**The Challenges of Restorative Justice Projects in Aboriginal Communities through
Social, Economic, and Political Perspectives**

by

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Abstract

This study examines the challenges of restorative justice projects in communities that are facing many social, economic and political difficulties. Often the understanding is that once communities gain control over justice measures through restorative justice projects the problems of the mainstream criminal justice system will be reduced. Here restorative justice is seen as way to engender equality, create peaceful relationships, empowerment of community members including victims and offenders, reduce recidivism, establish social control, and re-establish cultural expectations. However, due to colonization, marginalization, and loss of culture and social control that communities experience disproportionate levels of conflict, inequality, lack of resources and low socio-economic status challenge the likelihood of reaching the goals of a restorative justice agenda. Conflict theory will aid in an understanding of those factors that pull communities apart.

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Introduction:

Currently in Canada, Aboriginal peoples are demanding that their voices be heard for the purposes of improving communities and instituting restorative or traditional justice measures. This attention to more suitable forms of justice for Aboriginals often falls within a philosophy of restorative justice that focuses on an informal or holistic response to crime through community and cultural endeavours. The focus is on relationship-building, equality, communication, peacemaking and reintegration of offenders back into the society.¹ These ideals are in line with an Aboriginal view of justice, as Aboriginal people “stress respect for the land, harmony among all facets of nature and humankind, and respect for elders, women and children.”² Restorative justice projects have also emphasized the circle as the symbol for the equality and harmony of all things and the focus of justice is on restoring harmony of the community.

A system under restorative justice is unlike the mainstream system of justice as restorative justice views crime as “a conflict between people.”³ Some authors, such as Nils Christie, view conflict as something that has been stolen from individuals directly involved in a dispute and turned over into the hands of the state. For example, this can be understood in the criminal justice system where the prosecutor and defense lawyer argue the facts of the conflict without the direct involvement of the victim and the accused. Here the lawyer may leave out arguments that the accused feels important and argue points that seem irrelevant to the accused. Until recently, the role of victims was

¹ J. Lewellyn & R. Howse, *Restorative Justice – A Conceptual Framework*. (Ottawa: Law Commission of Canada, Paper, 1998) Online: www.lcc.gc.ca/en/ on March 18, 2003 at 35.

² P. Mallea, *Aboriginal Law: Apartheid in Canada?* (Brandon, Manitoba: Bearpaw Publishing, 1994) at 8.

³ Christie, N., “Conflict as Property” (1977) 17 *The British Journal of Criminology* at 1.

completely ignored in the criminal process as the accused was seen as committing wrongs against the state.

Another main focus of restorative justice is the concept of the community and its ability to empower its members to become involved in justice projects that promote healthy, crime free communities. The discourse on restorative justice reveals that the community is pivotal in the process of restorative justice projects in comparison to a state run justice system that limits opportunity for individuals affected most by criminal actions to be heard.⁴

Some restorative justice projects that will be discussed in this thesis, such as sentencing circles⁵ and healing circles⁶ are often seen as a better way to achieve justice in comparison to the mainstream criminal justice system as they promote equality and consensus. For example, the literature on sentencing circles discusses the idea that community members and justice professionals decide on an appropriate sentence for an accused within an informal setting where everyone is encouraged to participate.⁷ With everyone given the opportunity to express feelings and thoughts, an outcome can be reached through consensus where the community can work towards common goals.

Similarly, in Hollow Water Manitoba, a few social service providers became concerned about the community youth who were exhibiting many social problems as a result of being sexually victimized in the home.⁸ Because of these problems affecting the

⁴ M. Jackson, "In Search in the Pathways To Justice: Alternative Dispute Resolution In Aboriginal Communities" (1992) 26 *U.B.C Law Review* at 147.

⁵ *R.v.Moses* (1992) 71 C.C.C. (3d) 347 (Yukon Terr. Ct.)

⁶ Native Counselling Services of Alberta. "A Cost-benefit Analysis of Hollow Water's Circle Healing Process. Online :<http://www.sgc.gc.ca>. on May 21 2003.

⁷ J.V. Roberts & C. LaPrairie, "Sentencing Circles: Some Unanswered Questions" (1997) 39 *Criminal Law Quarterly* at 70.

⁸ R.G. Green, *Justice in Aboriginal Communities Sentencing Alternatives*, (Saskatoon: Purich Publishing, 1998) at 85.

youth the Community Holistic Circle Healing Program (CHCH) was created to provide healing and aid for youth and families.⁹ The program was also created as many community members were disappointed with the mainstream criminal justice system that removed people from communities and disintegrated the role of community in providing healing for victims and offenders.¹⁰

One of the main models for understanding the experiences of Aboriginal peoples and the push for restorative justice is through the lens of colonization and subjugation.¹¹ This lens focuses on the belief that Aboriginal people have the right to control their own destiny, including control over justice processes in Aboriginal communities. This focus on reform stems from the belief that Aboriginal people have been denied their rights to practice their culture and exercise control over their land through such measures of colonization, and oppression. For example, Paula Mallea states that, historically, the Canadian reserve system was similar to an apartheid system where people were removed from their traditional way of life, such as fishing and hunting grounds, and placed on small plots of land.¹² Other oppressive aspects of the *Indian Act* established in 1876, were laws where Aboriginals could not leave the reserve except under certain conditions.¹³ Children were removed from families and placed in residential schools.¹⁴ Also the potlatch and other cultural practices were prohibited. These policies were in

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ D.Clairmont, & Linden,R., "Developing & Evaluating Justice Projects in Aboriginal Communities: A Review of the Literature, 1998 at 32. Online: www.sgc.ca/publications/abor_corrections/199805_e.pdf. Here this term was used to describe the work of Michael Jackson in his paper, "In Search of the Pathways to Justice: Alternative Dispute Resolution in Aboriginal Communities" 26 (1992) *U.B.C Law Review* (Special Edition: Aboriginal Justice), where alternatives to the mainstream system focuses on self-government and self- determination as the mainstream system has been a failure for aboriginal people. Here the push for alternative measures is the result of colonization and subjugation.

¹² *Supra* note 2 at 2.

¹³ *Ibid.*

¹⁴ *Ibid.*

place to eradicate the culture of Aboriginal people as it was considered uncivilized and it was thought that in order to reduce cultural expression by Aboriginal people it was better to take children away and place them in residential schools to be socialized according to the early European standards of civilization. In regards to the economic sphere, if Aboriginal people became skilled at farming and competed well with their Euro-Canadian counterparts, regulations were passed to limit their opportunity to pursue the goals of successful farming.¹⁵ As a result the early Europeans excelled economically while poverty and loss of culture and social control became apparent among Aboriginal people.

The colonization/subjugation perspective views the need for restorative justice as a result of ignoring the importance that Aboriginal cultures and traditions play in social order. As a result, individuals within this perspective call for reforms that take into consideration the rights of Aboriginals to practice their own community controlled justice measures within a self-government framework.

Although this approach takes into consideration community and the ideals of establishing a communitarian focus on justice where individuals are empowered, it leaves out the consideration of many social, economic and political realities that affect communities and their ability to make projects work. Similarly, it is erroneous to assume that once the community is involved in justice projects the problems with the mainstream system are alleviated. For example, LaPrairie states, "The roseate visions of small

¹⁵ *Ibid.*

town/rural life or traditional aboriginal life often obscure the contemporary reality of change and the emergence of groups with competing interests in communities.”¹⁶

To critique restorative justice, this thesis will explore the reality that achieving equality and consensus through restorative justice programs such as circle sentencing and healing circles is challenging. For example, conflict theory stipulates communities are not always focused on equality and consensus as there are social, economic and political factors that create power differentials that pull people apart from a communitarian goal. Similarly, many Aboriginal people and communities suffer from limited social, economic, political resources, cultural awareness and social control measures to meet the goals of restorative justice projects such as sentencing and healing circles.

Currently in Aboriginal communities the implementation of restorative justice projects is questionable in light of governmental pressures to organize programs if the necessary motivation, funding, skilled staff, cultural awareness, and resources are lacking. For example, Judge Barry Stuart, a proponent of restorative justice projects, has stated that many communities do not have the ability to provide sufficient finances and personnel to sustain the efforts of restorative justice.¹⁷ Without adequate resources due to structural marginalization as a result of historical practices of segregation, repressive state policies and forced acculturation, it is unlikely that all projects can be implemented successfully.

In light of this, the main question of this thesis is: is it possible for Aboriginal communities to meet the claims set out within a restorative justice framework without

¹⁶ C.LaPrairie, “The “new” justice: Some implications for Aboriginal communities” (1998) 40 *Canadian Journal of Criminology* at 69.

¹⁷ B.Stuart, *Building Community Justice Partnerships: Community Peacemaking Circles* (Ottawa: Department of Justice, 1997) at 93.

taking into consideration the many social, economic and political factors that have contributed to social dysfunction, power imbalances, high crime rates in communities and loss of culture and social control?¹⁸

In the course of examining this question, several subsidiary questions will be discussed. For example, does it appear that communities have the stability, motivation and resources to rehabilitate, and reintegrate offenders back into the community? Are victims' voices heard in the process? Is there equal decision making power among all members in the community involved in restorative justice projects? Do restorative justice projects create a system that is similar to the dominant criminal justice system, which creates boundaries and better access to justice for those who have high economic status?

Significance of Research

Like many reforms to the criminal justice system, caution should be exercised and continued research pursued. In recent times it appears that restorative justice has been seen to be the answer to the pitfalls of the system. "Often it is used as a catchall phrase to refer to any practice which does not look like the mainstream practice of the administration of justice...."¹⁹ This cautious statement cannot be overstated in Aboriginal communities who are taking part in the restorative justice movement. The premise of restorative justice requires that communities that are economically, socially and politically disadvantaged are to acquire the necessary agency to motivate and implement programs that restores them to health and balance. This is a significant

¹⁸ The many questions from this thesis stem from the work of C.LaPrairie and J.Dickson-Gilmore from their book, *Will the Circle be Unbroken? Aboriginal Communities, Restorative Justice, and the Realities of Conflict and Change*. (Manuscript under contract with University of Toronto Press, 2003-2004).

¹⁹ *Supra* note 1 at 1

challenge for community members to achieve, thus it is important to investigate the many difficulties facing Aboriginal communities.

For instance, under the premise of conflict theory communities are not based on equality and consensus, but social, economic and political factors pull people apart where different interests and power imbalances are developed. In the case of Aboriginal communities, many historical pressures have contributed to changes in communities, and a weakening of the communitarian agenda that is representative in restorative justice practices.

Overview of Chapters

In the second chapter, many of the claims and theoretical positions of restorative justice will be discussed in contrast to the mainstream criminal justice system. Here the focus is on understanding the push for restorative justice projects in comparison to a retributive based justice system. Unlike retributive justice, restorative justice through such measures as circle sentencing, and healing circles focuses on equality, consensus, victim and offender satisfaction, rehabilitation, and community empowerment. The main impetus for restorative justice is so that community members, victims and offenders can take a greater role in the process, as in many cases the mainstream system focuses on punishment without the involvement of concerned people.

The third chapter of this thesis will explore the challenges that Aboriginal communities face in achieving the goals of restorative justice through an examination of conflict theory, social, economic and political challenges. These challenges to Aboriginal communities can often be explained through colonization, marginalization, and loss of culture and social control. Here the main argument is that these changes have affected

current Aboriginal communities to the point where communities are not focused on the same goals through consensus and peacemaking. As conflict theory demonstrates communities are not centered on communitarian goals but examines elements that pull communities apart.

Similarly, through changes such as colonization, marginalization, and mainstream ideals many communities have lost touch with their culture and social control measures in dealing with criminal activity. This can challenge restorative justice if many communities have lost touch with their communitarian approach.

The fourth chapter of this thesis addresses the opposing explanatory models such as the subjugation and colonization perspective and social/economic marginalization that deal with achieving justice for Aboriginal communities. Individuals from a subjugation and colonization perspective look at the historical policies of oppression and poverty, before and after the implementation of the *Indian Act*,²⁰ that contribute to the over-representation²¹ problem through such things as sentencing in the criminal justice system.²² According to this perspective racism and lack of understanding of differences in society have contributed to over-representation in the criminal justice system when Aboriginal offenders come before judges and are sentenced to imprisonment.

The response by individuals holding a colonization/subjugation perspective support restorative justice programs that encourage participation of community members. Here it is often understood that communities are better at dealing with criminal activity.

²⁰ *Indian Act, R.S.C. 1985.*

²¹ C. LaPrairie, "Aboriginal Over-representation in the criminal justice system: A tale of nine Cities" (2002) 44 *Canadian Journal of Criminology* at 202. The definition of over-representation, for the discussion of the subjugation/colonization and structural analysis, is the phenomenon where more aboriginal people are incarcerated or represented in criminal justice processes compared to their proportion of the population.

