues for a shift to restorative processes. This shift would allow for a continued commitment to restorative justice while alleviating the obstacles associated with an outcome-centered approach. Importantly, it reflects the recognition that the Aboriginal offender can benefit from actively participating in the determination of how best to address his offending. Finally, this approach recognizes that there is a disconnect between the criminal justice system and traditional Aboriginal justice, and reflects factors shown to increase voluntary compliance with the law.

La justice réparatrice met en question les résultats et les processus traditionnels du système de justice pénale. Quoique en tant que théorie unifiée de châtiment, la justice réparatrice est notamment problématique, certains de ses éléments ont été incorporés aux systèmes de détermination des peines partout au monde. En réaction

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aux taux croissants d'incarcération et des taux disproportionnés d'incarcération d'autochtones et en énonçant le but fondamental et les principes de la détermination des peines, le Parlement a inclus des principes de justice réparatrice, en partie à cause de la croyance en son application particulière aux contrevenants autochtones.

L'approche canadienne à la justice réparatrice porte entièrement sur l'obtention de résultats sans privation de liberté. Toutefois, d'autres principes de détermination des peines, la jurisprudence des cours d'appel, de nouveaux amendements législatifs et la croissance du sentiment populaire par rapport aux peines démontrent que le système canadien de détermination des peines, dans son ensemble, empêche justement l'atteinte de cet objectif. L'auteur fait voir que l'adoption statutaire de la justice réparatrice dans le Code criminel n'a pas eu l'effet voulu : les contrevenants autochtones ont les mêmes chances de se voir imposer une période de détention qu'ils avaient avant les amendements de 1996.

Cela dit, un rôle demeure pour la justice réparatrice. L'auteur argumente en faveur d'un virage vers les processus réparateurs. Ce virage permettrait de maintenir l'engagement envers la justice réparatrice tout en allégeant les obstacles associés à l'approche centrée sur les résultats. Il importe de noter que cela reflète la reconnaissance que le contrevenant autochtone peut bénéficier de participer activement à la détermination de la meilleure façon de traiter de son infraction. Finalement, cette approche reconnaît la discordance entre le système de justice pénale et la justice autochtone traditionnelle, et reflète des facteurs qui ont manifestement augmenté le respect volontaire de la loi.

The current Canadian justice system has profoundly failed Aboriginal people. It has done so in failing to respect cultural differences, failing to address overt and systemic biases against Aboriginal people, and in denying Aboriginal people an effective voice in the development and delivery of services. This must end.⁺

I. INTRODUCTION

Aboriginals make up 14% of the Saskatchewan population, the highest concentration amongst the Canadian provinces.¹ They represent 9% of Saskatchewan's

⁺ Canada, Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back*, vol. 1 (Ottawa: Supply and Services Canada, 1996) at 27.

¹ The statistical material presented in this paper is derived from data collected in the 2001 Census. See Statistics Canada, *Aboriginal Population Profiles, 2001 Census* (Ottawa: Census Division, 2001). Data from the 2006 census, discussing aboriginal demographics, had not yet been made available at the time this paper was written.

adult population and 25% of Saskatchewan's child population. 40% of Saskatchewan Aboriginals are under the age of fifteen. The median age for Aboriginals in Saskatchewan is 20.1 years, sixteen years below the median age of the general Canadian population. Amongst its Aboriginal population, Saskatchewan has the highest percentage of female single parents, the highest unemployment rates, the greatest dependence on government programs, and the largest percentage of Aboriginal youth who neither attend school nor participate in the workforce. Aboriginals residing in Regina and Saskatoon are consistently below the national average for Aboriginal education levels, literacy and standard of living. Furthermore, Aboriginals residing in these cities are more clustered and racially segregated than Aboriginals living anywhere else in Canada: "affluence remains elusive for many Aboriginal communities," and "poverty and violence remain the dominant pressures of daily life."² This grim reality has translated into higher than average rates of both Aboriginal offending and Aboriginal incarceration:³ in Saskatchewan, Aboriginal adults are incarcerated at 35 times the rate of non-Aboriginals and represent 80% of the total prison population though, as mentioned, they constitute a mere 9% of the provincial adult population. Aboriginal women account for 87% of all female prison admissions in the province. Aboriginal women constitute a disproportionate number of the women found in both federal and provincial penal institutions, are even more over-represented in Canada's prison system than are Aboriginal men, and are more likely to be incarcerated for violent offences and to have served more than one federal prison sentence.⁴

Responding, in part, to statistics and incarceration rates similar to those described above, the Parliament of Canada amended the *Criminal Code* in 1996, codifying the purpose and principles of sentencing in Canada. The newly enacted section 718 included the traditional sentencing principles of denunciation, deterrence, incapacitation and rehabilitation as well as, for the first time, principles of restorative justice. Indeed, restorative justice was explicitly included as a principle of sentencing, given that it is thought to reflect the values traditionally associated with Aboriginal justice. Subsequent jurisprudence on the application of section 718 has affirmed that it is remedial in nature, intended to address the over population of Canadian prisons in general, and to specifically address the disproportionate representation of Aboriginals within the criminal justice system. The jurisprudence has also indicated, however, that restorative justice principles will play a subordinate role to traditional sentencing principles, particularly when the offence is of a serious or violent nature.

In its purest form, restorative justice calls for the radical transformation of the entire organization of political society. Within the criminal justice context

2 Jane Dickson-Gilmore & Carol La Prairie, *Will the Circle be Unbroken? Aboriginal Communities, Restorative Justice and the Challenges of Conflict and Change* (Toronto: University of Toronto Press, 2005) at 26.

3 Canada, Statistics Canada, *Adult Correctional Services in Canada 2004/2005* by Karen Beattie, vol. 26 no.5 (Ottawa: Juristat, 2006) [*Correctional Services*].

4 See Helen Boritch, "Women in Prison in Canada" in Bernard Schissel & Carolyn Brooks, eds., *Marginality & Condemnation: An Introduction to Critical Criminology* (Halifax: Fenwood Publishing, 2002) 309 at 311.

specifically, it challenges both the traditional outcomes (demanding a decreased reliance on incarceration) and processes (demanding greater participation within the process by all stakeholders) of a system premised on adversarial adjudication, guilt, and punishment. This paper is not an argument for a wholesale transformation of the criminal justice system. Indeed, a full-fledged adoption of restorative justice is neither plausible nor desirable. But neither is this paper an outright rejection of restorative justice. Its two principal aims are much less ambitious: both focus on a shift in emphasis away from an outcome-centered approach to restorative justice, in favor of a greater emphasis on restorative justice values within existing criminal justice processes.

The structure of the Canadian approach to restorative justice is focused almost exclusively on securing non-custodial outcomes. However, primarily thanks to overarching principles of judicial interpretation and further legislative amendments, the very realisation of non-custodial outcomes is actually prohibited by that same structure in the vast majority of cases. In fact, there are very real practical limitations of an approach that focuses solely on outcomes. Yet I intend to make the positive argument that there remain, nevertheless, persuasive reasons for emphasizing restorative justice values within the sentencing *process*. Indeed, restorative justice values are appealing for two very important reasons. Firstly, and quite straightforwardly, they would allow for a continued commitment to restorative justice while alleviating a number of the practical problems associated with the current outcome-centered focus of the Canadian sentencing regime. This commitment is an extremely important one to maintain, given the important social concerns that restorative justice was adopted to address.

More importantly however, a serious attempt to adopt these values could, in the very limited means by which this is even possible through sentencing, begin to lend legitimacy to a system that is actively rejected by many Aboriginal people. In recognition that the criminal justice system currently enjoys little credibility with Aboriginal people, an emphasis on fostering more restorative processes would constitute a good faith recognition that the current system does not work. A procedural and more value-driven commitment to restorative justice would be a means through which conflict, the resolution of which has been removed from Aboriginals by the state, could in part, be returned. If the offender is given the opportunity to actively engage with his community and contribute to how best to address his offending, then any outcome arrived at will be more restorative than one imposed unilaterally by a sentencing judge, even if it results in a custodial sentence.

It is surely true that efforts to reduce both Aboriginal offending and Aboriginal incarceration rates properly lie outside the ambit of the sentencing regime. Within the sphere of what can be accomplished through sentencing, however, there remains a real role for restorative justice to play; one which could have the added benefit of promoting law-abiding behaviour, essential to effective long-term governance.

This paper is composed of three parts. Firstly, Part I offers a brief overview of restorative justice, followed by a number of recent efforts to incorporate restorative justice within traditional punishment theory. Part II then analyses the current outcome-focused formalization of restorative justice within the Canadian sentencing framework. I reveal, through a discussion of the sentencing regime set

up through section 718 of the Canadian *Criminal Code*, judicial discretion, and principles of Canadian appellate law, that achieving truly restorative outcomes is, in fact, impossible within that framework. I further examine the impact of the numerous *Criminal Code* offences which carry a mandatory minimum term in custody, and the increasing degree to which penal populism is driving criminal justice policy in Canada. Indeed, I demonstrate that Aboriginal offenders are just as likely as they were in 1996 to be sentenced to a term of incarceration. Finally, in Part III I make the positive argument that, notwithstanding the theoretical and practical difficulties associated with restorative justice as currently manifested, restorative processes, through an added emphasis on active participation and empowerment, offer considerable promise. I argue that restorative justice processes, which mirror the communal nature of traditional Aboriginal conflict resolution, should be thought of as a means of returning conflict to its rightful owners. I then proceed to discuss the importance of the perceived legitimacy of the legal system in promoting law-abiding behaviour. With an Aboriginal population that continues to rise and, meanwhile, remain troubled by poverty, disability and substance abuse, taking steps to promote voluntary compliance and a sense of pride in law-abiding behaviour will continue to be important for effective long-term governance and, ultimately, could help to address some of the over-arching issues at the root of Aboriginal offending.

II. AN INTRODUCTION TO RESTORATIVE JUSTICE

A. The Rise of Restorative Justice

As the aim of this paper is ultimately to argue for an alternative understanding of restorative justice's potential benefits, this overview of restorative justice is, admittedly, not comprehensive. Rather, my aim is to touch on several of the key contributions that have been made to the restorative justice literature. Restorative justice has gained popularity around the world thanks to an increasing dissatisfaction with state-centered, punishment-oriented criminal justice systems. Restorative justice advocates outright reject the role of the state, the structure of the criminal justice system and the struggle against crime as currently manifested. John Braithwaite, often considered the father of restorative justice, suggests that:

few sets of institutional arrangements created in the west since the industrial revolution have been as large a failure as the criminal justice system...[It] fails to correct or deter, just as often making things worse as better. It is a criminal *injustice* system that systematically turns a blind eye to crimes of the powerful, while imprisonment remains the best-funded labour market program for the unemployed and indigenous peoples... [A]ll western criminal justice systems are brutal, institutionally vengeful and dishonest to their stated intentions.⁵

5 John Braithwaite, "Restorative Justice and a Better Future" in John Braithwaite, ed., *Regulation, Crime, Freedom: Collected Essays in Law* (Aldershot: Dartmouth Publishing Co., 2000) 319 at 319-20 [Braithwaite, "Better Future"].