However, it will be shown that the perspective that looks at social/economic marginalization calls into question the assumption that racism and culture conflict explains over-representation alone.

It will be argued that a broader approach that takes into consideration social and economic factors that affect communities is needed. Social and economic factors such as social control measures and culture have been lost due to colonization and marginalization which challenge the likelihood of achieving successful restorative justice projects. Also there are limited resources for restorative justice projects and individuals living in poverty experience frustration and boredom through lack of education and employment.

The concerns about the Aboriginal peoples' right to restorative justice programs have contributed to the calls for reforming the system. This next chapter will examine restorative justice projects in light of socio-economic and political factors. Here restorative/alternative justice projects will be investigated by looking at victim and offender satisfaction, power imbalances, community, social, economic and political factors, recidivism rates, and issues of rights and equality with victims and offenders to see if they are a viable solution for communities facing many social problems. A look at different restorative justice projects such as sentencing circles, and healing circles will be discussed to see whether or not they are a viable solution with communities who are economically and socially disadvantaged.

²² Stenning, P., & J.V. Roberts, "Empty Promises: Parliament, The Supreme court, and the Sentencing of Aboriginal Offenders" (2001) 64 *Saskatchewan Law Review* at 142.

The final chapter of this thesis summarizes the areas of contention discussed and explores opportunities for reaching the goals of restorative justice projects in Aboriginal communities.

Chapter two: Understanding the Meaning of Restorative Justice and Reforms to the Criminal Justice System in Contemporary Aboriginal Communities

The main paradigm of criminal justice in Canada is viewed as adversarial/retributive, where punishment is the ultimate goal through the finding of an offender's guilt. However, commentators such as Monture-Okanee & Turpel(1992), Stuart(1991), and Jackson(1992) express dissatisfaction with the way in which the state practices law and order against Aboriginal offenders and their communities. It is argued that this system of justice has been imposed on Aboriginal people and goes against their cultural traditions and communitarian approach to justice. In this situation, it is often argued that Aboriginal people need to practice their own culture, beliefs, and forms of social control in order to restore a sense of justice within the community. Also the basis of Aboriginal controlled justice measures is often expressed within a restorative justice framework.²³

In the following discussion an examination of the meaning of restorative justice in comparison to retributive justice will highlight a main impetus for returning to a more restorative justice approach that focuses on relationships and improving communities through criminal justice conflicts.²⁴ Here a comparison points out the similarities and differences of the two main concepts of justice and highlights the reality that restorative justice is fundamentally concerned with restoring social relationships through consensus,

²³ M. Jackson, "In Search of the Pathways to Justice: Alternative Dispute Resolution in Aboriginal Communities (1992) *U.B.C Law Review* at 160

social equality among individuals and strengthening communities to deal with conflict and reduce the contributing factors that lead to conflict and confrontation with the criminal justice system.²⁵ Harm that is created affects not only victims but also the community as a sense of safety is weakened as well as trust and respect for members of the community.²⁶ Similarly, if a community experiences problems of alcohol, physical, and sexual abuse there is a need for community empowerment to deal with these issues.

There will also be a discussion on the criminal justice reforms that are occurring such as healing circles, and sentencing circles to show the relationship between restorative justice ideals and the projects taking place in Aboriginal communities as steps in the healing process.

One similarity between restorative justice and retributive justice is the idea that they both attempt to restore safety and social control; however there are differences in the way that these goals are achieved.²⁷ For example, through punishing wrongdoers, the goal of retributive justice is to reduce recidivism by deterring, rehabilitating, incarcerating, and denouncing their actions to eliminate future wrongdoings against society. However, evidence suggests that the goal of reducing re-offending cannot be reached through punishment, as Braithwaite and Pettit state,

...positive criminology accumulated masses of evidence testifying to the failures of such utilitarian doctrines. All manner of rehabilitation programmes for offenders were tried without any producing consistent evidence that they reduce re-offending rates. The deterrence literature

²⁴ *Supra.* note 1 at 30.

²⁵ *Ibid.* at 26

²⁶ *Ibid.* at 31.

²⁷ *Ibid.* at 31.

also failed to produce the expected evidence that more police, more prisons, and more certain and severe punishment made a significant difference to the crime rate.²⁸

With a growing dissatisfaction and evidence suggesting that the mainstream criminal justice system's measures to reduce recidivism through punishment do not work, many individuals have turned to the concept of restorative justice. Also, as the mainstream system implements these goals of punishment there is a sentiment expressed by some commentators and Aboriginal people that the system does not work.²⁹ The solution put forward is the idea that communities should take over justice measures.³⁰ Here within the context of Aboriginal communities there are many assumptions that they have always practiced customary and local justice and have currently developed restorative justice programs that address the needs of the offender, the victims of crime and the community.

Similarly, unlike retributive justice that is focused on the past wrongs by establishing guilt in the offender, restorative justice focuses on the future and aiming to reduce future wrongs by transforming behaviour.³¹ Here the concept of retributive justice and punishment removes the offender from the community and isolates him or her from restoring relationships with community members and adequately reintegrating the offender into the community. This sentiment regarding the mainstream retributive justice system is reflected in a comment made by Harry Morin, a Cree from Sandy Bay Saskatchewan:

Like a lot of times, to me personally, the system is right
now just a punishing system, it's punishing. They're not
looking at what's causing these problems, they're looking

²⁸ J. Braithwaite & Pettit, P., *Not Just Deserts: A Republican Theory of Criminal Justice* (Oxford: Clarendon Press, 1990) at 3. quoted in...J.Lewellyn & R.Howse, *Restorative Justice-A Conceptual Framework*. (Ottawa: Law Commission of Canada, Paper, 1998) online: www.lcc.gc.ca/en. at 31.

²⁹ *Supra* note 16 at 62.

³⁰ *Ibid.* at 63.

³¹ *Supra* note 1 at 35-36.

at, hey, we have to punish this guy for what he's done, basically, that's all it's at. And a lot of these guys go to jail, and they sit around this ten-by-twelve cell or whatever size they may be, and they sit there and think. And they get very bitter. [The offender's] bitter at the people that put him in there, the victim that reported him. He's mad at the justice system, he's mad at the RCMP. Here in a sentencing circle, we make sure somebody tells the offender that we're here to help, for support and not only that, if recommendations are made that he takes some kind of programming to better himself back in society, he's not only promising to the magistrate or the probation officer, he's promising it to his own community. And then he knows he's got all that support.³²

In this push for more control over justice measures that are reflective of restoring individuals in the community is a focus on the idea that justice projects are more in line with traditional cultural practices. For example, many authors have articulated charts showing the differences between justice with Aboriginal people and justice pursued through the mainstream criminal justice system. Griffiths and Hamilton³³ articulate these contrasts:

Anglo-Canadian Law and Justice (Retributive model)	Aboriginal Law and Justice (Restorative Justice)
Crime is a violation of the state.	Crime is a violation of one person by another.
The focus is on establishing blame or guilt.	The focus is on problem solving and restoration of harmony
Justice is defined by intent and process.	Dialogue and process negotiation are normative. Restitution and reconciliation are used as a means of restoration.
Community does not play a leading role.	The community acts as a facilitator in the restorative process.
Action revolves around the offender, Accountability of the offender is put in terms of punishment.	The offender is impressed with his/ her action on the total order.

³² R.G.Green, *Justice in Aboriginal Communities Sentencing Alternatives*, (Saskatchewan: Purich Publishing, 1998) at 37.

³³ C. T. Griffiths & R. Hamilton, "Sanctioning and Healing: Restorative Justice in Canadian Aboriginal Communities" in B.Galaway and J.Hudson, eds., *Restorative Justice: International Perspective* (New York: Kugler Publications and Criminal Justice Press) at 181.

Offenses are strictly legal and devoid of moral, social, political, and economic considerations. Past behaviour is important.	The holistic context of an offense is taken into consideration, including the holistic context of amoral, social economic, political and religious, and cosmic considerations.
Social stigma of criminal behaviour is almost un-removable.	Stigma of offense is removable through conformity.
Remorse, restitution and forgiveness are not important factors.	Remorse, repentance and forgiveness are important factors
Offenders play a passive role depending on proxy professionals.	Offenders take an active role in the restorative process.

This chart discusses the relationship and responsibility shared by community, victim and offenders to work together to restore relationships and aid in healing victims and offenders. The offender within a restorative justice system is encouraged to take responsibility and express remorse when confronted by community members. This can be an arduous journey for offenders as they are held accountable for breaking the norms and social rules of the community. The shame that an individual may feel within a community context may not be experienced through the mainstream criminal justice system where offenders are confronted by ‘strangers’ and are unlikely to feel remorse towards an abstract state.

Restorative justice is also creative through problem solving techniques in the sense that there can be many possible solutions to deal with crime and conflict through an involvement with community members working towards the best possible solution through consensus and addressing the causes of the problem.³⁴ This is unlike retributive justice practiced by the mainstream system of justice where the focus is on individualism and protecting the interests of individuals through the charging and convicting of offenders under the *Criminal Code*. Here there is a set body of rules that, if not followed,

³⁴ *Supra* note 1 at 24

various forms of punishment such as incarceration can be meted out by the state. Retributive justice is not concerned with restoring relationships between victims, offenders and communities as in most cases the offender is isolated from his or her community and given little chance to acknowledge their wrongdoing and make amends. In a courtroom setting where lawyers are the active members in the process, victims and communities are relegated to the sidelines in the process of achieving justice.

Restorative justice works towards dealing with the causes and outcomes of conflict between people on a multi-dimensional scale. This is developed through addressing social concerns, rather than strictly legal, of the community and transforming behaviour so that stronger and healthier communities are the result. Often conflict that results in violence is the 'tip of the iceberg' of much larger issues within an individual's experiences, such as power imbalances, alcohol abuse, childhood trauma, and family dysfunction.³⁵ Similarly, the definition put forth by Marshall supports the view that restorative justice is context dependent as he states:

Restorative justice is a process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future.³⁶

This definition offers the opportunity for restorative justice to be a flexible concept that applies on a variety of levels. Braithwaite, states that, "...restorative justice is about restoring victims, restoring offenders and restoring communities."³⁷ Also according to

³⁵ *Ibid.*

³⁶ Marshall quoted in Braithwaite. J. Braithwaite *Restorative Justice: Assessing an Immodest Theory and a Pessimistic Theory*. Review Essay Prepared for the University of Toronto Law Course, Restorative Justice: Theory and Practice in Criminal Law and Business Regulation. Online: <http://www.aic.gov.au/> at 3.

³⁷ *Ibid.*

Braithwaite restorative justice responds to any criminal action that affects victims, offenders and communities.³⁸

A similar characteristic between restorative and retributive justice is that there is a commitment to re-establishing or establishing social equality between the wrongdoer and the sufferer of wrong.³⁹ Retributive justice is often associated with the concept of an 'eye for an eye,' and takes on the view that offenders should be punished for actions committed against the state. Here actions committed against the state are considered resolved through punishing the wrongdoer and re-establishing equality.⁴⁰ Apparently, with both parties suffering a loss they are on equal footing.

In contrast to this perception of achieving equality, restorative justice looks at the context of harm and engenders social dialogue among the parties including victim(s) offender(s) and the community to deal with the needs of the parties involved to ensure restoration.⁴¹ Similarly, its focus on caring ensures that the voices of victims and offenders are heard where the needs of both parties are equally met. Through meeting the needs of offenders and victims there is also the ideal of reintegrating them back into the community.

Reforms to the criminal justice system: Circle Sentencing

The implementation of sentencing circles has come into practice to combat the dissatisfaction with the mainstream system of criminal justice and works towards improving communities and restoring them to health and balance. Sentencing Circles are a fairly recent practice formalized within Aboriginal communities by Judge Barry Stuart

³⁸ *Ibid.*

³⁹ *Supra* note 1 at 31.

⁴⁰ *Ibid*

⁴¹ *Ibid*

in the 1991, *R.v.Moses*⁴² decision. In this case, that took place in Na-cho Ny'ak Dun First Nation of Mayo, Yukon, it was decided that Moses' conflict with the criminal justice system was a revolving door of despair and that something needed to be done in order to improve his life as well as those affected by his actions in the community.⁴³ Moses came from a family fraught with alcohol abuse, poverty and abuse where he ended up in foster homes, group homes and juvenile centres.⁴⁴ In these settings he experienced sexual and physical abuse and was limited in his ability to obtain any formal education. Moses functions at a grade six educational level and this is related to his limited ability in achieving gainful employment.⁴⁵

Without adequate personal and financial resources Moses found himself stuck in a lifestyle that infringed on his ability to stay out of prison. Once released from custody, Moses found himself back into an unstable existence where substance abuse, poverty led him into a criminal lifestyle. His record of 43 convictions demonstrates that he often committed offences while impaired under the influences of drugs and alcohol and supports his addictions through criminal actions.⁴⁶

Judge Stuart noted that the mainstream criminal justice system failed Moses, for all his experiences in and out of prison he came back into the community an angrier and more alcohol and drug dependant than before.⁴⁷ After being released from jail, Moses came back into the community and was more dangerous to himself and the community. Similarly, the criminal justice system failed to rehabilitate Moses and help make him a contributing member of the community.