Braithwaite famously introduced his theory of “reintegrative shaming,” an approach that aimed to constructively cast shame on the conduct of the offender, while simultaneously offering forgiveness to the offender.⁶

Deeply consequentialist and rooted in republican political theory, restorative justice focuses on voluntariness, non-domination, respect, dialogue, empowerment, corrective justice and the mending of relationships. According to Braithwaite and Pettit, the state’s exercise of authority is seen as inherently arbitrary, requiring a radical reorganization of political life so “that this domination, this subjection to the arbitrary will of another”⁷ is eliminated or, at least, minimized. Ultimately, restorative justice aims to reflect five key commitments: economic and political equality; active participation by citizens in community life; the effect of inequality on crime; the inculcation of pride in being law-abiding; and the encouragement of the evolution of cooperation.⁸

Within the criminal justice context specifically, restorative justice theorists deny the presumptive link between criminal justice and punishment⁹ and challenge the “uncultural and univocal”¹⁰ imposition of penal sanctions for their own sake. It focuses on both outcomes and processes. Whereas Braithwaite sees incarceration as a “great disabler of social justice,” leading to unemployment, racism, drug addiction and further crime, he sees restorative justice as an “enabler of social justice.”¹¹ As such, respect for individual dominion ought to serve as a constraint on criminal justice intervention and, more specifically, the use of incarceration as a penal sanction.¹² Furthermore, restorative justice recognizes

6 See John Braithwaite, *Crime, Shame and Reintegration* (Cambridge: Cambridge University Press, 1989).

7 John Braithwaite & Phillip Pettit, “Republicanism and Restorative Justice: An Explanatory and Normative Connection” in Heather Strang & John Braithwaite, eds., *Restorative Justice: Philosophy to Practice* (Aldershot: Dartmouth Publishing Co., 2000) 145 at 149 [Braithwaite & Pettit, “Republicanism”].

8 John Braithwaite, “Inequality and Republican Criminology” in John Braithwaite, ed., *Regulation, Crime, Freedom: Collected Essays in Law* (Aldershot: Dartmouth Publishing Co., 2000) 57 at 76 [Braithwaite, “Inequality”].

9 Rupert Ross, *Returning to the Teachings: Exploring Aboriginal Justice* (Toronto: Penguin Books, 2006) at 36 (commenting on the “Western justice system’s unbreakable link between holding someone responsible for their crime and sending them to jail”).

10 John Braithwaite “Principles of Restorative Justice” in Andrew von Hirsch *et al.*, eds., *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms?* (Oxford: Hart Publishing, 2003) 1 at 15 [Braithwaite, “Restorative Justice”].

11 *Ibid.* at 12. See also Rob White, “Restorative Justice and Social Inequality” in Bernard Schissel & Carolyn Brooks, eds., *Marginality & Condemnation: An Introduction to Critical Criminology* (Halifax: Fenwood Publishing, 2002) 381 at 385.

12 Lode Walgrave, “Restorative Justice and the Republican Theory of Criminal Justice: An Exercise in Normative Theorising on Restorative Justice” in Heather Strang & John Braithwaite, eds., *Restorative Justice: Philosophy to Practice* (Aldershot: Dartmouth Publishing Co., 2000) 165 at 173. However, this view is not unique to restorative justice. Many retributivist theorists also advocate for a decrease in the reliance on incarceration as a sanction. See Andrew Von Hirsch, Andrew Ashworth & Clifford Shearing, “Specifying Aims and Limits for Restorative Justice: A ‘Making Amends Model’” in Andrew von Hirsch *et al.*, eds., *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms?* (Oxford: Hart Publishing, 2003) 21; Antony Duff, “Restoration and Retribution” in Andrew von Hirsch *et al.*, eds., *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms?* (Oxford: Hart Publishing, 2003)

that the scope of what constitutes harm is much larger than the criminal justice system would allow, and that there may be many alternative and appropriate means of repairing relationships and restoring harms. This might involve financial compensation, a verbal apology or some form of service to the victim or the community, for example.

With respect to processes, restorative justice in the criminal law context focuses particularly on participatory rights. The current criminal justice system limits an offender's participatory rights to basic procedural rights, and victims and the greater community are offered no meaningful participatory rights at all. They constitute passive participants in a process going on around them, which focuses on the offender as a wrongdoer and on the penal sanction warranted by the specific criminal act. By contrast, with restorative justice, offenders, victims and communities are all brought within the process and afforded a meaningful opportunity to participate in the decision about what to do about the wrongdoing, which, it is argued, could ensure a better reintegration of the offender within the community.¹³ Given restorative justice's overarching commitment to voluntariness, however, an offender is never forced to participate in a restorative process, and recourse to the courts is always available.

Ultimately, a "purest" theory of restorative justice would completely and radically replace the existing adversarial, state-dominated, and punitive criminal justice system. No such system currently exists and, as Daniel Van Ness explains, no one has "articulated how such a system might work."¹⁴ As such, restorative justice is now conceived of in two ways in the literature – as a process for resolving conflict and as a value system focusing on restoration and healing¹⁵ – and Van Ness has acknowledged in recent work that "if we require a restorative programme or system to exhibit both restorative processes and outcomes, we narrow the possibilities significantly."¹⁶ It has been further recognized that it would be counter-productive to offer "incomplete or ill-considered proposals" that, if implemented, would significantly hinder restorative justice's transformative potential.¹⁷ Given the obvious resiliency of the traditional, retributive crim-

44 [Duff, "Restoration"]; Antony Duff, "Restorative Punishment and Punitive Restoration" in Lode Walgrave, ed., *Restorative Justice and the Law* (Devon: Willan Publishing, 2002) 82 [Duff, "Punishment"].

13 Braithwaite & Pettit, *supra* note 7 at 158. See also Howard Zehr and Harry Mika, "Fundamental Principles of Restorative Justice," in Howard Zehr, eds., *The Little Book of Restorative Justice* (Intercourse, PA: Good Books, 2002) at 37 ("Restorative justice is a process to involve, to the extent possible, those who have a stake in a specific offense and to collectively identify and address harms, needs, and obligations, in order to heal and to put things as right as possible").

14 Daniel Van Ness, "Creating Restorative Systems" in Lode Walgrave, ed., *Restorative Justice and the Law* (Devon: Willan Publishing, 2002) 130 at 131.

15 Dickson-Gilmore, *supra* note 2 at 92.

16 Van Ness, *supra* note 14 at 138. Indeed, Lode Walgrave has articulated the fundamental problem of restorative justice as follows: "whether we consider restorative justice as merely a series of techniques which are to be integrated into the existing systems of penal or re-educative responses to crime or restorative justice has to become a fully fledged alternative which should in the longer term replace maximally the existing systems:" see Lode Walgrave, *Restorative Justice for Juveniles: Potentialities, Risks, and Problems for Research* (Leuven: Leuven University Press, 1998) 12.

17 *Ibid.* at 144. See also Dickson-Gilmore, *supra* note 2 at 207.

inal justice system, and its associated values and procedures, restorative justice advocates have recognized the need to make modifications.

A “maximalist” theory of restorative justice is prepared to cede that punitive outcomes are acceptable so long as they do not exceed upper limits on punishment. Even John Braithwaite has recognized that retributive punishment and proportionality carry no dangers “so long as they explicitly rule out...that a person should be put in prison for no better reason than that a failure to do so would be disproportionately lenient.”¹⁸ In its weakest form, then, restorative justice calls not for an absolute denial of the use of incarceration but, rather, a restraint in its use. As such, one of the most common applications of restorative justice has been to integrate it within the penalty phase of the criminal justice process, in cases where an offender has, at a minimum, not denied committing the offence. Alison Morris and Warren Young have acknowledged that a prison sentence could be restorative, so long as a restorative approach is applied consistently, and “it is an outcome agreed to and considered appropriate by the key parties.”¹⁹ Under this formulation of restorative justice, what is of the utmost importance is the active involvement of victims, offenders and their communities of interest in the decision of how to deal with the offending.²⁰

B. The Realities of Restorative Justice

A major criticism of restorative justice stems from those particularly concerned with its impact on due process. Imprisonment has the very serious effect of depriving individuals of their liberty and carries additional serious social consequences, including limitations on mobility, future employment and, in some jurisdictions, even the right to vote. Thus, firmly committed to the principles of rule of law, fairness, impartiality and accountability, restorative justice critics find the overall vagueness of restorative justice as a doctrine, its lack of specific goals or the specific means of attaining them, and its lack of procedural protections notably problematic.²¹ There is further concern that, by tailoring outcomes in

18 Braithwaite, “Restorative Justice”, *supra* note 10 at 17. Indeed, perhaps the biggest concessions made by restorative justice advocates is the acknowledgment that incapacitation may be required both for particularly heinous crimes and for certain classes of offenders who are beyond reform or where civil restraint is insufficient. See Braithwaite, “Inequality”, *supra* note 8 at 80-1.

19 Allison Morris & Warren Young, “Reforming Criminal Justice: The Potential for Restorative Justice” in Heather Strang & John Braithwaite, eds., *Restorative Justice: Philosophy to Practice* (Aldershot: Dartmouth Publishing Co., 2000) 11 at 16.; Kathleen Daly, “Revisiting the Relationship Between Retributive and Restorative Justice” in Heather Strang & John Braithwaite, eds., *Restorative Justice: Philosophy to Practice* (Aldershot: Dartmouth Publishing Co., 2000) 33 at 46 (Importantly, it is the determination of “how a sanction connects meaningfully with a harm that can make a process and outcome in part ‘restorative.’”).

20 John Braithwaite & Heather Strang, “Connecting Philosophy and Practice” in Heather Strang & John Braithwaite, eds., *Restorative Justice: Philosophy to Practice* (Aldershot: Dartmouth Publishing Co., 2000) 204 at 205; Daly, *ibid.* at 48; Morris & Young, *ibid.* at 12.

21 The most thorough criticism of restorative justice remains that offered by Andrew von Hirsch, Andrew Ashworth & Clifford Shearing in Von Hirsch, *supra* note 10 at 24. See also Malcolm Thorburn, “The Impossible Dreams and Modest Reality of Restorative Justice,” Book Review of *Compulsory Compassion: A Critique of Restorative Justice* by Annalise Acorn (2005) 30 Queen’s L.J. 863 at 870 (suggesting that restorative justice is so vague that it is perhaps best described as an “anti-theory”).

a contextual and individualized manner, the traditional sentencing principle of parity – that offenders should be similarly sentenced for committing similar offences – may be breached. And restorative justice's lack of procedural safeguards could lead to outcomes that are in fact disproportionately harsh, a reflection of feelings of vengeance by victims and the community. Indeed it was, historically, this concern over personal acts of vengeance that, in part, led to the adoption of a formalised criminal justice system complete with procedural safeguards.