⁴² *R.v.Moses* (1992), 71 C.C.C. (3d) 347

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

It was decided in this case that prison was not rehabilitating Moses and meeting the needs of the community. Moses was isolated from his family and other community members and there was a need for support and restoration of relationships in order to reduce Moses' alcohol and drug dependencies, and violence that contributed to his over-involvement with the criminal justice system. It was decided that a sentencing circle would be useful in gaining adequate collaboration from the community, family members, the Chief, probation officer and Crown Counsel to help Moses reduce his criminal behaviour.⁴⁸

The purpose of sentencing circles have been described by LaPrairie as a phenomenon that takes into account the social context of crime and disorder, empowers community members, and ensures that social rather than legal goals are met. Similarly, sentencing circles and the process have been developed to break down many barriers that have blocked Aboriginal people from participating adequately within justice procedures. For instance, the setting of the sentencing hearing is unlike the formal criminal justice system where the judge in a black robe is seated above the members of the court and the defence and crown attorney facing the judge have their backs to the rest of the people in the courtroom. In order to break down the barriers, sentencing circles have been set up so that they can take place in community centres or band halls.⁴⁹ Also depending on the number of community members involved in the process there may be two circles set up including an inner and outer circle. The inner circle contains people directly involved in the discussions and wrongdoing committed by the offender, and the outer circle is for

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

those people who want to observe and speak when called upon.⁵⁰ The circle always includes a judge, Crown and defence counsel, court recorder, community members and the offender. Also a probation officer, a court worker, youth worker, police officers, social workers, victim and family members are involved. In some instances, prior to a sentencing hearing some developmental work may take place by the judge and community workers.⁵¹

The procedures for most sentencing circle hearings are as follows: Participants are welcomed and introduced, the judge and counsel then make opening remarks about the facts of the offender and the offence, the discussion is then open to the public present where in theory everyone has a chance to speak. Here the discussion can focus on the underlying causes of crime contributing to an individual's behaviour, the impact of the crime on the victim and community, and the details of potential sentencing options.⁵² To ensure the informal process is maintained there are no rules regulating the statements that are made, no sworn testimony and cross-examination of the participants. Accordingly, this environment creates empowerment for the victim and offender to speak and be heard without interference from the Crown and Defence Counsel.

As the discussion evolves an appropriate sentence may emerge that is, in theory, supposed to reflect a consensus after the judge sets out the range of sentences available under the *Criminal Code*. In the end the judge could reject, accept or modify the recommendations of the circle proceedings.⁵³

⁴⁹ J.V. Roberts & C. LaPrairie, "Sentencing Circles: Some Unanswered Questions" (1997) 39 *Criminal Law Quarterly* 69 at 70.

⁵⁰ *Ibid.* at 71.

⁵¹ *Ibid.*

⁵² *Ibid.*

⁵³ *Ibid.*

Through circle sentencing procedures there is the desire for community participation and shared responsibility to find creative solutions that evolve in a consensual manner. Here there is the hope that a plan is established for reintegrating and rehabilitating the accused and ensuring the needs of victims are met. The individuals involved in a circle sentencing hearing often recognize that isolating offenders from the community does not aid in mending broken relationships and reducing criminal behaviour. Also the community involvement contributes to a sense of empowerment as community members can come together and discuss issues that affect them.

An example of community empowerment is shown through the community of Hollow Water located 190 kilometres northeast of Winnipeg with an on-reserve population of 490, where there were many problems with the young people who were troubled with substance abuse, vandalism, truancy and suicide.⁵⁴ The problems associated with these youth contributed to an understanding of home life factors affecting the well being of these young people where inter-generational sexual abuse was identified as the root problem.⁵⁵ In the mid-eighties, the Community Holistic Circle Healing Program (CHCH) began where it was estimated that 75 percent of the population of Hollow Water are victims of sexual abuse, and 35 percent are “victimizers”.⁵⁶

Here the development of this project was to combat not only the issues of sexual abuse but the growing dissatisfaction with the mainstream system of justice. For example, Berma Bushie, the co-ordinator of the CHCH program expressed frustration with the mainstream criminal justice system and child welfare systems where victims

⁵⁴ R.G. Green, *Justice in Aboriginal Communities Sentencing Alternatives* (Saskatchewan: Purich Publishing, 1998) at 85.

⁵⁵ *Ibid.* at 86.

⁵⁶ *Ibid.*

testified against their aggressors and in most cases were removed from the home and the community. Also offenders received minimal rehabilitation and incarceration was inevitable.⁵⁷

The process of the community justice project is characterized by disclosure of sexual abuse by a child followed by a thirteen step process where an assessment team provides support and treatment for victims, victimizers and their families. Ross Gordon Green states the thirteen steps, as:

(1) effecting disclosure, (2) protecting the child/victim, (3) confronting the victimizer, (4) assisting the victimizer's spouse, (5) assisting the family or families directly affected and the community, (6) calling together the assessment team, (7) getting the victimizer to admit and accept responsibility, (8) preparing the victimizer, (9) preparing all family or families, (11) organizing a special gathering, (12) implementing the healing contract, and (13) conducting the cleansing ceremony.⁵⁸

Once disclosure is given by the victim the assessment team is divided into support teams for the victim, victimizer, and family. After ensuring the safety of the victim, the accused is confronted by a member of an assessment team. Here the member of the assessment team encourages the accused to take responsibility for his or her actions.⁵⁹

As soon as a guilty plea has been given by the offender, showing that he or she takes responsibility for his or her actions, members of the assessment team ask the court to adjourn sentencing for a least four months to allow treatment with the offender to begin. Within this time period offenders are expected to participate in four circles. The offender is to disclose his or her wrongdoing and details of offence to the assessment team. In the second circle, the victim is able to express to the offender how the abuse has

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

affected his or her life. In the third circle the offender describes his actions to his family. Finally the offender faces his community in a form of a circle sentencing hearing.⁶⁰

The first sentencing circle at Hollow Water occurred in 1993 where two parents were responsible for serious sexual assaults against their children.⁶¹ If these offenders were processed in the mainstream criminal justice system their sentence would probably consist of eight to ten years in prison⁶². The assessment team expressed concern that incarceration does not accomplish much in terms of rehabilitation and reduction of recidivism. So the goals and responsibilities of healing these offenders were turned over into the hands of the community through a circle sentencing hearing. Over a fourteen hour day, the discussion went around the circle a total of four times.⁶³ During the first circle people discussed why they were there, during the second, participants were able to speak to the victims. The third and fourth circles focused on the effects of the crime and on restoring balance to the offenders.⁶⁴ In the end there was a consensus for the most part that a prison sentence would be counterproductive and the offenders received a three year suspended sentence with probation containing a condition that each offender follows the directions of the CHCH assessment team.⁶⁵ A beneficial outcome of this circle contributed to approximately one hundred Hollow Water community members to disclose their sexual offending behaviour.⁶⁶

In this chapter the goal was to discuss the theory of restorative justice and how it has been operationalized in practice through healing circles and sentencing circles. It is

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

⁶¹ *Ibid.* at 88.

⁶² *Ibid.*

⁶³ *Ibid.* at 89.

⁶⁴ *Ibid.*

⁶⁵ *Ibid.* 90.

felt by many that community justice as opposed to state justice works towards re-establishing personal relationships and promotes the dialogue and sharing of responsibility to restore relationships through community empowerment to deal with social problems. The next chapter looks at Aboriginal communities and the realities that communities experience through social, economic, and political imbalances that challenge the likelihood of achieving the ideals of community restorative justice projects.

⁶⁶ *Ibid.*

Chapter three: Understanding the complexities of Aboriginal communities within a social, economic and political construction and the implications for reforming the criminal justice within a restorative justice framework

In chapter two it was discussed that the adversarial justice system has been imposed on Aboriginal people and goes against their culture and wishes for restorative justice. Here proponents of restorative justice propose that Aboriginal communities should have the right to practice their own justice measures through equality, communication, and consensus to promote harmony and healing. However, this chapter will examine the challenges of attaining the goals of Aboriginal restorative justice projects through the sociological lens of conflict theory. Conflict theory is useful in discussing how communities have changed socially, politically and economically where many communities through colonization have been marginalized by mainstream society and influenced by individualism and capitalism, and forced to adopt mainstream cultural expectations. In this process of change, many cultures and social control measures have diminished over time making it difficult to deter criminal activity in restorative justice projects.

Similarly, in discussing changes to community through social, political and economic means communities engender many inequalities and differences that pull people apart. These changes create social, economic and political inequalities where community is made up of people with different personal and financial resources, social

standing and political power. It is my contention that it is difficult to meet the ideals of restorative justice if there are power imbalances and different interests expressed weakening the opportunity for consensus building and equalization of resources.

The social, economic and political characteristics of Aboriginal people will be shown through an analysis of Census material describing the broad characteristics of Aboriginals across Canada and then on a smaller scale through Aboriginal experiences on and off reserve.⁶⁷ This material will highlight the challenges and inequalities that Aboriginal people experience through employment, social assistance, education, and single female parented homes compared to non-Aboriginals. Here an analysis is important to examine the relationship between the affects of poverty, unemployment, lack of education, and single female parent homes on individuals as frustration, boredom, substance abuse, violence can often lead to a criminal lifestyle.

An understanding of community in this light challenges the many notions of community as represented in restorative justice literature. With different interests and power imbalances, loss of culture and social control, and people suffering from low socio-economic status leading to boredom and conflict, the goals of restorative justice can be difficult to meet, this is especially so if there is limited consensual relationships and commitment to allocating resources for improving the conditions of all people living in the community.

The Theoretical Underpinnings of Community

⁶⁷ 2001 Census: Analysis Series, *Aboriginal peoples of Canada: A demographic profile*, online: www12.statcan.ca/english/census01/products/analytic/companion/abor/pdf/96F0030XIE2001007.pdf, on February 5, 2003. Canadian Centre for Justice Statistics Profile Series, *Aboriginal Peoples in Canada*, online: www.statcan.ca/english/freepub/85F0033MIE01001.pdf.

Persistent in the social science literature on community are debates on defining community and what it means to the people involved. In order to have an understanding of community especially in conceptualizing the current reality of many Aboriginal people living on and off reserves a look at Stoneall's book entitled *Country Life, City Life* is useful.⁶⁸ She discusses the idea that there are so many definitions of community and that a single definition to explain the many dynamics of community is inadequate. Similarly, for some researchers the absence of one element of a definition of community signifies the likelihood that community does not exist.⁶⁹ In this case, Stoneall recommends that definitions of community be informed by a theoretical approach as no one definition will capture the essence of community. Three theories that will be discussed here to explain the concept of community in relation to Aboriginal communities and restorative justice projects are structural functionalism, conflict theory and social-psychological.⁷⁰ The first two theories encompass the macro perspective of society where, a micro social psychological perspective discusses the relationship between individuals and society. The macro-community comprises the entire Aboriginal population within Canada "defined by broad pan-Indian cultural characteristics and the shared interests that characterize the Aboriginal experience writ large,...and one which is largely a non-Aboriginal construction."⁷¹

⁶⁸ L. Stoneall, *Country Life, City Life Five Theories of Community* (New York: Praeger, 1983) at 2.

⁶⁹ *Ibid.*

⁷⁰ *Ibid* at 10

⁷¹ J. Dickson-Gilmore & LaPrairie, C., *Will the Circle be Unbroken? Aboriginal Communities, Restorative Justice and the Realities of Conflict and Change*. (Manuscript under contract with University of Toronto Press, 2003-2004) at 25.

The micro communities are usually rural areas comprising people living on reservations who share “a particular language and culture”.⁷² These micro-communities range in geographic size and population and within these micro-communities there are smaller communities of family, friends and concerned members surrounding issues of conflict and restorative justice projects.⁷³

Theoretical explanations from a sociological outlook help to inform the current state and changes of Aboriginal communities. Due to colonization and contact with Canadian society, Aboriginal communities have been marginalized from the mainstream society. As a result of these social and economic influences power imbalances, social problems, and crime are prevalent. Similarly, Aboriginal people who have left reserves and moved to city locations are often suffering from low socio-economic status. For Aboriginals living in cities the hopes of a better life are diminished without adequate education or employment skills to compete in the marketplace. The explanations of changes in community life from a structural functionalist, conflict and social psychological perspective are useful in understanding the likelihood of viable restorative justice projects.

The researcher, Toennies, who developed the concepts of *Gemeinschaft* and *Gesellschaft*, contributed to the expansion of the concept of community by influencing the work of classical theorists such as structural functionalists and conflict theorists.⁷⁴ Toennies examined the changes in society from one that was more communal to a culture based on individualism.⁷⁵ The term *Gemeinschaft* meant that people lived in close

⁷² *Ibid.*

⁷³ *Ibid.*

⁷⁴ Stoneall, *Supra* note 68 at 8.

⁷⁵ *Ibid.*

personal ties where people had similar goals and co-operated with each other. With the influences of industrialization, mobility and urban society the idea of Gesellschaft became the polar opposite of the Gemeinschaft and community life characterized by family and sense of caring. The Gesellschaft defined people as relating to each other in “impersonal, cold, calculating ways, out to get whatever they can for themselves.”⁷⁶ The focus is on competition and individualism. A formal system of governance such as law is the focus instead of family ties, morals, and customs that regulate behaviour. Although these definitions of community are extreme they highlight some important changes in society characterized by rural community living to urbanization and individualism.

Emile Durkheim, who was a structural functionalist, developed the analysis of communities as systems of institutions held together by shared values and examined how these communities stayed together.⁷⁷ Durkheim desired an ordered society where he emphasized solidarity and moral integration and “treated departures from order and equilibrium as pathological.”⁷⁸ In Durkheim’s book, *The Division of Labour in Society*, he discussed how divided labour is functional for society where interdependency among workers on differing levels of the socio-economic ladder work together for finished products. Similarly, Durkheim was concerned with the breakdown of morals, so in his book *Elementary forms of Religious life*, he constructed the argument that religion was necessary to maintain values and norms and not upset the functional system of economic exchange.⁷⁹ Thus the main emphasis of a structural functionalist is to examine how communities stay together through consensus and shared values and norms.

⁷⁶ *Ibid.* at 9

⁷⁷ *Ibid*

⁷⁸ *Ibid* at 107.

⁷⁹ *Ibid.*

In contrast to this view is conflict theory which relates mostly to a Marxist view of society. This theoretical approach criticizes the structural functionalist view of society and states that communities do not work together for common interests and questions the elements that pull communities apart. In fact, communities are comprised of different class and power structures where social and economic inequalities are features of capitalist society. Therefore, conflict theorists do not see society divided into different parts that serve a function for the common good but emphasize conflict characterized by different interests and oppression of some groups over others.⁸⁰

As a result of the destructive nature of historical attempts of assimilating, Christianizing, and segregating Aboriginal people from the mainstream society, many Aboriginal people have lost touch with their traditional culture, political, and economic structures. The aftermath of colonization can be seen in the dependant nature of many of its members. As the Canadian state contributed to the disappearance of economic self-sufficiency and the basic requirements for survival, governments compensated by giving financial support such as social assistance and provided limited opportunities for economic self-sufficiency.⁸¹ Boldt offers confirmation of Aboriginal peoples' reliance and dependence on the Canadian state by stating that approximately 60 to 70 per cent of Aboriginals are chronically unemployed and survive on social assistance.⁸²

Similarly, research completed by Hull into the socio-economic position of Aboriginal peoples in Manitoba discusses how dependence on social assistance among the on-reserve population has been increasing over the years. The proportion of the on-

⁸⁰ *Ibid* at 11.

⁸¹ M.Boldt, *Surviving As Indians The Challenge of Self- Government* (Toronto: University of Toronto Press, 1993) at 178.

⁸² *Ibid*.

reserve population that is dependent on social assistance has fluctuated between 50% and 60%.⁸³ According to Hull, 31% of Aboriginal income comes from government transfer payments compared to 15% of the income of the total population of Manitoba. Also the dependence on social assistance for Aboriginals living on reserves is higher than for those people living off the reserve.⁸⁴

An important factor to take into consideration is that one must not assume that the entire Canadian Aboriginal population is living in poverty.⁸⁵ This view held by many Canadians, can often perpetuate myths and stereotypes of Aboriginal people as welfare dependent and occupy the same socio-economic disadvantaged position.⁸⁶ According to Satzewich and Wotherspoon, "the Canadian Aboriginal population is very diverse and, like non-Aboriginal people, exists on various levels of the socio-economic ladder."⁸⁷

Historically, some Aboriginal communities had values of reciprocity and redistribution of resources as reflective of a *Gemeinschaft* setting. With the influence of the *Indian Act*, and the development of influential politicians, bureaucrats, very few entrepreneurs and a large group of lower class people, reserves have engendered socio-economic inequalities.⁸⁸ Hull has also emphasized that there is a "new class" within Manitoba reserves where "it is often alleged that reserves are controlled by a small political elite who reap advantages for themselves and dispense these to their friends and relatives in order to bolster political support."⁸⁹ Hull also states that this group of people

⁸³ J.Hull *Aboriginal People and Social Classes in Manitoba*. Ottawa: Canadian Centre for Policy Alternatives. 2001

⁸⁴ *Ibid*

⁸⁵ V. Satzewich & T. Wotherspoon, *First Nations Race Class, and Gender Relations* (Scarborough: Nelson Canada, 1993) at 50.

⁸⁶ *Ibid*.

⁸⁷ *Ibid*. at 76.

⁸⁸ *Supra* note 83 at 124.

⁸⁹ *Supra* note 85 at 5.

“...do not have ownership of the means of production and are not policy-makers, but who hold positions of authority and have power over hiring, funding and sometimes of coercion.”⁹⁰

Conflict theory and structural functionalism are useful in explaining the interactions and power dynamics between the Canadian state and Aboriginal communities. For example, conflict theory demonstrates the idea that communities are not characterized by peaceful, and consensual relationships. A society that has been changed to one that is more industrial and individualistic challenges the notion that communities exist in a state where social, economic and political power structures do not affect relationships and creates inequalities.

Similarly, the state of Aboriginal communities challenges the claim that they can automatically restore conflict through restorative justice projects without addressing the issues that communities confront. Dickson-Gilmore and LaPrairie question commentators such as Pranis who suggest that the community is “the source of moral authority or influence”⁹¹ and it “exercises moral authority in denouncing crime and deciding requirements of offenders to make amends.”⁹² Without addressing the challenges facing communities in terms of apathy of its members, and impoverished neighbourhoods and the unwillingness for leaders in communities to make a true difference in the lives of many members, it remains to be seen whether restorative justice can restore communities

⁹⁰ *Ibid* at 17.

⁹¹ Pranis, K., “Engaging the Community in Restorative Justice.” Balanced and Restorative Justice Project, 1998. Community Justice Institute Ft. Lauderdale Florida Atlantic University and the Center for Restorative Justice and Peacemaking University of Minnesota. Online: <http://www.ssw.che.umn.edu/rjp/Resources/Documents/cpra98a.PDF/> on April 15, 2003. at 2. quoted in J.Dickson-Gilmore, & C.LaPrairie, *Will the Circle be Unbroken? Aboriginal Communities, Restorative Justice, and the Realities of Conflict and Change*. (Manuscript under contract with University of Toronto Press, 2003-2004) at 22.

⁹² *Ibid*.

to health. As mentioned, the economic structures previously characterizing Aboriginal communities have been changed over time as communities have come into contact with Canadian governments. The cultural elements of redistribution of wealth are minimal and replaced by a system of social inequality and class based structures.

For example, according to Boldt, traditional Aboriginal communities fostered a communal relationship among its members and “leadership grew out of social systems that were organized around extended kinship groups...”⁹³ Most communities did not differentiate sources of power into “formal, specialized institutional structures.”⁹⁴ Also the community... “reached decisions by a ‘dialectic consensus’ approach, in the equivalent of ‘town-hall’ meetings. ...the people constituted ‘the government’ in respect of all of its functions.”⁹⁵ LaPrairie also offers confirmation of the changes to Aboriginal communities when she states:

Residential schools, the decline of traditional activities, the emergence of the reserve system which binds people together in unnatural ways, and the creation of band government which locates power and resources in the hands of a few have dictated the form of reserve life across the country and have profoundly affected institutions such as kinship networks, families, as well as the unspoken rules of behaviour in traditional societies.⁹⁶

Although authors such as Boldt and LaPrairie have recognized the changes in the way in which Aboriginal communities govern, there remains a common assumption that Aboriginal communities have maintained this ideal state despite the affects of colonization.⁹⁷

⁹³ Boldt, *Supra* note 81 at 118.

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*

⁹⁶ C.LaPrairie, “Aboriginal crime and justice: Explaining the present, exploring the future” (1992) 34 *Canadian Journal of Criminology* at 287.

The point is that many Aboriginal people have lost connections to their traditional social, economic and political structures. The values and social norms that dealt with anti-social acts are disappearing, and traditional knowledge has diminished to the point where Aboriginal people have little knowledge of their traditional culture.⁹⁸ In her paper, E.J. Dickson-Gilmore, discusses this issue that is apparent among the Mohawk people of Kahnawake where the right to administer Mohawk law and traditions was diminished by the British, despite treaty negotiations established in 1664. Dickson-Gilmore states:

The practical consequences of the subsequent British and Canadian drives to impose their culture, languages, laws, and legal traditions upon native nations have been to subsequently erode much First Nations' traditional knowledge. As a consequence, many of those nations, who would wish to resurrect their traditional legal structures as alternatives to remaining under Canadian law, are faced with limited sources from which to draw the traditional stuff from which such structures might be constructed.⁹⁹

The Mohawk people of Kahnawake and other Aboriginal people are seeking the re-creation of their traditional legal structures in a time when Aboriginal groups realize the failures of the Canadian criminal justice system in dealing with criminal conflicts.¹⁰⁰ With these modern day justice projects there is the question of whether or not the traditional endeavours practiced are indeed "invented" or "real".¹⁰¹ Within this paper, Dickson-Gilmore addresses the idea that community empowerment is key and whether or not justice projects are, "'really traditional' is secondary to the importance of alleviating

⁹⁷ C. Andersen, "Governing Aboriginal Justice in Canada: Constructing Responsible Individuals and Communities Through "Tradition" (1999) 31 *Crime Law and Social Change*.

⁹⁸ *Ibid.* at 316.

⁹⁹ E.J. Dickson-Gilmore, "Finding the ways of the ancestors: Cultural change and the invention of tradition in the development of separate legal systems" (1992) 34 *Canadian Journal of Criminology* at 481.

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.*

the current position of native people within Canadian legal traditions.”¹⁰² Dickson-Gilmore also goes on to state that, “what may be central here is not whether the systems are based on ‘rightful’ traditions, but whether those systems are the right ones for the native nations who will administer them.”¹⁰³

Conflict theory and structural functionalism deal mostly with macro factors such as institutions and stratification where micro definitions of community emphasize individuals and how they interact with others. There are differences in community in terms of interests and power imbalances that contribute to some peoples’ interests heard over others.

Most communities, except for band level or simplified societies, differ according to the concepts of stratification, institutions and interactions. A macro sociological approach such as structural functionalism and conflict theory addresses the large-scale economic influences in a social setting that affect the life of people. As part of the definition of community, members differ in a community setting according to their rank in the social and economic scale. Depending on the theorist, he or she may say this phenomenon is functional for society as some individuals meet certain roles in the division of labour. There is a demand for different positions in the labour force to meet economic expectations, and some positions are more rewarding than others, therefore this provides the motivation for individuals to work towards better occupations. Other researchers, such as conflict theorists, emphasize that those people higher on the economic scale have more power in society, thereby oppressing those with less. Often

¹⁰² *Ibid* at 500.

¹⁰³ *Ibid*.

there is limited choice for people to improve their positions on the socio-economic ladder.

Structural functionalists consider stratification to be necessary as individuals are motivated to work hard and move along the socio-economic ladder to receive rewards. On the other hand, conflict theorists view stratification as dividing people and breaking a sense of community through establishing inequalities through power and class differentials. In applying this theory to Hull's analysis of Aboriginal people and social classes it is apparent that most Aboriginal people compared to non-Aboriginals are more likely to be employed in low income jobs as opposed to skilled and professional jobs.¹⁰⁴ A structural functionalist approach to looking at community would not be useful here, as Aboriginals occupying low level positions in the work force and who may have the motivation to move up the socio-economic ladder experience blocked access due to minimal resources such as marginalization on reserves and limited educational and employment opportunities.