Critics are also troubled by the way restorative justice characterizes criminal acts as “disputes” or “harms;” in fact, crimes are *properly* characterized as public wrongs and the wrongfulness of criminal conduct should never be open to discussion.²² They caution that such a complete transformation of the criminal process would result in a system of corrective loss-shifting which is something, they argue, best left to private law. Finally, critics question the truly voluntary nature of restorative justice. While they accept that offenders may never be explicitly forced to participate in a restorative process, there will remain nevertheless a subtle, less overt pressure. Offenders, aware that they may receive a reduced sentence as a result of participating in a restorative process, may choose to do so as the basis of a lesser evil.²³

Others have sought to critique restorative justice on different grounds. George Pavlich has observed that restorative justice rests on a clear paradox: while it is portrayed as alternative, separate and autonomous to the mainstream criminal justice system, restorative justice's foundational concepts derive from that same system that it purports to substitute. That is, restorative justice “predicates itself on key concepts within the criminal justice system,” such as victim, offender and crime.²⁴ Indeed, diluted approaches to restorative justice, whereby it is incorporated within the processes of the mainstream justice system, defer to criminal justice agencies to designate and define what crime is and, notably, who will be labelled a criminal in a particular context. Moreover while restorative justice seeks, Pavlich notes, to transform and reform communities it does so, curiously, with an individualistic focus. This paradox, Pavlich suggests, should not nullify restorative justice's achievements or its claims, nor should it revoke its tangible effects on everyday life. Rather, it is meant to highlight the “complexities and seductions” associated with any attempt to conceive of justice outside of the dominant criminal justice system.²⁵

Annalise Acorn is interested neither in refuting the empirical claims about restorative justice's effect on recidivism, nor the conceptual arguments about criminal justice institutions' political legitimacy. Rather, she challenges the viability of the notion of justice as “right relations” proposed by restorative justice.²⁶ Acorn

22 Duff, “Restoration,” *supra* note 12 at 50.

23 George Pavlich, *Governing Paradoxes of Restorative Justice* (London: Glasshouse Press, 2005) at 97; Dickson-Gilmore, *supra* note 2 at 80.

24 Pavlich, *ibid.* at 14, 77. See also Kathleen Daly, “Restorative Justice: The Real Story” (2002) 4 *Punishment & Society* 55 [Daly, “Real Story”] (challenging the four “myths” of restorative justice).

25 Pavlich, *Ibid.* at 15.

26 Annalise Acorn, *Compulsory Compassion: A Critique of Restorative Justice* (Vancouver: UBC Press, 2004).

argues that, in reality, restorative justice is not a conception of justice at all: it simply reflects our intuitive unwillingness to confront the bleak reality of crime as a fact of life. Restorative justice, she suggests, is tied to an "age-old human hope for the convergence of love and justice," and that hope becomes hypocritical, irresponsible and dangerous when it forms the basis of criminal justice policy.²⁷ On her account, offenders and victims should not, under any circumstances, be brought together to work things out themselves, and forced compassion²⁸ is inappropriate for dispensing criminal justice. Acorn's alternative, however, is equally problematic. She envisages a system where "prisons are meaningfully rehabilitative as well as seriously punitive. They inflict suffering on offenders as a matter of justice, restrain the liberty of offenders as a matter of protection, and extend assistance to help offenders make better lives for themselves as a matter of common sense and humanity."²⁹ Malcolm Thorburn, in his review of *Compulsory Compassion*, has suggested that this account, too, is problematically utopic.³⁰

Finally, Carole La Prairie and Jane Dickson-Gilmore have criticized the particular adoption of restorative justice in the context of Aboriginal offenders.³¹ They highlight, in particular, the degree to which restorative justice fails to account for the power imbalances that often characterize the communities that participate in a restorative process, as well as the insufficient attention given to Aboriginal victims and, in particular, Aboriginal women. Any account of restorative justice in the Aboriginal context must address its applicability to serious offences against the person and, in particular, sexual abuse and domestic violence. They also suggest that we should remain cautious about any of restorative justice's grand consequential claims, given the lack of any rigorous assessment of adopted restorative justice programs.

C. The Marriage of Retributive and Restorative Justice

Recognizing that there are beneficial elements to restorative justice, Antony Duff is one who has tried to reconcile the "obvious incompatibility" between restorative justice practices and current Anglo-American criminal justice systems.³² He argues that retributivists correctly insist that offenders deserve to suffer punishment for committing a public wrong, but that restorative justice advocates also correctly recognize that responses to crime ought to seek restoration. However, Duff insists that punishment must properly address the wrongfulness of conduct: by harming a fellow citizen, the offender "damages the normative bonds of citizenship,"³³ which, by necessity, brings us within the realm of punishment. The offender deserves to suffer both remorse and the censure of others, to acknowledge the act as one that should not have been done, and to take steps to repair that wrong. It is here that Duff sees a place for restorative justice. When seen as a form

27 Acorn, *Ibid.* at 22.

28 *Ibid.* See also Pavlich, *supra* note 23 at 97.

29 Acorn, *ibid.* at 161.

30 See Thorburn, *supra* note 21 at 880-881.

31 See generally Dickson-Gilmore, *supra* note 2. These critiques will be discussed more fully in Part III (a)(ii) *infra*.

32 Duff, "Punishment," *supra* note 12 at 83.

33 Duff, "Restoration," *supra* note 12 at 47.

of punishment, a restorative mediation process can, Duff argues, “induce [the] appropriate kind of suffering”³⁴ and can determine what “kind of ‘restoration’ the wrong makes necessary.”³⁵ Under this conceptualisation, then, restorative justice is not an alternative to punishment but rather an alternative *form* of punishment.

Andrew Ashworth, Clifford Shearing and Andrew Von Hirsch have similarly offered a revised restorative justice model, “as a scheme for a specified range of cases within the broader framework of a proportionality-oriented sentencing system.”³⁶ Under their “Making-Amends Model,” “guilt or innocence would continue to be determined by the courts, with traditional procedural safeguards,”³⁷ while allowing for the participation of victims and communities during the sentencing phase. Like Duff’s account, their “Making-Amends Model” “more clearly treats the conduct as wrongdoing, and the response as a way of acknowledging that wrong.”³⁸ The resulting dispositions remain thought of as punishments.

Both of these adaptations of restorative justice focus on process and institutional design. They involve incorporating restorative justice within the state-centered criminal justice system, during the sentencing phase and after the determination of guilt.³⁹ They do not insist on non-custodial outcomes but would insist on, at most, a general attitude of restraint in the use of custodial sanctions. Put another way, the outcome of either model could still result in a custodial sanction. At first glance, these two approaches seem to be in line with a “maximalist” approach to restorative justice however both models differ in a few fundamentally important ways. Firstly, both would recognize the ability of a reviewing court to overrule a sentence arising out of the restorative process as disproportionately lenient. By contrast, while “maximalist” restorative justice advocates would accept a custodial sanction if it were the product of a restorative process, they would clearly insist that appellate courts defer to the outcome of a sentencing circle or the discretion of the sentencing judge. Secondly, both models focus overwhelmingly on the offender, and provide no concrete framework for the role of victims or the greater community. While these models claim to incorporate restorative justice values, upon further examination, it is clear that they do not. Many actual sentencing models have purportedly incorporated restorative justice in this manner, however, and the Canadian sentencing regime provides just such an example.

III. RESTORATIVE JUSTICE IN THE CANADIAN CONTEXT

A. Section 718 and its interpretation in *R. v. Gladue*

Responding to high rates of incarceration,⁴⁰ the Parliament of Canada intro-

³⁴ *Ibid.* at 53.

³⁵ Duff, “Punishment”, *supra* note 12 at 92.

³⁶ Von Hirsch, *supra* note 12 at 21.

³⁷ *Ibid.* at 38.

³⁸ *Ibid.* at 35.

³⁹ Another method of incorporating restorative justice within the existing criminal justice system is through diversion programs, whereby offenders are diverted from the criminal justice system prior to trial and, typically, after having acknowledged their wrongdoing. A discussion of this type of restorative justice program is beyond the scope of this paper.

⁴⁰ When introducing the second reading of what was then Bill C-41, Justice Minister Allan Rock

duced a new sentencing framework by amending the *Criminal Code* in 1996. Parliament's intent was to provide sentencing judges with a series of tools which would allow for both greater guidance in determining the appropriate sentence and greater restraint in what had become the frequent use of incarceration, by clearly identifying the fundamental purpose and principles of sentencing. Section 718 now explicitly includes the traditional principles of sentencing: denunciation, deterrence, separation and rehabilitation. Marking a monumental shift in policy, however, section 718 also includes principles of restorative justice, reflected in those provisions focused on reparation,⁴¹ and the promotion of responsibility and the acknowledgement of harm done.⁴² Furthermore, in response to the particularly disproportionate rates of incarceration for Aboriginal offenders, section 718.2(e) now states that "all available sanctions other than imprisonment that are available in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders."⁴³ In further reinforcement of Parliament's remedial intent, the 1996 amendments also introduced a new penal sanction, the conditional sentence: an alternative form of imprisonment that, under the appropriate circumstances, is served in the community.⁴⁴ Sections 718.2(e) and 742 have subsequently been equated with restorative justice:⁴⁵ if section 718.2(e) constitutes restorative justice's underlying principle or rationale, then section 742 is its implementation mechanism. Both clearly reflect an outcomes-based approach, emphasizing non-custodial dispositions.

The Supreme Court of Canada first examined Canada's new sentencing model, and section 718.2(e) in particular, in *R. v. Gladue*.⁴⁶ It has subsequently

suggested the following: "[w]hen appropriate, alternatives must be contemplated, especially in the case of Native offenders. A general principle that runs throughout Bill C-41 is that jails should be reserved for those who should be there. Alternatives should be put in place for those who commit offences but who do not need or merit incarceration. [T]his bill creates an environment which encourages community sanctions and the rehabilitation of offenders together with reparation to victims and promoting in criminals a sense of accountability for what they have done." See *House of Commons Debates*, vol. IV (20 September 1994) at 5871, 5873 (Hon. Allan Rock). Minister Rock made similar comments to the House of Commons Standing Committee on Justice and Legal Affairs., *Minutes of Proceedings and Evidence*, 35th Parl. 1st sess., No. 62 (17 November 1994) at 62:15. His comments were echoed by several other Members of Parliament and Senators. See *House of Commons Debates*, vol. V (22 September 1994) at 6028 (Mr. Morris Bodnar); *Debates of the Senate*, vol. 135, No. 99, (21 June 1995) at 1871 (Hon. Duncan J. Jessiman). See also *R. v. Gladue*, [1999] 1 S.C.R. 688 at para. 45 ff [*Gladue*].

41 *Criminal Code*, R.S.C. 1985, c. C-46, s.718(e) [*Criminal Code*].

42 *Ibid.*, s.718(f).

43 *Ibid.*, s.718.2(e). See also *Youth Criminal Justice Act*, S.C. 2002, c.1, s.38(2)(d) ("all available sanctions other than custody that are reasonable in the circumstances should be considered for all young persons, with particular attention to the circumstances of aboriginal young persons").

44 *Criminal Code*, *Ibid.*, s.742. The Supreme Court of Canada has set out the criteria that must be met before a conditional sentence is imposed. Firstly, the offence must not be punishable by a minimum term of imprisonment. Secondly, the sentence imposed must be for less than two years. Thirdly, the safety of the community must not be endangered by the offender serving the sentence in the community. Finally, the sentencing judge must conclude that the imposition of a conditional sentence would be consistent with the fundamental purpose and principles of sentencing. See *R. v. Proulx*, [2000] 1 S.C.R. 61 at para. 46 [*Proulx*].

45 *Gladue*, *supra* note 40; *R. v. John*, [2004] S.J. No. 61 (C.A.) (Q.L.), Vancise J.A. [*John*].

46 *Gladue*, *ibid.* The Supreme Court affirmed that the approach set out in *Gladue* is the proper ap-

become the seminal case on Aboriginal sentencing. Tanis Gladue pled guilty to manslaughter in the death of her common law partner. The sentencing judge, failing to consider the “special circumstances” of the offender as an aboriginal under Section 718, sentenced Gladue to three years imprisonment, with a ten-year weapons prohibition. In dismissing the appeal, the British Columbia Court of Appeal held that even though the sentencing judge committed an error in law in failing to consider the offender’s Aboriginal heritage, the nature of the crime as a “near murder” warranted a term in custody.⁴⁷ Rowles J.A. dissented in part, arguing that the special circumstances of the offender warranted a less excessive sentence. Leave to appeal to the Supreme Court was granted as of right.

In a judgment given by Cory and Iacobucci for a unanimous Court, the Supreme Court first confirmed that section 718 is a remedial provision intended to address over-incarceration, and is not simply a restatement of existing sentencing principles.⁴⁸ The Court recognized that restorative justice coincides with traditional Aboriginal justice, and that neither Aboriginal offenders nor their communities are necessarily served by incarceration. Indeed, the Court made it a particular point to recognize the way in which the Canadian criminal justice system and society more generally have, through both systemic and direct forms of discrimination, done a disservice to Aboriginals. The Court even suggested that our society “literally sentences them to jail”⁴⁹ thus concluding that, for Aboriginal offenders, “imprisonment should be the penal sanction of last resort.”⁵⁰ The Court proceeded to offer guidance to sentencing judges for making the determination of appropriate sentence for Aboriginal offenders. The *Gladue* factors include “systemic and background” factors such as substance abuse, poverty, overt racism, or family and community breakdown.⁵¹ This list, the Court confirmed, is not exhaustive. The Supreme Court also confirmed that section 718 does not create a two-tiered sentencing system, cautioning that, as offences become more serious or violent, it is more likely that the Aboriginal offender will receive a sentence similar to that of a non-Aboriginal offender, and will often include incarceration.⁵² Indeed, further examination will demonstrate that the sentencing structure that was enacted to diminish the reliance on incarceration, through judicial interpretation, further legislative amendment and political obstacles, prohibits the realization of that very goal.

proach to restorative justice and Aboriginal offenders a year later in *R. v. Wells*, [2000] 1 S.C.R. 207 at para. 36.

47 *R. v. Gladue*, [1997] B.C.J. No. 2333 (C.A.) (Q.L.).

48 *Ibid.* at para. 34.

49 *Ibid.* at para. 67.

50 *Ibid.* at para. 36.

51 *Ibid.* The Ontario Court of Appeal has recently affirmed that a sentencing judge’s failure to consider the *Gladue* factors for an Aboriginal offender constitutes a reversible error in law. See *R. v. Kakekagamick*, [2006] 40 C.R. (6th) 383 (Ont. C.A.) [*Kakekagamick*].

52 *Gladue*, *ibid.* at para. 33

B. But Does it Work in Practice? – Obstacles to Restorative Justice as Outcome-Centered

1. The Problems of a Principle-Based Approach to Sentencing

As the *Gladue* court itself anticipated, section 718.2(e) may not be capable of having any actual impact on Aboriginal incarceration rates and that, as the court cautioned, the provision does not “alter the fundamental duty of the sentencing judge to impose a sentence that is fit for the offence and the offender.”⁵³ This is an implicit reference to both cardinal proportionality (which ensures that similar sentences are associated with similar offences and ordinal proportionality (which ensures that an offender is only punished to the extent of his desert or blameworthiness). As a result, there will be Aboriginal offenders for whom the court feels, their differing views on punishment notwithstanding, that deterrence, denunciation and the protection of the public justify a sentence of incarceration. For example, the Supreme Court’s statement that the severity of an offence should weigh heavily on sentencing has, in part, allowed Saskatchewan judges to revert to sentencing offenders to terms in custody. And they have indeed done so by relying on the traditional sentencing principles with which they clearly feel more at ease. As former Chief Justice of Saskatchewan Edward Bayda somewhat sarcastically suggests, “[w]e know retributive justice ‘works’, at least in the sense that we know how to use it.”⁵⁴ Indeed, the Canadian sentencing framework remains heavily rooted in principles of proportionality and parity.

Furthermore, rather than equating section 718.2(e) with restorative justice, some sentencing judges have approached it as nothing more than a general mitigating provision. They have considered Aboriginal status as another variable to be weighed along with other mitigating or aggravating factors, rather than focusing on whether a restorative (meaning non-custodial) outcome is appropriate for the Aboriginal offender before them. Thus, it is entirely possible that some judges had already been doing that which they incorrectly interpreted section 718.2(e) to require of them. As such, the availability of restorative justice is to a certain extent dependent upon jurisdiction. The Saskatchewan Court of Appeal, for example, has an extremely narrow reading of the *Gladue* factors. An Aboriginal offender who is not particularly influenced by poverty, racism, communal breakdown or substance abuse will not be able to benefit from section 718.2(e). In that particular situation, that Court has held that the *Gladue* factors do not apply.⁵⁵ The effect is that, in Saskatchewan, the presence of the *Gladue* factors constitutes threshold criteria to even the mere consideration of restorative justice. This is notwithstanding the fact that restorative justice was adopted, in part, thanks to a belief in its alignment with values held by all Aboriginal people.

53 *Ibid.*

54 Hon. Edward Bayda, “The Theory and Practice of Sentencing: Are They on the Same Wavelength” (1996) 60 Sask. L. Rev. 317 at 329.

55 See *R. v. Mantee*, [2005] S.J. No. 784 (Sask. C.A.) (QL) [*Mantee*]; *R. v. Andres*, [2005] S.J. No. 491 (Sask. C.A.) (QL) [*Andres*]. However, in the aftermath of the Ontario Court of Appeal’s decision in *Kakekagamick*, *supra* note 51, it is possible that the state of the law will change.

2. Judicial Discretion

Within this framework, sentencing judges continue to enjoy a significant amount of discretion in deciding which principles of sentencing ought to animate in a particular case. The section 718 principles are unranked and, from both a theoretical and a practical perspective, demand different sentencing responses. For example, an offender might be particularly suited to a community-based sentence, premised on his conduciveness to rehabilitation, and yet be similarly found, based on a perceived need to denounce, to require a term in custody. But so long as the sentencing judge makes his determination in light of both the facts of the case before him and the fundamental purpose of sentencing – that “a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender”⁵⁶ – the sentence he imposes will be met with considerable deference.⁵⁷

In reality, then, it seems that those judges who want seriously to consider restorative justice are faced with a series of substantial obstacles. Section 718 provides a litany of justificatory factors to consider, from which a prudent sentencing judge must somehow arrive at a sentence that serves the interests of justice. This becomes only increasingly difficult when that same prudent sentencing judge is faced with the unique situation of the Aboriginal offender:

The terms ‘honour’ and ‘dignity’ somehow seem out of place when applied to him as possessor of those qualities. His life has been rudderless and totally lacking in motivation. Violence, confrontation, and alcohol predominated his early and later life. He is unemployed and uneducated. His chances of obtaining either are, frankly speaking, nil or approaching nil.⁵⁸

Traditional principles of sentencing, particularly those emphasizing deterrence and rehabilitation, may not so readily apply to this offender. Indeed, in his account of prison’s impact on Aboriginal offenders Donald Morin, himself a formerly convicted Aboriginal offender, offers the following as an indication of prison’s failure to deter:

Being in prison in my late teens and early twenties was not a deterrent; it never stopped me at all from wanting to continue in that lifestyle. It was a game I found exciting and fun, and this frame of reference came to dominate in my way of thinking and actions. It is my belief that many people who commit crimes have a higher threshold to risk-taking. As a result I did things knowing there was a possibility of getting caught, but [it] was not a major concern. I was driven by a calculated greed for materialistic goods – a basis of survival.⁵⁹

⁵⁶ *Criminal Code*, *supra* note 41, s.718.1.

⁵⁷ *R. v. C.A.M.*, [1996] 1 S.C.R. 500 at para. 90 [*C.A.M.*]; *Proulx*, *supra* note 44 at para. 116. The particular issue of the deference owed to sentencing judges will be further discussed below.

⁵⁸ Bayda, *supra* note 54 at 319.

⁵⁹ Donald Morin, “Doing Time” in Bernard Schissel & Carolyn Brooks, eds., *Marginality & Con-*

These examples question what has been described as the neo-liberal attitude toward criminal offending, which suggests that citizens are first and foremost autonomous individuals, detached from the social structure, who are responsible for their own fate through their ability to make rational choice.⁶⁰

And yet, judges must remember that principles of parity dictate that offenders should face sentences similar to those who have committed similar offences. As the Court suggested in *Gladue*, as an offence becomes more serious, it will become more likely that an Aboriginal offender will face a similar sentence to that of a non-Aboriginal offender, regardless of whether or not the *Gladue* factors are considered. *Gladue* would seem to set out a restorative justice framework through which the judiciary can, to the extent that this is possible through sentencing, attempt to remedy Aboriginal over-incarceration. However, this structure is fatally flawed. It speaks very little to the role of restorative justice in terms of criminal justice processes. The sentencing judge remains ultimately responsible for determining the type of penal sanction imposed, holds the discretion over whether to divert or hold a sentencing circle, and remains vested with considerable discretion throughout the sentencing process in its entirety.⁶¹

Furthermore, Canadian appellate law shows sentencing judges a high level of deference: "absent an error in principle, a failure to consider a relevant factor, or an overemphasis of the appropriate factors, a court of appeal should only intervene to vary a sentence imposed at trial if the sentence is demonstrably unfit."⁶² This, however, has not necessarily been the case when dealing with restorative justice dispositions; that is, those that are the product of section 718.2(e) and section 742 analyses. Here the rationale, in overturning sentencing judges, has overwhelmingly been a concern over proportionality and parity. For example, the Saskatchewan Court of Appeal has not hesitated to interfere by increasing a sentence's punitiveness.⁶³ In increasing the length of the sentence or in replacing a conditional sentence with a term in custody, the court has universally held that the sentencing judge placed too much emphasis on the *Gladue* factors, failing to consider section 718's remaining and equally important principles. It is increasingly clear that other principles of sentencing seem to "inhibit the use of restora-

demnation: An Introduction to Critical Criminology (Halifax: Fenwood Publishing, 2002) 330 at 332. Dickson-Gilmore and LaPrairie have similarly noted the degree to which the social context of Aboriginal offenders may, in fact, "render the choice of a criminal lifestyle a fairly rational one;" see Dickson-Gilmore, *supra* note 2 at 55.

60 See White, *supra* note 11 at 387. It has been further suggested that judges and lawyers often fall into the trap of applying a "Eurocentric knowledge" of how they themselves would be deterred; see Ross, *supra* note 9 at 190.

61 See Dickson-Gilmore, *supra* note 2 at 143 (suggesting that the attribution of the label of restorative justice, a theory geared toward empowerment and participation, to a structure that "leaves the basic distribution of power untouched, wherein the judge retains the power of decision making, is at best overly optimistic, at worst misleading").