Another aspect of a sociological analysis of community that will be used to highlight the experiences of Aboriginal people is the concept of a micro-perspective, where researchers discuss the relationship individuals have with their communities in processes of communication, conflict, negotiation and symbols.¹⁰⁵ This approach characterizes the social psychological perspective where the focus is on the individuals, not the institutions, which make up a society. Although this theory addresses individuals as its prime focus of analysis, it does not neglect the study of society and its relationship

¹⁰⁴ *Supra* note 85 at 3.

¹⁰⁵ *Supra* note 68 at 14.

to people. As Stoneall states, "Social-psychological perspectives examine how society influences individuals and, in turn how individuals influence society."¹⁰⁶

A social-psychological understanding of community and restorative justice projects often relates to the idea of a "community of interest".¹⁰⁷ According to Paul McCold, restorative justice projects are characterized by victim restitution programs, offender accountability, victim awareness programs, and victim offender reconciliation programs.¹⁰⁸ These restorative justice projects often consist of a small group of individuals directly involved with the conflict such as the victim, offender and families. Thus community is defined in accordance with the conflict where a sense of communal feeling has been broken down.¹⁰⁹ On the other hand, in cases where the crime was committed amongst strangers, the boundary should be defined according to the unique needs and responsibilities held by the victim(s) and offender(s). Also within this setting the involvement of the victim's and offender's families or supporters is effective for the process as the individuals forming the "community of interest" provide support and reintegrative shaming.¹¹⁰

The idea of restorative justice and forming the "community of interest" can be quite challenging for Aboriginal people living in urban settings. Here the history of Aboriginal offenders often consists of them leaving their reserves for such reasons as finding a better life in urban areas as housing and employment are limited. In many cases, "It is usually the more marginalized members of reserve communities who move to the city and, once they arrive, they lack the tools (such as education and employment

¹⁰⁶ *Ibid* at 175.

¹⁰⁷ Braithwaite, J. *Crime, Shame and Reintegration* (Cambridge: Cambridge, University Press, 1989).

¹⁰⁸ P.McCold, "Restorative Justice: The Role of Community" in B.Galaway & J.Hudson, eds., *Restorative Justice: International Perspectives*, (New York: Kugler Publications and Criminal Justice Press) at 86.

skills) which would enable them to thrive in an urban environment than are Canadians in general.”¹¹¹ Also in moving to urban areas, Aboriginal people are leaving behind many issues of violence and dysfunction in hopes of a better life but often find few positive social contacts.¹¹² Here there are limited family supports that could form a “community of care” and in many cases the only social ties that can be formed are to people who encourage the individual to lead a criminal lifestyle.¹¹³

Moreover, in McCold’s analysis of the idea of community, he views community as a very structured phenomenon where there is a need to restore a sense of health after crimes have occurred. Thus McCold states that there are needs that community members mobilize to achieve in order to restore a sense of balance. These five needs include:

(1) A sense of justice; (2) community empowerment in conflict resolution; (3) re-establishment of peaceful relationships between conflicting individuals and their important social relationships; (4) a sense of safety and hopefulness; and (5) concrete actions to prevent the recurrence of similar conflicts.¹¹⁴

The responsibility to meet these needs entails a full commitment of select community members to provide healing for the parties mostly affected by the crime with appropriate support and motivation. McCold states that the New Zealand model of family group conferencing is most effective where a “community of care” involving families, concerned friends and supporters, victim(s), offender(s), and police officers are “empowered to provide concrete and socially relevant reparations and ameliorative

¹⁰⁹ *Ibid* at 87.

¹¹⁰ *Ibid*.

¹¹¹ Issues in Urban Corrections for Aboriginal People Report of a Focus group and an overview of the Literature and Experience. March 1998. Edited and with supplementary material added by Joan Nuffield. Solicitor General. At 7 online: www.sgc.gc.ca/publications/abor_corrections/199803b_e.pdf

¹¹² *Ibid*. at 13.

¹¹³ *Ibid*.

¹¹⁴ *Supra* note 108 at 96

solutions.”¹¹⁵ Not only is there a sense of justice among the small conferencing session but, “Community members are restored to a sense of justice and peace, knowing that they themselves “did something about it”.”¹¹⁶ This is also a mode of empowerment where community members are taking control of their own conflicts and thus are mobilized to provide the necessary resources to provide programs to heal offenders and victims.¹¹⁷

On the other hand, in the case of many Aboriginal communities and reserves there is a growing sense that they do not want to offer support for offenders.¹¹⁸ According to some service providers Aboriginal communities are quick to send individuals out of the community to treatment instead of working as a community to provide adequate social control.¹¹⁹ As one social service provider stated, “Aboriginal communities need to rebuild their strength of family and community. People and the communities where they live are lacking in discipline.”¹²⁰

Community life can be hard for individuals with troubled family lives, who often leave reserves because of lack of access to opportunities such as housing, jobs, and additional resources.¹²¹ In LaPrairie’s study on urban Aboriginal peoples she found that more than half the inner city Aboriginal people believed their families were “looked down upon [on reserves] ... The primary reasons for non-acceptance were ‘being different’ or ‘parental misbehaviour’ ... For those who fit in, reserve life is positive; for those who are different it is not.”¹²²

¹¹⁵ *Ibid*

¹¹⁶ *Ibid*

¹¹⁷ *Ibid*

¹¹⁸ *Supra* note 111 at 25.

¹¹⁹ *Ibid.*

¹²⁰ *Ibid.*

¹²¹ *Ibid.* at 6.

¹²² *Ibid.*

Other challenges facing restorative justice projects will be shown through an analysis of Aboriginal communities at the macro and micro¹²³ level of community. Here it will be shown that Aboriginal people living in urban and rural environments face many obstacles that challenge the likelihood of successful restorative justice projects. **The many challenges consist of high unemployment, poverty, and low education, which can lead to family dysfunction, boredom, high crime rates and weakened social control measures.** Accordingly, due to the many structural issues affecting the personal and family levels it can be difficult to mobilize and provide the necessary agency in community members to maintain projects that make positive change.

Aboriginal People in Canadian Society: The Macro Community¹²⁴

The next section of this paper will look at communities from a social, economic, and political perspective by using census material. It is useful to look at recent census material as it highlights socio-economic realities and contributes to a holistic understanding of communities suffering from family dysfunction, high crime rates, unemployment, low education and lack of resources. These factors all challenge the efforts of achieving justice through community endeavours that is focused on equality and consensus. In this discussion many factors such as gender, age, education, employment and single female parent homes will be looked at in relation to the Indians, Metis, Inuit and non-Aboriginal groups.

Although there are many differences among Aboriginal peoples in Canada in terms of language, economic position, and cultural groups, there are similarities that

¹²³ J.Dickson-Gilmore, & LaPrairie, C., *Will the Circle be Unbroken? Aboriginal Communities, Restorative Justice, and the Realities of Conflict and Change*. (Manuscript under contract with University of Toronto Press, 2003-2004) at 26.

¹²⁴ *Ibid.*

contribute to this group being called a “community” where Aboriginal people share a common history of being the first inhabitants of Canada, they have suffered from cultural depletion, discrimination, assimilation, and paternalism by the colonial and Canadian governments. They also share many interests in terms of having their voices heard and demand for change in such things as criminal justice matters. On the other hand Aboriginal people are a very diverse people characterizing different cultural groups and languages across Canada. The diversity of these people is reflected in the fifty languages and fifty-two cultural groups, such as Cree, Algonquian, Haida and Mohawk.¹²⁵ There are six major cultural regions in Canada such as Woodland, Iroquoian, Plains, Plateau, Pacific Coast and Mackenzie and Yukon River Basins that established different economic and social realities. Aboriginal people in Canada have also been subject to top-down definitions of who they are and what rights they have because of their Aboriginality defined by the Constitution of Canada and the *Indian Act* (R.S.C. 1985, c.I-5). In relation to defining Indians, Boldt states, “The term ‘Indian’ serves the Canadian government as a convenient political-legal-administrative categorization of the culturally diverse first peoples of Canada.”¹²⁶

When comparing the Aboriginal group to the non-Aboriginal group according to social, economic factors it can be demonstrated that they are a younger population, with lower education levels, lower employment levels, higher rates of unemployment, and more children likely to live in single female headed households.¹²⁷ Some other

¹²⁵ O.P. Dickason *Canada's First Nations A History of founding Peoples from Earliest Times* (Toronto: McClelland & Stewart, 1994) at 63.

¹²⁶ M. Boldt, *Surviving as Indians The Challenge of Self Government* (Toronto: University of Toronto Press, 1993).

¹²⁷ Canadian Centre for Justice Statistics Profile Series, *Aboriginal Peoples in Canada*, www.statca.ca/english/freepub/85F0033MIE01001.pdf on February 5, 2003.

characteristics relating to Aboriginal people are that more and more individuals are living off the reserve and rural areas and living in urban areas, especially Aboriginal women.¹²⁸

Although Aboriginal people have made gains in education, large gaps still exist between the Aboriginal and non-Aboriginal groups.¹²⁹ For example, according to the 1996 Census data, only 3% of Aboriginal people aged 15 and over had a university degree compared with 13% of the non-Aboriginal population.¹³⁰ Similarly, 54% of Aboriginal people had not completed high school compared to 34% of the non-Aboriginal population.¹³¹ Among Aboriginal people, the Metis are the most likely to have a university education. In 1996, 4% of Metis had a university degree compared with 3% of the Indian population and 1% of the Inuit.¹³²

Another characteristic of Aboriginal peoples is the fact that they suffer from lower employment levels.¹³³ For example, Aboriginal people compared to their non-Aboriginal counterparts are less likely to be part of the paid work force.¹³⁴ In 1996, 48% of Aboriginal men aged 15 and over were employed, compared with 66% of their non-Aboriginal counterparts.¹³⁵ Similarly, just 41% of Aboriginal women were part of the paid workforce that year, versus 53% of non-Aboriginal women.¹³⁶ The Metis, out of all Aboriginal groups are more likely to be employed at 52% compared to the Indians at 41% and Inuit at 47%.¹³⁷

¹²⁸ 2001 Census: Analysis Series, *Aboriginal people of Canada: A demographic profile*, online: www12.statcan.ca/english/census01/products/analytic/companion/abor/pdf/96F0030XIE2001001.pdf on February 5, 2003 at 10.

¹²⁹ *Supra* note 127 at 5.

¹³⁰ *Ibid.*

¹³¹ *Ibid.*

¹³² *Ibid.*

¹³³ *Ibid.*

¹³⁴ *Ibid.*

¹³⁵ *Ibid.*

¹³⁶ *Ibid.*

¹³⁷ *Ibid.*

Unemployment rates for Aboriginal groups are higher than the non-Aboriginal group, in fact, one in four were unemployed in 1996.¹³⁸ This rate is 14% higher than the unemployment rate of 10% representing the non-Aboriginal population.¹³⁹ Among Aboriginal peoples, the Indian group represents the highest unemployment rate and individuals living on reserve are more likely to be unemployed.¹⁴⁰

Given the Aboriginal populations lower education levels and employment levels, the incomes of Aboriginal peoples are significantly lower than those of the non-Aboriginal population.¹⁴¹ In 1995, Aboriginal people had an average income of \$15,700 compared to \$25,400 for the non-Aboriginal group.¹⁴² The group with the lowest income is the Indian people and it is likely that many Aboriginal people receive a relatively large share of their income from government transfer payments.¹⁴³ For example, Hull's research on Manitoba states that, "... welfare dependency among the Aboriginal population, and especially among the registered Indian population, is high and the rate of welfare dependency among registered Indians is increasing."¹⁴⁴

In this section looking at the socio-economic characteristics, it is important to emphasize the unique characteristics of Aboriginal women as single parents.¹⁴⁵ Not only are Aboriginal women disadvantaged due to their ethnic background but they are also socially and economically disadvantaged according to their gender. Aboriginal women comprise 51% of the Aboriginal population and are more represented in the statistics as

¹³⁸ *Ibid.*

¹³⁹ *Ibid.*

¹⁴⁰ *Ibid.*

¹⁴¹ *Ibid.* at 6.

¹⁴² *Ibid.* at 6.

¹⁴³ *Ibid.*

¹⁴⁴ *Supra* note 83 at 59.

¹⁴⁵ *Aboriginal Women A Profile from the 1996 Census*. Online: Department of Indian Affairs and Development <www.ainc.inac.gc.ca/pr/sts/awp11_e.pdf> on June 30, 2003.

lone parents. In 1996, living on the reserve for registered lone female parents, is around 19% and male parents represents the approximate percentage of 5.¹⁴⁶ On the other hand, lone female parents living off the reserve is even higher at 25%.¹⁴⁷ Although Aboriginal females are more likely to have a university degree than their male counterparts, they still have a higher unemployment rate than Aboriginal males and their non-Aboriginal female counterparts.¹⁴⁸ This shows that simply gaining a higher education does not entail greater employment opportunities.