62 *C.A.M.*, *supra* note 57 at para. 90.

63 *R. v. McDonald*, [1997] S.J. No. 117 (Sask. C.A.) (QL) [*McDonald*]; *Mantee*, *supra* note 55; *Andres*, *supra* note 55; *R. v. D.S.K.*, [2005] S.J. No. 97 (Sask. C.A.) (QL); *R. v. Anaquod*, [2005] S.J. No. 531 (Sask. C.A.) (QL).

tive sanctions that do not involve the use of imprisonment”⁶⁴ when restorative justice is conceptualized merely in terms of outcomes.

(a) Mandatory Minimums

Focusing squarely on the judiciary, however, overlooks another important factor that bears on sentencing in Canada. The *Criminal Code* contains provisions which seriously restrict the use of conditional sentences, frequently used by judges in the name of restorative justice. Conditional sentences are prohibited for any “offence that is punishable by a minimum term of imprisonment.”⁶⁵ Offences subject to mandatory minimum sentences in Canada include, among others, first and second degree murder,⁶⁶ manslaughter,⁶⁷ impaired driving,⁶⁸ certain sexual offences,⁶⁹ robbery,⁷⁰ and the use of a firearm in the commission of any other offence.⁷¹ Starkly put, the commission of any of the above offences automatically attracts a custodial sentence notwithstanding the fact that the offender may be Aboriginal, that there may be a number of relevant *Gladue* factors present, and that neither the offender nor the community may benefit from the sentence being served in a penal institution. Given that “aboriginal offenders commit a disproportionate number of serious crimes against the person,”⁷² they are more likely to have frequent encounters with the criminal justice system and, as a result, longer custodial sentences. Restorative justice, in the form of a conditional sentence would, perhaps ironically, only be available in circumstances where the offender may not even be facing imprisonment. In many situations, it has been outright precluded by statute.

(b) Penal Populism

Furthermore, there remains, within both public opinion and the minds of the judiciary, the view that restorative dispositions are too lenient. In Saskatchewan, Justice Vancise has observed the “ongoing struggle” amongst the judiciary “con-

64 Julian V. Roberts & Kent Roach, “Restorative Justice in Canada: From Sentencing Circles to Sentencing Principles” in Andrew Ashworth *et al.*, eds., *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms?* (Oxford: Hart Publishing, 2003) 237 at 249.

65 *Criminal Code*, *supra* note 41, s.742.1.

66 *Ibid.*, s.235(1).

67 *Ibid.*, s.236(a).

68 *Ibid.*, s.255(1)(a)(ii); s.255(1)(a)(iii).

69 *Ibid.*, s.151; s.152; s.153.

70 *Ibid.*, s.344(a).

71 *Ibid.*, s.83(3). And Bill C-9, “Restricting House Arrest,” which sought to amend section 742 by eliminating the availability of a conditional sentence for indictable offenses punishable by ten years or more, and that qualify as either serious personal injury offenses (including sexual assault, aggravated assault, and sexual assault with a weapon), terrorism offenses, or criminal justice offenses, was passed by the Senate on May 16, 2007. It was to receive Royal Assent on May 31st, 2007. See Department of Justice, Background, “Restricting House Arrest” (31 May 2007), online: Department of Justice <http://www.justice.gc.ca/en/news/nr/2007/doc_32026.html>.

72 Dickson-Gilmore, *supra* note 2 at 82. See also Canada, Canadian Centre for Justice Statistics, *Returning to Correctional Services after Release: A Profile of Aboriginal and non-Aboriginal Adults Involved in Saskatchewan Corrections from 1999/00 to 2003/04*, 25:2 (Ottawa: The Juristat, 2005) [After Release].

cerning the use of alternative sanctions.”⁷³ He suggests that the “change away from punitive-type sentences will not be easy and will not come without some effort and some courage.”⁷⁴ Even a well-intentioned sentencing judge is keenly aware that his decisions form part of a public system of justice. Former Chief Justice Bayda has described the situation as follows: “[i]f only those judges – I heard they referred to the other day by a member of the public who telephoned a talk radio show as ‘senile old buggers’ – would ‘get with it’ and sentence offenders to long stiff terms of imprisonment we would end up with the safe and peaceful society we all so desperately want.”⁷⁵

Wide-spread acceptance of restorative justice principles through a more flexible approach to conditional sentences will be a difficult goal to achieve. Given the unwillingness of policymakers, critics and the public to give up their commitment to the current adversarial and punishment-oriented criminal justice process – and this constitutes a considerable obstacle indeed – any radical transformation of the criminal justice system is neither desirable nor practical. Lawyers, too, remain committed to principles of due process, institutionalized procedural protections and formalized legal processes within the criminal law context. This is despite a favourable view, within the legal profession and amongst the public, of more informal processes in the realm of civil litigation, evidenced through an increasing trend toward the adoption of mediation and alternative dispute resolution schemes.⁷⁶

However, there remains a perceived need, from both politicians and the public, for immediate and tangible results which, they feel, must be achieved through lengthy jail sentences. While restorative *dispositions*, by way of conditional sentences, are a good way to decrease prison populations, as the *Globe and Mail*’s Rebecca Dube suggests, “victims’ advocates often fume at what they see as soft punishment.”⁷⁷ Public opinion generally has shown a significant degree of “outrage” over the perceived lenience of conditional sentences⁷⁸ and, to an increasingly dramatic extent, public opinion does drive criminal justice policy in Canada.⁷⁹ Professor Neil Boyd, a criminologist at Simon Fraser University, per-

73 Hon. W.J. Vancise, “To Change or Not To Change – That is the Issue” (1996) 1 Can. Crim. L. Rev. 263 at 264. Both Former Chief Justice of Saskatchewan Edward Bayda and Associate Justice William J. Vancise, of the Saskatchewan Court of Appeal, have are known for their thoughtful sentencing jurisprudence.

74 *Ibid.* at 267.

75 Bayda, *supra* note 54 at 325.

76 See Dickson-Gilmore, *supra* note 2 at 96 (“The principles on which restorative justice rests, and to which it lays claim, have long been a part of the juridical landscape in Canada, and have been seen in the alternative dispute resolution, community justice, and popular justice movements”); Ross, *supra* note 9 at 230 (“It is worth noting that large corporations are doing exactly the same thing in some jurisdiction, abandoning the antagonistic, costly and time-consuming Western courts in favour of privately chosen mediators whose decisions they pledge to respect. The same movement is afoot in other matters as well, from disputes between neighbors to marriage breakdown. People are leaving the courts”).

77 See Rebecca Dube “Home Sweet Jail” *The Globe and Mail* (31 May 2007), online: *Globe and Mail* <<http://www.theglobeandmail.com>>

78 *Ibid.*

79 The federal government suggested that Bill C-9, intended to restrict the availability of conditional sentences, demonstrates “Canada’s New Government’s commitment to protecting Ca-

haps best articulates this tension when he states: “[d]o these sentences adversely affect the crime rate? No. Do these sentences upset the public? Yes.”⁸⁰ Ultimately, restorative justice and criminal law reform more generally, are subject to fluctuations in the political climate.

The already difficult theoretical and practical reconciliation between restorative and retributive justice becomes exacerbated in light of the Canadian sentencing framework, particularly if we limit our understanding of what restorative justice is meant to accomplish to the realization of non-custodial outcomes in sentencing. This is particularly the case in the Canadian sentencing context. Given the inherent judicial discretion within the section 718 sentencing structure and the presence of numerous offences that carry mandatory minimum sentences within the *Criminal Code*, coupled with a political climate that continues to reward political platforms that are “tough on crime” and favor lengthy prison terms, outcome-based considerations of restorative justice are essentially precluded from the outset. Given that restorative justice was adopted in partial recognition that, as the Supreme Court noted in *Gladue*, the justice system has profoundly failed Aboriginal people, this is an important failing indeed.

Thus, it would seem that the Canadian approach to restorative justice, as currently manifested, cannot contribute much in terms of positive impact. In Saskatchewan, Aboriginal incarceration rates have actually increased slightly since restorative justice was officially adopted in 1996.⁸¹ A more promising formulation of restorative justice, however, would shift the focus to ensuring that processes of the criminal justice system reflect restorative justice values. This shift in emphasis would further recognize the role that empowerment and participation can have in promoting the legitimacy of the justice system.

3. Conflicts, Legitimacy and the Promotion of Law-abiding Behaviour

(a) Conflicts as “Property”

In an influential 1977 article, Nils Christie suggested that modern criminal justice systems create processes whereby “conflicts [are] taken away from the parties directly involved” and become “the property of lawyers.”⁸² The criminal trial is an artificial exercise in the determination of guilt, reduces the attention paid to the conflict itself and focuses on the offender as someone who can be studied, manipulated, and ultimately controlled. Importantly, that process is far removed from the intensely personal experiences of those subject to it. Perhaps an increasingly stratified and less connected society is prepared to give their conflicts up to the state and the fact that they are being taken away is of little consequence. There is no relationship to be repaired, nor is there any particular desire for

nadians by ensuring that those who commit serious offenses serve their sentences in prison, not the community” Department of Justice, News Release, “Statement from Minister Toews on Amendments to Conditional Sentencing Bill” (24 October 2006), online: Department of Justice < http://www.canada-justice.ca/en/news/nr/2006/doc_31914.html >.

80 Dube, *supra* note 77.

81 See *Correctional Services*, *supra* note 3 and Canada, Statistics Canada, *Adult Correctional Services Survey, 1996 Census* (Ottawa: Canadian Centre for Justice Statistics, 1996).

82 Nils Christie, “Conflicts as Property” (1977) 17 *Brit. J. Crim.* 1 at 4.

contact between victim and offender. However, where communities are particularly connected and close-knit and where real relationships between offender and victim do in fact exist, the criminal justice system represents but one of the many “cases of lost opportunities for involving citizens in tasks that are of immediate importance to them.”⁸³ Christie’s criticisms of the modern criminal justice system are consistent with those of restorative justice advocates, seeing the need for greater community empowerment.

The Law Commission of Canada has similarly recognized that Canadians generally feel detached from the criminal justice process. Like Christie, it has suggested that the legal system takes conflict and “translates [it] into the [legal] language of rights and wrongs.”⁸⁴ In relying solely on the formalized and adjudicative processes associated with the criminal justice system, it is suggested that the role conflict plays in the everyday lives of Canadians is neglected. This, in turn, is affecting the way Canadians perceive whether justice is being done. “[T]hinking creatively”⁸⁵ about conflict resolution, however, could lead to an approach that may better resonate with Canadians’ perceptions of justice. I suggest that Aboriginal Canadians have particular reason to feel detached from the criminal justice system, given their troubled history with the Crown.

(i) Conflicts as “Aboriginal Property”

The characterization of conflicts as “property” carries particular resonance within the Aboriginal context where, as Mary Ellen Turpel suggests, “an alien political and legal culture has been imposed upon indigenous practices and institutions”⁸⁶ unilaterally by representatives of the Crown. Aboriginal land was taken without thought of compensation. Aboriginal language and cultural traditions were taken through a systematic program of forced assimilation to European culture. Traditional forms of childrearing were taken through the forcible removal of Aboriginal children from their homes and their placement in residential schools. The distinct Aboriginal system of justice was taken through the unilateral imposition of a foreign, European legal system. The *Indian Act*,⁸⁷ the single piece of Canadian legislation which affects the day-to-day lives of Aboriginals more so than any other, was enacted without consulting Aboriginal people or incorporating any traditional Aboriginal practices. The 1996 Royal Commission on Aboriginal Peoples has never been fully implemented. There remain roughly 800 outstanding, active Aboriginal land claims and the land

83 *Ibid.* at 7.

84 Dennis Cooley, *From Restorative Justice to Transformative Justice: Discussion Paper* (Ottawa: Law Commission of Canada, 1999) at 11. Strang has observed that when asked what they require from justice in the aftermath of a crime, victims show a desire for less formal processes that properly account for their views, provide them with information about their cases and claims, provide them with greater participation and respect, provide restoration for material losses and harms, and provide emotional restoration through both apology and affirmation. See Heather Strang, *Repair or Revenge: Victims and Restorative Justice* (Oxford: Clarendon Press, 2002) at 2-3 [Strang, *Revenge*].

85 Cooley, *ibid.* at 15.

86 Mary Ellen Turpel, “Home/Land” (1991) 10 Can. J. Fam. L. 17 at 18.

87 *The Indian Act*, R.S.C. 1985, c. I-5.

claims process, on average, takes thirteen years to complete.⁸⁸ And, prior to the recent policy announcement by the federal government, proposing substantial changes to the land claim process, Ottawa had “acted as defendant, judge, and jury” in disputed land claims.⁸⁹

As Dickson-Gilmore and La Prairie note, for hundreds of years Aboriginals have witnessed the Crown’s efforts to “usurp the traditional culture and institutions that once defined and maintained their communities.”⁹⁰ Clearly, “conflicts” are not the only form of “property” taken from Aboriginals by the state. Aboriginals have been forced to rely on “others,” most notably the state, to define their experiences. As the Supreme Court poignantly observed in *Gladue* those “others” have profoundly failed Aboriginal people. Turpel suggests that “the political situation for aboriginal peoples in Canada can only be fully understood by appreciating its colonial context.”⁹¹

Nevertheless, while Aboriginal Canadians continue to struggle in their interactions with non-Aboriginal Canadians, once described as the “outside world,”⁹² they continue to place a fundamental importance on community. Turpel has described the significance of Aboriginal communities as follows:

it is the home of a distinct culture and linguistic people. It is a community of extended families, tightly connected by history, language and culture. It is often a place where children can be educated in their language and with culturally-appropriate pedagogies.⁹³

The combination of a criminal justice system which frequently removes Aboriginal offenders from their own milieu, and the belief on the part of Aboriginals that the conflict and disorder they face is due in large part to the theft of their cultural traditions, have undoubtedly led to a distrust of and disrespect for the formal criminal justice system.⁹⁴ Within the criminal justice context specifically,

88 Chief Terrence Nelson recently signed an agreement with Federal Indian Affairs Minister Jim Prentice. In reference to a disputed 1871 treaty, Chief Nelson suggested it took 135 years, ten months and ten days for his tribe to get its land back. See Sarah Hampson, “I’ve known violence all my life” *The Globe and Mail* (18 June 2007), online: [Globe and Mail <http://www.theglobeandmail.com>](http://www.theglobeandmail.com).

89 *Ibid.*

90 Dickson-Gilmore, *supra* note 2 at 3.

91 Turpel, *supra* note 86 at 18.

92 Dickson-Gilmore, *supra* note 2 at 4.

93 Turpel, *supra* note 86 at 32. This statement is not meant to suggest that Aboriginal culture is uniform. The diversity of Aboriginal culture and traditions has been well documented: see Dickson-Gilmore, *ibid.* However it has been recognized that there is a “remarkable similarity of problems” and shared experiences for Canadian Aboriginals: see Dickson-Gilmore, *ibid.*; Ross, *supra* note 9. While this necessarily challenges Ross’ “romanticized” view of Aboriginal communities, it does not challenge the suggestion that there are common starting points and beliefs where Aboriginal communities from across Canada can come together: see Dickson-Gilmore, *ibid.* at 226. Ross himself does not deny that there is a considerable amount of diversity and, yet, shared values and beliefs, amongst Aboriginal communities: Ross, *supra* note 9.

94 For a discussion of the degree to which Aboriginal people are seeking to resolve their disputes on their own and without the assistance of outsiders, see Dickson-Gilmore, *ibid.* at 70; Ross, *ibid.* at 230.

and given that, as Dickson-Gilmore and La Prairie have observed, the “majority of serious offending in Aboriginal communities is intra-Aboriginal,”⁹⁵ the Canadian criminal justice system removes from Aboriginals the conflicts which, under their own practices, would be resolved within their communities. In a sense, then, a procedural commitment to restorative justice should properly be seen as a form of returning conflict to its rightful owners.

(ii) Restorative Justice as Aboriginal Justice

Aboriginal claims, criminal or otherwise, continue to be addressed within the “highly formalist” adversarial justice system. This, Turpel suggests, “utterly silences aboriginal peoples and denies their experiences.”⁹⁶ By contrast, restorative justice, with its commitment to empowerment and participation and its broader conceptualisations of harm, is thought to be particularly applicable to the Aboriginal context. Indeed, the restorative justice movement has been heavily influenced and enriched by Aboriginal justice.⁹⁷ Aboriginals recognize the value in, and favourably perceive, restorative justice, as its key value commitments reflect the fundamental importance that Aboriginal culture places on interconnectedness and a balanced and “holistic” approach to life.⁹⁸ While Aboriginals perceive the criminal justice system as “foreign and distant from their communities and cultures” and “overtly biased against and unduly punitive”⁹⁹ towards them, Dickson-Gilmore and La Prairie suggest that Aboriginals see restorative justice as confirming that communities are better able to arrive at a just result. Aboriginals hold a fundamentally different concept of dispute resolution whereby isolating an offender from the community, the practice of the western legal tradition, is the least effective way of dealing with conflict.

Further, traditional notions of Aboriginal justice place a great importance on “restitution, apology, and the provision of an opportunity to demonstrate positive behavioral change.”¹⁰⁰ Aboriginals do not outright reject the prison as a vehicle for justice; indeed, it is accepted that prison may be the only option for those few who are out of control or beyond the reach of healing.¹⁰¹ Rather, it is believed that prison is an institution that represents the symbolic removal of Aboriginals from “spiritual contact”¹⁰² with their communities, and limits their opportunities for healing. Aboriginal culture is communal and, by extension, so are

95 Dickson-Gilmore, *ibid* at 83. See also Canada, Statistics Canada, “*Aboriginal people as victims and offenders*” (Ottawa: The Daily, 2006).

96 Turpel, *supra* note 86 at 21. See also Ross, *supra* note 9 at 9 (“Almost every aspect of our Western approach to justice breaks traditional Aboriginal law”); Dickson-Gilmore, *ibid.* at 88 (suggesting that the mainstream justice system is “authoritarian and hierarchical and distant from those whose conflicts it claims and purports to resolve”).

97 Braithwaite, “Better Future”, *supra* note 5 at 329.

98 See *supra* note 93 and accompanying text. See also Dickson-Gilmore, *supra* note 2 at 9-13; Ross, *supra* note 9 at 245 (“Aboriginal communities across Canada have different histories, political dynamics, social problems, cultural characteristics, economic resources and administrative capacities”).

99 Dickson-Gilmore, *ibid.* at 91.

100 *Ibid.* See also Ross, *supra* note 9.

101 Ross, *ibid.* at 240-241.

102 Braithwaite, “Better Future,” *supra* note 10 at 18.

Aboriginal conflicts. To say, however, that Aboriginal culture places a fundamental importance on resolving conflict communally is not to similarly ignore the impact of intra-Aboriginal offending, which leaves a trail of Aboriginal victims in its wake. This does not mean that a communal approach cannot work in cases of intra-Aboriginal offending and, particularly in cases of domestic and sexual abuse. Rather, it highlights the degree to which these are largely communal problems – those that go far beyond those problems of individual offenders – that require attention and shifts in attitude. Aboriginal women and women's groups in general have been particularly vocal in their concerns over their own victimization and the seriousness of family violence. Indeed, the victimization of Aboriginal women constitutes a significant problem, as does the failure to address the power imbalances within Aboriginal communities that may perpetuate cycles of abuse or, worse, deny its existence. These factors must be considered in the construction of any restorative justice programme designed for a specific Aboriginal community.¹⁰³

However, it was the acknowledgment that the Aboriginal approach to conflict and wrongdoing is fundamentally at odds with the western legal system that contributed to Parliament's recognition of restorative justice's potential. Indeed, another fundamental attraction of restorative justice is that it acknowledges that the offender is also a victim and that there may be more broadly defined and yet very real societal harms that require reparation. A number of the offences that attract mandatory minimum sentences are often the manifestation of greater social problems. Justice Vancise, of the Saskatchewan Court of Appeal, has suggested that restorative justice can do the most good in "cases where it is clear the underlying cause of the problem is social."¹⁰⁴ However, traditional principles of sentencing and deterrence, in particular, are rooted in the neo-liberal belief that the threat of punishment associated with criminal conduct will deter individual citizens from committing crimes.

Even if we are prepared to accept that both general and specific deterrence rationales influence the behaviour of ordinary citizens, it is not clear that they so readily apply to the Aboriginal offender. And yet this is the approach that the criminal justice system continues to adopt, applying alien legal principles and understandings to a population which neither recognizes them as part of their reality, nor is particularly well-suited to their application. Donald Morin's testimonial as to the lack of effect deterrence had on his subsequent recidivism supports this claim.¹⁰⁵ The magnitude of deprivation suffered by incarceration will be very different for the middle-class, employed non-Aboriginal offender

103 See Dickson-Gilmore, *supra* note 2 at 82-83, 109, 212. For examples of restorative justice programmes that have been carefully designed and, therefore, able to deal with cases of serious sexual and domestic abuse, see Dickson-Gilmore, *supra* note 2 at 171 and Ross, *supra* note 9 at 145.