The socio-economic characteristics of females living in urban areas create extreme difficulties for females to attain a meaningful income that enables them to pay for child care, adequate housing, and the time to provide adequate supervision and social control of their children. As Hull states:

Past research on socioeconomic status (SES) has established that occupation, education and income can be used to define a person's relative SES and that these variables are related to a wide range of behaviours such as demand for social or health services, political preferences, and the success of children in school among others.¹⁴⁹

Here it is shown that the likelihood of success without completing post-secondary education in terms of finding gainful employment to support children growing up in single parent homes is unlikely. According to many American authors on inner cities, the socio-economic characteristics of Aboriginal females and their children creates an environment that contains many criminogenic factors. For example La Prairie states, "The literature on communities and crime suggests that many factors such as residential instability, concentration of poor, female-headed households with children, multiunit

¹⁴⁶ *Ibid.* at 3-1.

¹⁴⁷ *Ibid.*

¹⁴⁸ *Ibid.* at 4-3 and 5-1.

housing units and disrupted social networks are implicated in the commission of crime in neighbourhoods.”¹⁵⁰ These communities are also isolated and segregated from the mainstream, which creates an environment with few positive role models and informal social control measures exercised by adults. Consequently, this environment breeds crime through the adoption of anti-social attitudes as individuals are developing subcultures in opposition to the mainstream social and economic life as they often feel rejected.¹⁵¹

The Micro Community

This section will look at community life for Aboriginal people living on and off reserve. The previous description of the three main Aboriginal people defined within the *Constitution Act 1982*, demonstrate the fact that Canadian Aboriginal people are very diverse in culture, and socio-economic status.¹⁵² According to LaPrairie’s research on nine cities across Canada some Aboriginal people living in certain cities such as Prairie cities and Thunder Bay comprise the most impoverished groups of all Aboriginal people and most of those groups are Registered Indians.¹⁵³ For example, these cities have the largest, the youngest, the least educated, the poorest and the most mobile Aboriginal populations.¹⁵⁴ In contrast, the eastern cities have the best educated and most well off Aboriginal populations.¹⁵⁵

The On-Reserve Community

¹⁴⁹ *Supra* note 83 at 24.

¹⁵⁰ C.LaPrairie, “Aboriginal over-representation in the criminal justice system: A tale of nine Cities” (2002) 44 *Canadian Journal of Criminology* at 184.

¹⁵¹ *Ibid.* at 185.

¹⁵² Dickson-Gilmore & LaPrairie, *Supra* note 123 at 40.

¹⁵³ *Ibid.*

¹⁵⁴ *Ibid.*

¹⁵⁵ *Ibid.*

According to Dickson-Gilmore and LaPrairie, most reserves in Canada are in rural areas followed by urban, special access and the smallest numbers of reserves are in remote areas.¹⁵⁶ Within the Yukon and North West Territories most of the reserve population live in remote or special fly in areas.¹⁵⁷ In Ontario, Quebec, and Alberta most Aboriginal reserves are in urban areas, and the majority in Saskatchewan, Manitoba, and the Atlantic provinces live in rural areas.¹⁵⁸

The on-reserve population has the most people with the lowest education and employment levels compared to individuals living in urban areas with higher numbers attending school and acquiring employment.¹⁵⁹ Also reserves have the most income from government transfers and the lowest income overall.¹⁶⁰

The Off-Reserve Community

Shown in the statistics is the growing reality that many Aboriginal people are moving off of reserve areas. This could be the reality that many reserves lack opportunities for educational attainment, and employment.¹⁶¹

A finding with Aboriginal people moving into urban areas reveals higher concentrations of some Aboriginal groups living in Prairie cities such as Winnipeg with the highest, Regina and Saskatoon compared to other eastern cities such as Toronto and Montreal where more Aboriginals are dispersed.¹⁶² In the cities with a higher concentration of Aboriginals living in inner core areas there is a significantly large

¹⁵⁶ *Ibid.* at 41.

¹⁵⁷ *Ibid.*

¹⁵⁸ *Ibid.*

¹⁵⁹ *Ibid.*

¹⁶⁰ *Ibid.*

¹⁶¹ *Ibid.*

¹⁶² *Ibid.* at 44.

number of individuals who are within younger age groups and among the most marginalized.¹⁶³

In order to grasp a clear understanding of Aboriginal people living in urban areas, Carol LaPrairie completed a study in 1995 where she interviewed 621 inner city Aboriginal persons in four major Canadian urban centres.¹⁶⁴ These areas comprised two western cities such as Edmonton and Regina and two eastern cities including Toronto and Montreal.¹⁶⁵ LaPrairie found that there were three sub-groups of people with varying relationships with the justice system.¹⁶⁶ Here she stated that inner city people who were living lives of greater poverty and dysfunction were more likely to be involved in the justice system than were those who were less dysfunctional and were making a better life for themselves through employment and education.¹⁶⁷ The first group (Inner 1 group) had the greatest involvement with the criminal justice system. This group also had the greatest exposure to “violence, disruptive and unstable family circumstances, unemployment and the welfare system, criminal victimization, alienation from society and reserves and severe alcohol problems.”¹⁶⁸ The “Inner 2 group” had less involvement with the system and these individuals reported having more stable home lives, less violence, were somewhat educated and reported working for most of their adult lives.¹⁶⁹ The third group of people interviewed had the least involvement with the justice system, had the most stable childhood environment, more education, less unemployment, and

¹⁶³ *Ibid.* at 45.

¹⁶⁴ *Supra* note 111 at 8.

¹⁶⁵ *Ibid.*

¹⁶⁶ *Ibid.* at 9

¹⁶⁷ *Ibid.*

¹⁶⁸ *Ibid.*

¹⁶⁹ *Ibid.*

residence in a neighbourhood they liked.¹⁷⁰ Also LaPrairie found that individuals living in inner core areas such as Regina and Edmonton suffered from lower socio-economic status and were more marginalized compared to Toronto and Montreal.¹⁷¹

The focus of this chapter was to develop an understanding of community through conflict theory as it enlightens definitions and informs a holistic understanding of the concept of community. Conflict theory was used to provide for an understanding of structural inequalities that separates people and creates inequalities.

The socio-economic and other social demographic characteristics of Aboriginal people are a result of historical processes of colonization and oppressive policies enforced through the *Indian Act*. These processes have contributed to the reduction of independence, culture, and social control measures by many members of the Aboriginal community and created dependency especially among Registered Indians living in the prairie cities and Thunder Bay. The community characteristics reveal the many challenges faced by Aboriginal people and the likelihood of achieving health and balance through restorative justice projects.

¹⁷⁰ *Ibid.*

¹⁷¹ *Ibid.*

Chapter four: The two opposing perspectives: subjugation and colonization vs. structural analysis of Aboriginal communities in the understanding of over-representation and reform in the criminal justice system.

The previous chapter addressed some of the social, economic and political inequalities that affect Aboriginal people in relation to power dynamics and oppression of some groups over others. Here conflict theory was used to discuss how communities are not peaceful and consensual places as communities have people with different interests and power differentials. This was shown through the interactions between the Canadian state and Aboriginal communities through colonization, marginalization, and assimilation contributing to a loss of traditional culture, social control efforts, and economic, social and political structures. Currently Aboriginal communities have structures of inequalities that weaken the roles of attaining consensus, redistribution of resources and equalization of power.

The main focus of this chapter is to look at over-representation in the criminal justice system by utilizing two different perspectives that explain the reasons for over-representation and the reforms that these perspectives suggest. The subjugation/colonization perspective is based on the idea that the justice system does not respect the culture and consensus mode of justice for Aboriginal people and their right to practice their own justice endeavours. According to this perspective, Aboriginal people are over-

represented in prison and probation because of the systems lack of respect for Aboriginal people. To critique the subjugation/colonization perspective the structural analysis/conflict theory approach will be discussed to show that Aboriginal over-representation relates more to factors existing outside of the criminal justice system such as social, economic and political factors then culture conflict between the state and Aboriginal communities.¹⁷²

In order to combat the over-representation problem, proponents of the subjugation/colonization perspective suggest that Aboriginal people should have the right to practice their own justice endeavours. On the other hand, the main focus of this chapter through the structural analysis/conflict theory approach will highlight the many challenges that communities experience through restorative justice projects. For instance, through colonization and marginalization there are many social and economic inequalities and a loss of culture and social control measures. This challenges the likelihood of achieving restorative justice if many of the values of equality, consensus, communitarianism are absent. Similarly, as was shown in the previous chapter many communities suffer from limited resources; without opportunity and facing frustration many young people become involved with the criminal justice system. In this case there is a need for resources to combat this problem.

The subjugation and colonization perspective views the problem of over-representation as rooted in historical policies of oppression and poverty through the implementation of the *Indian Act*. Some authors contend that the legacy of oppression,

¹⁷² C.LaPrairie, "Aboriginal over-representation in the criminal justice system: A tale of nine cities" (2002) Canadian Journal of Criminology. J.Dickson-Gilmore & LaPrairie, C., *Will the Circle be Unbroken? Aboriginal Communities, Restorative Justice, and the Realities of Conflict and Change*. (manuscript under contract with University of Toronto Press, 2003-2004)

racism and ethnocentrism has found its way within the processes of the criminal justice system.¹⁷³ For instance, the Commission of Inquiry into the Donald Marshall, Jr., Prosecution, identified some key areas where the system wronged Marshall and convicted him, in part, because he was Aboriginal.¹⁷⁴ Donald Marshall was wrongfully convicted of murder as the system failed to investigate conflicting information, provide a thorough defense, and the judge had made critical errors in law.¹⁷⁵ Similarly the *Aboriginal Justice Inquiry* expressed the idea that Aboriginal people were more likely to receive incarceration as a sentence, and argued that overt discrimination is the reason for the greater use of incarceration for the Aboriginal group.¹⁷⁶

On the other hand, the research literature clearly shows that racism and culture conflict cannot explain over-representation alone.¹⁷⁷ Due to varying rates of over-representation statistics across Canada with higher rates of over-representation in Saskatchewan and Manitoba, where disadvantage is more prevalent, reveals that over-representation relates more to socio-economic status and loss of informal means of social control and culture.¹⁷⁸ In the following discussion, the focus will be on critiquing the subjugation/colonization perspective as an explanatory model for the over-representation of Aboriginal people in the criminal justice system. Socio-demographic factors, together with the loss of tradition and informal measures of social control, contribute to an understanding of over-representation rates of Aboriginals and the implications for

¹⁷³ Manitoba, Public Inquiry into the Administration of Justice and Aboriginal People. Report: Vol 4: *The Justice System and Aboriginal People* (Winnipeg Queen's Printer, 1991).

¹⁷⁴ Nova Scotia, *Royal Commission on the Donald Marshall, Jr., Prosecution: Findings and Recommendations*, (T.A., Hickman, 1989) at 16.

¹⁷⁵ *Ibid.*

¹⁷⁶ Manitoba, Public Inquiry into the Administration of Justice and Aboriginal People. Report: Vol. 4: *The Justice System and Aboriginal People* (Winnipeg: Queen's Printer, 1991).

¹⁷⁷ P. Stenning and J.V. Roberts, "Empty Promises: Parliament, The Supreme court, and the Sentencing of Aboriginal offenders" (2001) 64 *Saskatchewan Law Review* 141. *Supra* note 172.

reforming the criminal justice system in terms of establishing restorative justice projects. The social, political, and economic factors within Aboriginal communities affect the ability to meet the ideals of a restorative justice project where the idea of community is equality based, and shares in the responsibilities of meeting the needs of offenders and victims and community members. The discussion that follows will discuss the idea that many social factors, and loss of culture and social control measures, relating to Aboriginal communities contribute to the over-representation problem and the challenges of achieving restorative community justice.

Researchers who hold the subjugation and colonization perspective view the over-representation problem as an outcome of culture conflict and the justice systems' inability to take different perspectives on justice into account. Authors such as Monture-Okanee and Turpel argue the need for a criminal justice system that takes into consideration the varying justice needs of Aboriginal groups across Canada. The authors say, "...the existing system involves a basic disrespect for Aboriginal culture and different forms of social, political and spiritual life."¹⁷⁹ The authors continue to state, "the cultural barriers which separate aboriginal people from non-aboriginal people are at the heart of this problem, and these barriers must become clearly identified and understood."¹⁸⁰ Here the authors make the argument that reform should focus on establishing justice systems that reflect different Aboriginal cultures and traditions, and that the criminal justice system should be adapted to respect Aboriginal cultures. Without allowing for difference, and ensuring that the criminal justice system operates in a manner which is respectful of the

¹⁷⁸ *Ibid.*

¹⁷⁹ M. E. Turpel & P.A. Monture-Okanee, "Aboriginal Peoples and Canadian Criminal Law: Rethinking Justice" (1992), 26 *University of British Columbia. Law Review* 240 at 247.

¹⁸⁰ *Ibid.*

aboriginal offender's history, language, and culture, discrimination in the justice system will continue.¹⁸¹

Turpel discusses culture conflict between the Canadian state and Aboriginal people in criminal justice processes in her article, "On the Question of Adapting the Criminal Justice System for Aboriginal Peoples: Don't Fence Me In."¹⁸² Here she discusses how the Canadian criminal justice system represents an adversarial approach that conflicts with a more consensual model of justice practiced by Aboriginal communities. In the Canadian criminal justice system, crime is viewed against the state and the victim and offender become passive players in the process where the Crown prosecutor and defense lawyer play a pivotal role.¹⁸³ Consequently, punishment is meted out by the state and the victim is often left unsatisfied. According to Turpel "The adversarial system is one of the most troubling aspects of the criminal justice system for Aboriginal peoples, and most Aboriginal people would say it exhibits little respect for their autonomy or dignity as persons."¹⁸⁴ The goal of seeking truth is through argument and rules of evidence.¹⁸⁵ This process goes against the ethic of restraint and emotional control exercised by Aboriginal communities. An Aboriginal person's restraint in condemning another person could represent to the court that the individual is unsure of the events that occurred and the unwillingness to find a person at fault.¹⁸⁶ Similarly,

¹⁸¹ *Ibid* at 252.

¹⁸² M.E. Turpel, "On the Question of Adapting the Canadian Criminal Justice System for Aboriginal Peoples" in R. Cairns-Way and R. Mohr, eds., *Dimensions of Criminal Law* (Toronto: Emond Montgomery Publications, 1996) 63.

¹⁸³ *Ibid.* at 65.

¹⁸⁴ *Ibid.*

¹⁸⁵ *Ibid* at 66.

¹⁸⁶ *Ibid.*

Aboriginals who tend to be soft-spoken, quiet and who make less eye contact are often viewed as concealing information.¹⁸⁷

Another difference between non-Aboriginals and Aboriginal peoples is the way in which disputes are defined. The legalistic definitions of crime limit a person to discuss the emotional, and social costs experienced by the wrongdoing.¹⁸⁸ This occurs especially when professionals are prevalent in the process. The professionals take the dispute away from the individuals and develop an objective, rational means of control through formal legal language.¹⁸⁹ In contrast, restorative justice projects often consist of victims and offenders speaking for themselves or they may choose to have a representative of the family or clan speak for them on their behalf.¹⁹⁰ Similarly, to show accountability to the community, individuals involved in the wrongdoing would speak freely and uninterrupted in a path to taking responsibility.

In attempts to reform the system Turpel suggests that “mere tinkering” with the system will not work and Aboriginals working as administrators in the mainstream justice systems will not work to address the needs of Aboriginal people.¹⁹¹ According to Turpel, there needs to be a system premised on Aboriginal culture, goals and community endeavours.¹⁹²

To critique these statements made by Turpel and Monture-Okanee, it is important to highlight that many people have lost touch with their culture due to colonization and marginalization.¹⁹³ As Chris Andersen states, many Aboriginal communities have lost

¹⁸⁷ *Ibid.*

¹⁸⁸ *Ibid.* at 66.

¹⁸⁹ *Ibid.*

¹⁹⁰ *Ibid.*

¹⁹¹ *Ibid.* at 69.

¹⁹² *Ibid.*

¹⁹³ *Supra* note 97.

touch with their traditional values and beliefs that served as mechanisms for social control.¹⁹⁴ As a consequence of the diminishing nature of culture and tradition, Andersen states, “most Aboriginals in Canada have little or no knowledge of their traditions.”¹⁹⁵ Here there is a challenge of re-establishing “traditions” or as Dickson-Gilmore states, “inventing” traditions where there is a gap in historical knowledge.¹⁹⁶

It will be argued that it is too simplistic to state that community justice systems are better in governing their own people.¹⁹⁷ There are many factors through the aftermath of colonialism such as social, economic and political affecting the viability of community responses to social problems.

Similar to these arguments is the suggestion that there is a need for communities to take ownership over restoring social order through community involvement and empowerment in criminal justice practices. This argument does not take into consideration the fact that many communities have lost traditional social control measures and lack many resources such as finances to make projects work. For example, a lament by service providers is the fact that many governments are prepared to off-load the costs of providing projects onto the community without providing the financial support to do so.¹⁹⁸ Similarly, on reserves there is a need for resources such as adequate protection for victims and rehabilitative measures for offenders. As part of the healing process offenders often stay within the community for healing. “This emphasis on healing presents different resource needs than a punishment-based system, which requires jails, guards and related resources. A healing orientation requires resources such as

¹⁹⁴ *Ibid.*

¹⁹⁵ *Ibid* at 316.

¹⁹⁶ *Supra* note 99.

treatment facilities, counseling services, elders and healthy staff.”¹⁹⁹ Some other needs are community development programs such as education and employment opportunities.

The focus on healing in the community should not cloud the sense of safety and security that victims need especially in cases of violence. As Emma LaRocque expresses, not all victims of violence (especially in cases of sexual assault) want to see their victimizers.²⁰⁰ Resources such as counseling, healthy staff and treatment facilities should be in place to protect victims and their families.

There are many concerns about community in terms of ameliorating the situation of Aboriginal people and the criminal justice system. For instance, LaPrairie states that just because Aboriginal communities take on the responsibility of justice projects does not mean that there is adequate community involvement and participation, resources to rehabilitate offenders and effectively meeting the needs of victims.²⁰¹

Dealing with offenders is neither quick nor easy as shown through mainstream correctional research. Individuals who come into contact with the justice system have often been exposed over long periods of time to adversities and disadvantages. Research completed by Graham and Bowling highlight the idea that attention to the offenders’ environment, including family life, schools, reducing the risks of alcohol and drugs, and

¹⁹⁷ C. LaPrairie, *The new justice: Some implications for aboriginal communities*” (1998) 40 *Canadian Journal of Criminology* 61 at 79.

¹⁹⁸ *Supra* note 111 at 20.

¹⁹⁹ C. Levis, “Circle Sentencing: The Silence Speaks Loudly, Considering Whether the Victims’ Needs Can be met through Circle Sentencing” (M.A. Thesis, University of Northern British Columbia, 1998) at 6.

²⁰⁰ E. LaRocque, “Re-examining Culturally Appropriate Models in Criminal Justice Applications.” In M. Asch, ed., *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality and Respect For Difference*. (Vancouver: UBC Press, 1997).

²⁰¹ *Supra* note 197.

encouraging the use of informal social control, is needed to decrease the likelihood of re-offending.²⁰²

When communities come across repeat offenders there is a need for skilled staff, other resources and willingness on the part of community members to deal with their behaviour. As was mentioned earlier, a growing problem is arising where many Aboriginal communities do not want to deal with offenders, as a majority of programs depend largely on volunteers, and burn-out is a common problem.

A step by the government to ameliorate the situation with Aboriginal offenders is the action taken by Parliament in 1996. Here the federal government amended the sentencing provisions of the *Criminal Code* to deal with the needs of Aboriginal offenders. For example, s. 718.2 (e) states, “all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.” The Supreme Court cases of *R.v.Gladue*²⁰³, and *R.v.Wells*²⁰⁴ established the guidelines for trial judges in sentencing Aboriginal offenders. In *R.v.Gladue*, the court reflected on the remedial nature of s.718(2)(e) and directed sentencing judges to treat Aboriginal offenders differently and achieve “a truly fit and proper sentence in the particular case”.²⁰⁵ Similarly, the Supreme Court stated in *R.v.Wells* that s. 718. 2(e), “was intended to address the serious problem of over-incarceration of Aboriginal offenders in Canadian penal institutions to the extent that a remedy is possible through the sentencing

²⁰² *Ibid.*

²⁰³ *R.v.Gladue.*, [1999] 1 S.C.R. 688

²⁰⁴ [2000] 1 S.C.R. 207

²⁰⁵ *Supra* note 203 at para 33.

process.”²⁰⁶ The Supreme Court also stated that the over-representation of Aboriginals in penal institutions in Canada results “from an unfortunate institutional approach that is more inclined to refuse bail and to impose more and longer prison terms for Aboriginal offenders.”²⁰⁷

Here the statistics on this issue shows the opposite where as early as 1982, Correctional Services Canada data ‘showed that native admissions tended to be very similar or marginally shorter, than their non-Native counterparts with the same admitting offence’(Moyer et al. 1987).²⁰⁸ More recent research from 1993, shows that non-Aboriginal offenders generally receive longer sentence lengths than aboriginal offenders with the mean sentence length for non-Aboriginal offenders as 5.2 years compared to 4.2 years for Aboriginal offenders.²⁰⁹ At the same time, York found that more aboriginal than non-aboriginal offenders had served a previous sentence and that approximately 75 per cent of the aboriginal offenders had been convicted of the more serious offences.²¹⁰

When comparing Aboriginal prison statistics to the general population some interesting findings challenge the argument that racism in the criminal justice system explains the high rates of incarceration for Aboriginal people. For instance, the provincial court study in Manitoba during the course of the Manitoba Inquiry found that Aboriginal offenders were more likely to receive incarceration as a sentence.²¹¹ The authors of this report make the argument that overt discrimination is taking place because so many Aboriginals are being incarcerated compared to the non-Aboriginal group when

²⁰⁶ *Supra* note 204 at para 37.

²⁰⁷ *Ibid.* at para 65

²⁰⁸ C.LaPrairie, “Sentencing Aboriginal Offenders: Some Critical Issues” in J.V. Roberts and D.P.Cole (eds.), *Making Sense of Sentencing* (Toronto: University of Toronto Press, 1999) 173 at 176. *Supra* note 123.

²⁰⁹ *Ibid.*

²¹⁰ *Ibid.*

both groups had the same number of offences.²¹² However, LaPrairie states that the Aboriginal group had more counts and charges and had committed more offences against the person.²¹³ Also in the study the authors did not look at the factors that affect sentencing such as the nature of crimes committed in the past.²¹⁴

Similarly, there is some evidence to show that judges are more lenient with Aboriginal offenders compared to non-Aboriginal offenders. For example, LaPrairie noted in her research that although available data was limited, a trend is evident where Aboriginals are receiving shorter sentences for some offences.²¹⁵ Research from 1996 demonstrates that Aboriginal offenders generally received shorter sentences than non-Aboriginal offenders charged with comparable offences, even for the more serious offences against the person such as assault, and homicide.²¹⁶ Here LaPrairie is not stating that racism does not exist in the criminal justice system, but rather that there are other factors that make for a more complex argument. Ignoring the other issues limits a holistic understanding.²¹⁷

In order to re-establish power over justice measures, communities and interested people have stepped in and suggested that restorative justice is a viable option in which to restore communities and limit over-representation. To critique this, LaPrairie has stated that Aboriginal control over justice “appears to be the moral road to repudiation of

²¹¹ *Ibid* at 175.

²¹² *Ibid.*

²¹³ *Ibid.*

²¹⁴ *Ibid.* at 176.

²¹⁵ C. LaPrairie, “The role of sentencing in the over-representation of aboriginal people in correctional institutions” (1990) 44 *Canadian Journal of Criminology* 429 at 435.

²¹⁶ C. LaPrairie, *Examining Aboriginal Corrections in Canada* (Ottawa: Supply and Services Canada, 1996)

²¹⁷ *Supra* note 208.

previous government policies.”²¹⁸ Also it appears that the way in which to solve the “over-representation problem” is for Aboriginal communities to develop their own justice systems. Here the assumption is that community justice projects promote empowerment necessary for crime reduction and, as stated by Pranis in the manuscript of Dickson-Gilmore and LaPrairie, “The community has tools which the system does not have. The community has resources which the system does not have.”²¹⁹ Adam Crawford also states that, “The community constitutes a site around which individuals and groups can be mobilized to take on board greater responsibility from the State...”²²⁰ Together with the popular justice literature, restorative justice is seen as a way to restore communities to the practice of their traditional culture, which is in opposition to an “all-powerful, expensive, bureaucratic, technical, inflexible, adversarial, adjudicatory model of justice.”²²¹

Researchers contend that the lack of respect of Aboriginal cultures by the mainstream has translated into discrimination in the criminal justice system through sentencing and police investigations. In contrast to this conclusion, studies are showing that sentencing has little to do with over-representation and that other factors such as social, economic marginalization are contributing to varying rates of over-representation in provincial and federal institutions.²²² For example, researchers Philip Stenning and Julian Roberts in their article “Empty Promises: Parliament, The Supreme Court, and the Sentencing of Aboriginal Offenders”, are very critical of the likelihood that ameliorating

²¹⁸ C.LaPrairie, “The impact of Aboriginal Justice Research on Policy: A Marginal Past and an even more Uncertain future.” (1999) 41 *Canadian Journal of Criminology*.