104 Vancise, *supra* note 73 at 264.

105 See Morin, *supra* note 59 and accompanying text. In that same article, Morin describes how Aboriginal prisoners routinely, when a fellow Aboriginal offender is released, make bets as to how long it will be before that offender returns to prison. He notes that, while these comments are passed off as jokes, they illustrate the degree of cynicism characterizing the community of Aboriginal offenders; see Morin, *supra* note 59 at 343.

and the Aboriginal offender who has neither a job nor material goods to lose. Indeed, Aboriginal offenders often suffer from abject poverty, malnutrition and substance abuse. Dickson-Gilmore and La Prairie have observed that “alcohol use, early departure from school, unemployment, and being taken away from one’s family are the main factors distinguishing Aboriginal people who have been arrested from those who have not.”¹⁰⁶ It would seem that Aboriginal offenders generally have very little to lose.¹⁰⁷ The deterrence argument should be viewed with particular skepticism when it is applied to Aboriginal offenders.¹⁰⁸

(b) The Importance of State Legitimacy

(i) Legitimacy Through Process, Procedure, and Participation

It has been suggested that a voluntary commitment to law-abiding behaviour flows from the belief that the law is just and properly authoritative.¹⁰⁹ Tom Tyler’s landmark study, *Why People Obey the Law*, explored the everyday behaviour of citizens toward the law and examined the reasons why citizens do or do not obey. His results support the notion that “those who regard legal authorities as having greater legitimacy are more likely to obey the law in their everyday lives.”¹¹⁰ Rejecting an instrumentalist view of compliance in favour of a normative one, Tyler’s results further show that “citizens with higher levels of support for the authorities are less likely to engage in behaviour against the system.”¹¹¹ That is, if citizens feel that compliance with the law is appropriate and thus assume a voluntary obligation to obey the law, they will be committed to law-abiding behaviour, irrespective of any threatened sanction in case of breach.¹¹² In

106 Dickson-Gilmore, *supra* note 2 at 28. See also *After Release*, *supra* note 72; Bayda, *supra* note 54.

107 Indeed, risking one’s freedom by stealing sandwiches from a convenience store to satisfy a next meal, for example, constitutes a decision-making process that is foreign to many ordinary citizens. This is precisely the situation described in an early 2007 feature in *Maclean’s* magazine, profiling the current situation facing inner-city Regina. See Jonathon Gatehouse, “Canada’s Worst Neighborhood” *Maclean’s* (15 January 2007) 20. See also Ross, *supra* note 9 at 226 (suggesting that jail may be an ineffective deterrent given the other traumas driving an Aboriginal offender). And see, generally, Dickson-Gilmore, *ibid.*; Bayda, *ibid.*; White, *supra* note 11 at 385; Morin, *supra* note 59 and accompanying text.

108 It is no doubt true that this suggestion applies equally to many non-Aboriginal offenders. However it is my suggestion that it is particularly the case for many Aboriginal offenders, and is important given the over-representation of Aboriginals within the criminal justice system more generally.

109 Tom R. Tyler, *Why People Obey the Law* (New Haven: Yale University Press, 1990). John Braithwaite has similarly suggested that this is the case. See Braithwaite, “Inequality,” *supra* note 8 at 77.

110 Tyler, *ibid.* at 57.

111 *Ibid.* at 33.

112 The law serves to prohibit individuals from doing that which they would otherwise be at liberty to do. When the underlying support for the force espoused by the positive law is deemed to be illegitimate, voluntary compliance will be difficult to achieve. As Ross notes those citizens, once angered, will try to beat those laws any way they can and will never go beyond the bare, legislated minimums. He further notes that they are likely to take that anger out directly on those whom those laws were meant to protect. This has direct application to the legal status of Aboriginal Canadians: see Ross, *supra* note 9 at 93. See also Pavlich, *supra* note 23 at 89 (suggesting that strong communities may be the residual by-product of active individuals who voluntarily take charge of restoring and righting both themselves, and the relationships distorted by criminal events).

contradistinction, when citizens have low levels of confidence in the legitimate authority of the legal system, voluntary compliance with the law decreases. Rod Brunson and Jody Miller have further found, as recently as 2006, that negative attitudes toward the criminal justice system in particular can lead citizens to question the legitimacy of both the justice system and the state.¹¹³ Tyler's results ultimately suggest that "legitimacy in the eyes of the public is a key precondition to the effectiveness of authorities."¹¹⁴ Any order-seeking state official, who expects legal rules to be followed, should take note.

Tyler's results specifically highlight the importance of procedural fairness – that it is important for citizens to feel they have been given the opportunity to state their case – in promoting legitimacy and compliance with the law. His work emphasises the importance of "voice," and highlights several factors in particular. Interestingly, respondents focused not on the ultimate favourability of outcomes but, rather, the degree to which they felt they could influence the decision-making process. When citizens feel they have been allowed to convey their suggestions for solving problems – when they are afforded active participatory rights – they feel their experiences are procedurally fairer.¹¹⁵ Put somewhat differently, citizens are more inclined to accept an unfavourable outcome if they feel they have been given a fair opportunity to have their voices heard.¹¹⁶ Moreover, Tyler's study shows that citizens respond favourably to informal procedures as a means for settling disputes, as they tend to offer more avenues of direct participation than do most formal procedures associated with the legal system, such as trials for example.¹¹⁷ These attitudes, too, have no doubt influenced the growing demand for alternative dispute resolution and mediation in the private law context. Finally, and perhaps most importantly, Tyler's study highlights the importance of past experiences, mediated through perceived procedural fairness, in fostering compliance. Importantly, perceptions of the legal system's legitimacy can be eroded by unsatisfactory past experiences, specifically where citizens feel they have been treated unfairly, or in a biased, inconsistent, or dishonest way.¹¹⁸

113 Rod K. Brunson & Jody Miller, "Young Black Men and Urban Policing in the United States" (2006) 46 *Brit. J. Crim.* 613. See also Robert J. Sampson & William Julius Wilson, "Toward a Theory of Race, Crime, and Urban Inequality" in John Hagan & Ruth Peterson, eds., *Crime and Inequality* (Stanford: Stanford University Press, 1995) at 34 (structural disorganization, cultural isolation and racial segregation provide a context for understanding the adoption of antisocial attitudes and the prevalence of crime and delinquency); Dickson-Gilmore, *supra* note 2 at 50 (suggesting that an offender who perceives her position in society as resulting from racist processes and politics is unlikely to change that view based on accounts of positive discrimination in the system).

114 Tyler, *supra* note 109 at 5.

115 For discussions of the importance of perceptions of fairness to the credibility of the legal system, see Strang, *Revenge*, *supra* note 84 at 216 (suggesting that offenders are more likely to respond favourably to their justice experience when they perceive it to be fair); Daly, "Real Story", *supra* note 24 (suggesting the comparative ease of achieving "fairness" as opposed to "restorativeness"); Dickson-Gilmore, *supra* note 2 at 53 (suggesting that incorporation of restorative justice may enhance the perceived legitimacy and fairness of the system, but also permit the extension of culpability for that system and its failings beyond the system itself).

116 Tyler, *supra* note 109 at 163.

117 *Ibid.* at 155.

118 *Ibid.* at 63, 106.

The idea that there is a normative obligation to obey the law which, in turn, reinforces law-abiding behaviour may seem, at first, to have little place outside of abstract, theoretical discussions.¹¹⁹ In reality, however, it is fundamental to any system of effective governance and social functioning that citizens voluntarily obey the law and the decisions of legal authorities. This is particularly true in the criminal law context. These studies, rooted as they are in empirical data, suggest that the law's legitimacy, in the eyes of the public, is an essential precondition to law-abiding behaviour. Citizens who routinely feel that the legal system is unresponsive to their concerns, fails to adequately protect them, and generates processes that regularly and routinely generate outcomes perceived as unfair, will not identify with the authority of that system. They will not see it as "their" law. Indeed, there is a growing concern amongst social scientists working in this area that perceived injustice, itself, is a cause of criminal behaviour.¹²⁰ Russell has argued that perceptions of injustice, penalties perceived as unfair and the lack of sanctions for race-based harms diminishes faith in the criminal justice system and this, in turn, lays the groundwork for criminal offending.¹²¹ A society whereby the majority of the population rejects the law's authority, breaking it at will, would soon find itself in a state of anarchy.

Indeed, the state bases its claim to legal legitimacy on a moral argument¹²² and, in return, expects allegiance by citizens to its laws. There is a fundamentally interdependent relationship between the legal system and the citizens of a polity. Citizens rely on the machinery of the criminal justice system, for the prevention and detection of crime and the punishment of offenders. But similarly, the justice system depends on the public for its legitimacy and, in turn, the efficient administration of justice. If citizens become too alienated from the justice system, they will be reluctant to cooperate with the police or the courts as complainants or witnesses. There is evidence that Aboriginal people, particularly Aboriginal women, are not reporting crimes to the police.¹²³ It has been suggested that such

119 For an excellent and thorough discussion of the theoretical foundations for an argument that there is an obligation to obey the law see H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1994); H.L.A. Hart "Positivism and the Separation of Law and Morals" (1957) 71 Harv. L. Rev. 593; Lon Fuller, "Positivism and Fidelity to Law: A Reply to Professor Hart" (1957) 71 Harv. L. Rev. 630.

120 See in particular Tyler, *supra* note 109; Gary D. Lafree, *Losing Legitimacy: Street Crime and the Decline of Social Institutions in America* (Boulder, CO: Westview Press, 1998); K. Russell, *The Racial Hoax as Crime: The Law as Affirmation* (Indianapolis: Indiana State Bar Association, 1996) [Russell *Racial Hoax*]; Clive Norris, Nigel Fielding, Charles Kemp & Jane Fielding, "The Status of this Demeanor: An Analysis of the Influence of Social Status on Being Stopped by the Police" (Draft paper prepared for the British Criminology Conference, University of Wales, Cardiff, 28 July 1993) (the quantity and quality of law enforcement received by citizens, both as victim and as suspect, reflects the underlying pattern of social stratification in society).

121 Russell, *Racial Hoax*, *ibid*.

122 Evan Fox-Decent offers a persuasive account of this idea, in "The Fiduciary Nature of State Legal Authority" (2005) 31 Queen's L.J. 259 at 271.

123 See Ross, *supra* note 9 at 211 ("This is one of the most striking and unacknowledged failures of the Western justice system: a great many victims, especially Aboriginal victims, choose not to use it"). At the successful Hollow Water program, it has been observed that victims are refusing to disclose their abuse to anyone from the state justice system and are choosing, rather, to disclose to the Hollow Water team. They are asking that their cases be resolved entirely within

a situation would thwart the efforts of law enforcement officials in controlling crime and maintaining social order.¹²⁴

The interdependency between the state and its citizens takes on a particular meaning in the Aboriginal context, where it is established Canadian law that the Crown owes Aboriginal people a fiduciary obligation.¹²⁵ Indeed, we can go further and suggest that Aboriginals are in large part *dependant* on the state. However the ever increasing list of incidents of mistreatment by the Crown seriously limits the legitimacy of the Crown's claims to have acted in the best interests of its beneficiaries, and in an unbiased way. Furthermore, by being forced to air their grievances – be it through treaty, title, or rights claims or in actions for civil damages – within an Anglo-European, adversarial legal regime, Aboriginals continue to be forced to accept what they understand as an “alien” process.¹²⁶ Furthermore, the fact that the federal government has acted as judge, jury and defendant in a number of issues facing Aboriginals would seem to violate the *nemo iudex* principle of natural justice.¹²⁷ In rejecting the criminal justice system, and the colonial Western justice system more generally, Aboriginals are rejecting its legitimacy. They see neither as properly authoritative over them, nor do they feel that the legal system is deserving of their loyalty.

(ii) Proper authority, the promotion of law-abiding behaviour, and effective governance

The animating principle of section 718 states that “the fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society.”¹²⁸ However, as the former Chief Justice of Saskatchewan has observed, for Aboriginal people “the society we have is not one that ought to be boldly held out as ‘just, peaceful and safe.’ To maintain the society we have is not a goal they would support and endorse.”¹²⁹ Indeed for Aboriginal people, long marginalized from mainstream society, “the presumption is unjustified, and the goal sadly wanting. In their view, the purpose ought to be restructured. First, to contribute to the

their own community; see Ross, *supra* note 9 at 230. See also Dickson-Gilmore, *supra* note 2 at 74 (suggesting that when Aboriginal people turn to the police, either their own or non-Aboriginal outsiders, they simply want their complaints to be taken seriously. That is, they want meaningful interaction with the police and the courts, which matches the nature and degree of the victimization that they have experienced).

124 See Scott H. Decker, “Citizen Attitudes Towards the Police: A review of past findings and suggestions for future policy” (1981) 9 *Journal of Police Science and Administration* 80 at 80-87; S. Murty *et al.*, “The Image of the Police in Black Atlanta Communities” (1990) 17 *Journal of Police Science and Administration* 280 at 280-87; Vincent J. Webb & Chris E. Marshall, “The relative importance of race and ethnicity on citizen attitudes toward the police” (1995) 14 *American Journal of Police* 45; Catherine Kaukinen & Sandra Colavecchia, *Public Perceptions of the Courts: An examination of attitudes toward the treatment of victims and accused* (Ottawa: Canadian Criminal Justice Association, 1999).

125 *R. v. Guerin*, [1984] 2 S.C.R. 335.

126 Turpel, *supra* note 86 at 34.

127 *Nemo debet esse iudex in propria causa*: the principle of natural justice that no person is fit to be the judge in his own case.

128 *Criminal Code*, *supra* note 41, s.718.

129 Bayda, *supra* note 54 at 318-319.

establishment for all of a just, peaceful, and safe society. And, second, once that is established, to maintain that society."¹³⁰ Given the history of their treatment by the state and, until recently,¹³¹ the state's relative disregard for the impact it has had on Aboriginals generally, there is little reason for Aboriginals to have any confidence in the justice system and there seems to be "much to resent."¹³²

Nor does it seem that many Aboriginals feel any particular sense of pride in being law-abiding. Mary Ellen Turpel, now a Saskatchewan Provincial Court Justice and leader in the Aboriginal community, has suggested that the cumulative impact of years of legal oppression has been a disintegration of the social control network, and a loss of respect for social responsibility amongst Aboriginal people and that "it is little wonder that the legal system enjoys a low level of respect from aboriginal peoples."¹³³ Donald Morin provides further testimonial insight:

I have for a large part of my life hated and resented authority figures both on the street and in prison. My institutional record clearly illustrates this feature, with a long list of disciplinary charges as well as Criminal Code charges. One could argue that the hatred that I and others feel is applicable to all Aboriginal prisoners, who are keenly aware of the racism in Canadian society and within the justice system now and in the past.¹³⁴

There seem to be real issues of legitimacy here that cannot be resolved through the sentencing system alone. And yet, by adjudicating disputes, criminal or otherwise, through the formal justice system, we continue to decontextualise these disputes and reinforce the impact that the legal system has had on Aboriginal people.¹³⁵

Yet the criminal justice system continues to loom large within the lives of Aboriginal Canadians. Based on the gross overrepresentation of Aboriginals at all stages of the criminal justice system,¹³⁶ an uncomfortable number of Aboriginals

130 *Ibid.* at 318.

131 *Supra* note 1.

132 Braithwaite & Pettit, "Republicanism" *supra* note 7 at 158; Dickson-Gilmore, *supra* note 2 at 148 (suggesting that fairness is a major issue for Aboriginal people, something that even a " cursory historical study quickly reveals has long been absent in the relationship between their communities and the state, fiduciary obligations notwithstanding").

133 See Turpel, *supra* note 86 at 34. See also Hampson, *supra* note 88 (describing the activities planned for the June 29th 2007 National Day of Action endorsed by the Assembly of First Nations). The on-going land claims dispute in Caledonia, Ontario, complete with sometimes violent protest by Aboriginal groups, serves as an additional example that has garnered significant government attention and media coverage. See, most recently, "Caledonia Redux," Editorial, *The National Post* (17 January 2008), online: [The National Post <http://www.nationalpost.com/story.html?id=242865>](http://www.nationalpost.com/story.html?id=242865). See also Dickson-Gilmore, *ibid.* at xii (noting the perception that the justice system does "little to encourage responsible citizenship in Aboriginal communities by diffusing accountability and taking the right to 'do justice' away from communities").

134 Morin, *supra* note 59 at 338.

135 Turpel, *supra* note 86 at 30.

136 Dickson-Gilmore, *supra* note 2 at 209; Ross, *supra* note 9 at 253.

face their principal interaction with the Canadian legal system through the criminal justice system. At the conclusion of his concurring reasons in *R. v. Marshall*, an Aboriginal rights case, Justice LeBel highlighted his particular dissatisfaction with the number of Aboriginal rights claims that are litigated by way of summary conviction proceedings. Indeed, this practice is but another example of how the Canadian legal system deals with Aboriginal claims through a formalistic and foreign process.¹³⁷ Justice LeBel suggests that there is a serious need to “re-think the appropriateness of litigating aboriginal treaty, rights and title issues in the context of criminal trials,”¹³⁸ given that the “issues to be determined in the context of aboriginal rights claims are much larger than the criminal charge itself and that the criminal process is *inadequate* and *inappropriate* for dealing with such claims.”¹³⁹ Though he does not explicitly state it as such, what Justice LeBel is in fact hinting at is something akin to a restorative justice process whereby all those impacted by a land or rights claim – and in this context there will be many stakeholders indeed – are brought together and given the opportunity to participate.

Yet in this and other contexts, the justice system continues to apply legal principles and doctrines to Aboriginal offenders that are often not in the best interests of anyone. And for the Aboriginal offender, it is likely not the threat of punishment that will promote and ensure law-abiding behaviour or, put another way, deter criminal behaviour. Rather, it is the recognition that, often a victim in his own right, the Aboriginal offender can benefit from being given the opportunity to participate within a fair process whereby he is actively engaged, along with the members of his community, in the determination of how best to address his offending.¹⁴⁰ It provides the further opportunity to address the deeper problems and attitudes that may characterize an Aboriginal community and contribute to the cycle of violence and offending. It is here where restorative justice values can play a clear role: in contributing to the promotion of law-abiding behaviour which is, necessarily, key to effective social control and organization.

137 Dickson-Gilmore and La Prairie have observed the “general lack of awareness and knowledge on the part of the community members of the operation and practices of the mainstream justice system, notwithstanding the degree to which it intrudes into their lives;” see Dickson-Gilmore, *ibid.* at 185.

138 *R. v. Marshall; R. v. Bernard*, [2005] 2 S.C.R. 220 at 142.

139 *Ibid.* at 143 [emphasis added]. Justice LeBel went on to highlight the importance and complexity of the issues involved in recognizing Aboriginal rights and that, therefore, they deserve “careful consideration, and all interested parties should have the opportunity to participate in litigation or negotiations; *ibid.* at 144.

140 In her study of the impact of impact of restorative programs on Aboriginal offenders at the Prince Albert Federal Penitentiary, Connie Braun documented the testimonials of Aboriginal offenders who participated in the Aboriginal Segregation Pilot Project. The program, in part, permitted Aboriginal offenders to embark on or continue the path toward healing and rehabilitation. Braun’s findings corroborate previous research, indicating that many Aboriginal offenders benefit positively from their participation in these programs. See generally Connie Braun, “Seeking Alternatives to Segregation for Aboriginal Prisoners” in Bernard Schissel & Carolyn Brooks, eds., *Marginality and Condemnation: An Introduction to Critical Criminology* (Halifax: Fenwood Publishing, 2002) 355.

IV. CONCLUSION

Despite its obvious flaws as both a theory of justice and as a practical basis for non-custodial outcomes, there is no reason to reject restorative justice outright. It is important to distinguish between the revolutionary claims the theory makes in its purest form, the practical impossibilities associated with a narrow focus on non-custodial outcomes, and the real practical benefits it can provide. Restorative justice can make an important contribution to our understanding of the criminal justice system in a much “humbler” way: it reminds us that participants in the criminal justice system – victims, offenders and communities – have emotional needs that ought not to be ignored.¹⁴¹ While it is extremely important to recognize that an appropriate response to Aboriginal incarceration rates lies far beyond the scope of the criminal justice system, to the extent that it is possible to effect change through sentencing, there is a role to play for restorative justice if given the proper emphasis.

The reality remains that the practical consequences of the Canadian sentencing framework for Aboriginal offenders is that they are just as likely to end up incarcerated as they were prior to the 1996 amendments. Changes to the Canadian sentencing structure have, in large part, reinforced a system whereby the prison remains the criminal sanction of choice. As such, the Canadian approach to restorative justice further emphasizes what little can actually be accomplished through a sentencing regime. And in doing little to attempt to truly incorporate restorative justice values, it denies the very possibility of ensuring the real practical and substantive benefits associated with increasing participatory rights and perceptions of fairness.

However as Justice Vancise has observed, it is clear that “what we, the judges, prosecutors, and corrections professionals, are doing is not working.”¹⁴² And as former Saskatchewan Chief Justice Bayda has warned, it is essential that we recognize that “old answers to old questions and old reasons for doing new work will not form the foundation for a new approach to sentencing.”¹⁴³ While lawyers have been quick to embrace informal procedures in the private law sphere, there remains a pervasive reluctance to take the further step of incorporating informal procedures within the criminal law context. But it is for the positive reasons discussed above that a process-oriented, value-driven approach offers such a promising option. While such an approach is in line with the empirical studies that suggest that increased citizen participation within the criminal justice process can have a positive influence on the promotion of law-abiding behaviour, it also reflects a system of justice that is further in line with traditional notions of Aboriginal justice and self-determination. More importantly, however, promoting law-abiding behaviour through a justice system perceived as properly authoritative and legitimate could have a potential and yet very real positive impact on future governance initiatives over and above the goal of reducing Aboriginal offending.

141 Thorburn, *supra* note 21 at 881.

142 Vancise, *supra* note 73 at 269.

143 Bayda, *supra* note 54 at 331.

The problems currently facing Aboriginals go far beyond the individual criminal transactions for which they are brought within the confines of the criminal justice system. They are deeply systemic and call out for attention from other areas of social policy. Relying on changes to the sentencing process alone is a most inadequate response. Continuing to rely on the criminal justice system as a remedial device seriously limits the possibilities for moving forward in the long term. With Aboriginal populations that continue to rise across the country – a phenomena most acute in the province of Saskatchewan – it is fundamentally important for policy makers to address the broader issues of poverty and poor standards of living that currently characterise too many First Nations communities.¹⁴⁴ The presence of an increasing subset of the population that denies the authority of the legal system is not a positive pre-condition to effective governance and social control. As the quotation from the Royal Commission on Aboriginal Peoples that began this paper poignantly notes, Aboriginal people have been denied an effective voice for far too long and this, indeed, must end.

144 Indeed, for the purposes of governance and the allocation of resources, this situation is likely to become only more pronounced: “With an increasing First Nations and Aboriginal population that is both rural and urban, young, vital and rapidly expanding.” See Campaign 2000, *Oh Canada! Too Many Children in Poverty for Too Long: 2006 Report Card on Child and Family Poverty in Canada* (Toronto: Campaign 2000, 2006) at 4.