²¹⁹ *Supra* note 126 at 14

²²⁰ A. Crawford, “The Spirit of Community: Rights, Responsibilities, and the Communitarian Agenda (1996) 23 *Journal of Law and Society*. 247 at 250.

²²¹ R.Depew, “Popular Justice and Aboriginal Communities” (1996) 36 *Journal of Legal Pluralism* at 26.

²²² *Supra* note 172.

sentencing practices can provide for a reduction in over-representation of Aboriginals in the criminal justice system.²²³ According to Stenning and Roberts, the evidence suggests that socio-economic factors and marginalization are more accurate explanations of over-representation in the criminal justice system, and not discriminatory sentencing practices.²²⁴ For example, LaPrairie completed a study in 1991 that stated that there were varying rates of over-incarceration across the country where in some provinces such as Quebec Aboriginal people were not over-represented. In 2002, LaPrairie's study showed that the Prairie Provinces such as Alberta, Saskatchewan and Manitoba had the highest rates of over-representation compared to provinces such as Nova Scotia and Newfoundland.²²⁵ It was also found that in these provinces the degree of disadvantage varies widely and is directly related to the level of over-representation. Factors outside the criminal justice system such as levels of poverty, unemployment, higher proportion of youths, and alcohol abuse are better at determining over-representation levels.²²⁶

The systemic/colonization approach to understanding over-representation as an outcome of systemic racism within the criminal justice system ignores other factors contributing to criminal behaviour in urban areas and reserves. The discussion that follows demonstrates the importance of understanding high crime rates from a social economic position as there are many factors stemming from these structural issues that lead Aboriginal people into the criminal justice system. As marginalized status can be related to crime rates, LaPrairie states, "Adult aboriginal offenders are generally younger,

²²³ P. Stenning and J.V. Roberts, "Empty Promises: Parliament, The Supreme Court, and the Sentencing of Aboriginal Offenders" (2001) 64 *Saskatchewan Law Review*.

²²⁴ *Ibid.*

²²⁵ C.LaPrairie, "Aboriginal Over-representation in the criminal justice system: A tale of nine cities" (2002) *Canadian Journal of Criminology*.

²²⁶ M.Jackson, *Locking Up Natives in Canada: A Report of the Canadian bar Association Committee on Imprisonment and Release* (Vancouver: University of British Columbia, 1989)

have less education, and are more likely to be unemployed than are non-aboriginal offenders.”²²⁷ Also demographic research shows that Aboriginal people are generally a younger population and “it is well known that young people between the ages of 15 and 19 are at the greatest risk for involvement in the criminal justice system.”²²⁸

Also there are differences in the levels of over-representation among Aboriginal people. For instance, Status Indians are highly over-represented in correctional institutions compared to Metis and non-Status Indians.²²⁹ In a recent CCJS “one-day inmate snapshot” (1999), the majority of offenders in Manitoba correctional facilities were Status Indians.²³⁰ Also it was found in 1997, that Status Indian offenders comprise the largest group of probationers.²³¹

According to LaPrairie’s research, the lower an individual or group is on the socio-economic and political scale the more likely the individual will be involved in the criminal justice system.²³² This finding is related to the idea that Registered Indians are more disadvantaged than other aboriginal groups and have higher rates of recidivism and incarceration rates compared to other Aboriginal groups. For example, the recent census from 2001, reveals that Aboriginal people suffer from lower socio-economic status compared to non-Aboriginals.²³³ Contrary to some perceptions, there is diversity among Aboriginal groups as Registered (status) Indians have lower levels of education, and employment compared to their non-status, Metis and Inuit counterparts.

²²⁷ *Supra* note 208 at 181

²²⁸ *Ibid* at 189.

²²⁹ *Ibid*

²³⁰ C.LaPrairie, “Aboriginal over-representation in the criminal justice system: A tale of nine cities” (2002)

⁴⁴ *Canadian Journal of Criminology* 181-298 at 189.

²³¹ *Ibid.* at 189.

²³² *Ibid.*

²³³ *Supra* note 127.

LaPrairie's study from 2002 is based on data from the Statistics Canada (1999) Aboriginal People's Survey where she compared nine cities across Canada that have varying rates of disadvantaged Aboriginal people and over-representation statistics. In regards to variation of socio-economic status across provinces, the Prairies cities including Winnipeg, Regina, Saskatoon, and the northern city of Ontario - Thunder Bay have the "largest, youngest, least educated, poorest and the most mobile Aboriginal populations."²³⁴ In contrast, eastern cities such as Toronto, Halifax, Montreal have the best-educated and the most economically sustainable Aboriginal populations.²³⁵ The cities of Winnipeg, Regina, Saskatoon, and Thunder Bay are consistent in negative scores comprising areas of socio-economic status such as age, education-completion rate of high school and post-secondary, income levels, mobility and single parenthood.²³⁶ The eastern cities are on the positive side of these statistics in comparison to Aboriginals living in Prairie cities and Thunder Bay. Cities such as Edmonton and Vancouver meet average scores in socio-economic categories.²³⁷

Correspondingly as a link to socio-economic status, the cities with the highest rates of over-representation are the Prairie cities and Thunder Bay, the medium scores of over-representation are the cities of Edmonton, and Vancouver and the lowest percentages of over-representation are Halifax, Montreal, and Toronto.²³⁸ In the cities with the highest rates of over-representation have the youngest population, are the poorest, the most mobile and lone-parent households, the least educated and employed.²³⁹ The medium and low contributor cities to over-representation statistics share Aboriginal

²³⁴ *Supra* note 230 at 191.

²³⁵ *Ibid.*

²³⁶ *Ibid.* at 192.

²³⁷ *Ibid.* at 193.

population characteristics but are more advantaged in comparison to the high contributing cities.²⁴⁰

Thus the factors that distinguish the high contributing cities from the low contributing cities relates to levels of educational attainment, employment, income mobility, age, and family structure.²⁴¹ Another characteristic of high contributing cities is the fact that there is a large population of Aboriginal people living in the city's inner core. Here LaPrairie states that Winnipeg has the largest percentage of Aboriginal people living in extremely poor neighbourhoods at 41.2%, Saskatoon (30.2%), and Regina (26.9%).²⁴² The cities with the lowest levels are Toronto (15.8%), Vancouver (17.1%) and Edmonton (19.4%).²⁴³

In order to have a clear understanding of Aboriginal over-representation and the factors affecting the likelihood of achieving restorative justice projects, La Prairie states that "It may be helpful to link socio-economic variables with community risk factors such as community composition, social structure, legitimate opportunities, and social and physical disorder, and personal factors such as relative deprivation."²⁴⁴ LaPrairie recommends criminological theories that have largely been developed on reflections of urban areas in the United States, such as social disorganization, and social learning theory²⁴⁵ are useful in explaining the urban reality of high over-representation rates among Canadian Aboriginal populations. The common explanations of colonization and

²³⁸ *Ibid.*

²³⁹ *Ibid.*

²⁴⁰ *Ibid.*

²⁴¹ *Ibid.*

²⁴² *Ibid.* at 197.

²⁴³ *Ibid.*

²⁴⁴ *Ibid* at 198.

culture conflict are not broad enough due to the varying rates of over-representation in Canadian cities across the country.²⁴⁶ To explain crime in the inner city, social disorganization theory postulates that segregation and isolation of racial and minority groups in marginalized sections of cities results in criminogenic structures and cultures.²⁴⁷ Similarly, social learning theory argues that individuals learn anti-social behaviour from families, peers, communities, and schools.²⁴⁸ Those on the lowest sphere of economic and social status are subject to the adoption of anti-social attitudes and behaviour due to the excessive limitations, alienation from mainstream and community resources, lack of pro-social attitudes and role models in their lives.²⁴⁹

Similarly, poverty stricken communities where the majority of families are female-headed living in multi-unit housing are targeted in the commission of crime.²⁵⁰ This context creates a susceptibility to anti-social attitudes and anti-social subcultures, which take part in criminal activity in opposition to mainstream economic and social life and the rejection of these groups by the mainstream.²⁵¹ With social disorganization theory and the combination of social learning theory, which looks at the individual aspect of criminal behaviour, one can see why there are varying over-representation statistics.²⁵²

Another important element in order to have a holistic understanding of Aboriginal over-representation and the challenges facing Aboriginal restorative justice projects is put forth by LaPrairie in her articles, "Aboriginal crime and justice: Explaining the present,

²⁴⁵ J.Dickson-Gilmore, & LaPrairie, C., *Will the Circle be Unbroken? Aboriginal Communities, Restorative Justice, and the Realities of Conflict and Change* (Manuscript under contract with University of Toronto Press, 2003-2004).

²⁴⁶ *Ibid.* at 186.

²⁴⁷ *Ibid.*

²⁴⁸ *Ibid.* at 185.

²⁴⁹ *Ibid.*

²⁵⁰ *Ibid.* at 184.

²⁵¹ *Ibid.* at 200.

exploring the future” and “Reconstructing Theory; Explaining Aboriginal Over-Representation in the Criminal Justice System in Canada”. Here LaPrairie, using the work of Braithwaite, discusses the fact that contemporary Aboriginal communities have lost to some degree the ability to provide shaming and reintegration of offenders due to the costs of the erosion of traditional aboriginal institutions.²⁵³ According to Braithwaite the way in which a community shames its deviants is a reflection on crime rates. “He claims that societies which shame their members “potently and judiciously” have low crime rates but those where shame is applied injudiciously and counterproductively” suffer high crime rates.”²⁵⁴ Communities that practice reintegrative shaming focus on the “interdependency” between offenders and “significant others” be these “family, school, employer, or community.”²⁵⁵ Accordingly, offenders rely on their relationships with significant others to shame and at the same time provide for re-acceptance into the community.²⁵⁶ Braithwaite suggests “that who commits crime depends largely on the degree to which individuals are “connected” to the institutions of family, school, work and community because their interdependence with these institutions dictates the power of shaming.”²⁵⁷ On the other hand, if offenders are punished by an impersonal structure where stigmatization is utilized, dysfunction and a criminal lifestyle could characterize the lives of offenders.

Communities that are characterized by “interdependency, communitarianism, and cultural homogeneity” are more likely to exhibit low crime rates as they are able to utilize

²⁵² *Ibid.*

²⁵³ C.LaPrairie, “Aboriginal crime and justice: Explaining the present, exploring the future” (1992) 34 *Canadian Journal of Criminology* 281-298 at 281.

²⁵⁴ *Ibid.* at 284.

²⁵⁵ *Ibid.*

²⁵⁶ *Ibid.*

²⁵⁷ *Ibid.*

these powerful resources in dealing with criminal behaviour.²⁵⁸ On the other hand, LaPrairie states that Aboriginal communities suffering from high crime rates on and off-reserve relates to the “corresponding weakening of traditional aboriginal institutions through processes of colonization and modernization, and more recently through mass communication.”²⁵⁹ As a result, communities are socially stratified and suffering from limited resources and resource distribution create large groups of disadvantaged people with few opportunities for advancement on the social-economic scale.²⁶⁰ In LaPrairie’s James Bay (Quebec) research, where she interviewed members of the community she noted that individuals in the community are saddened by the loss of traditional controls through family, community, schools which leaves youth and young people without a clear set of values and rules to follow.²⁶¹ Similarly, in this community there is a lack of shame expressed about one’s negative behaviour in harming another and other community members.

Communities such as James Bay suffer from lack of opportunities which contribute to idleness can lead to destructive behaviour in the community.²⁶² A challenge for communities is establishing options and opportunities for young people and youth to find jobs and develop the skills necessary to take part in the job market on reserves and in urban areas.²⁶³

Braithwaite states that societies that are characterized by individualistic values rely on the state for social control measures as the sense of communitarianism and

²⁵⁸ *Ibid.* at 285.

²⁵⁹ C. LaPrairie, “Reconstructing Theory: Explaining Aboriginal Over-Representation in the Criminal Justice System in Canada” (1997) 30 *The Australian & New Zealand Journal of Criminology* at 39.

²⁶⁰ *Ibid.* at 40.

²⁶¹ *Supra* note 253 at 287.

²⁶² *Ibid.*

²⁶³ *Ibid.*

interdependency is limited or does not exist²⁶⁴. In essence, in individualistic societies there is no obligation to the group, and interdependent qualities of trust and helping.²⁶⁵ As a result, crime control in individualistic societies is ineffective as individuals are removed from society and stigmatized instead of shamed and reintegrated. As Gibbons states, “societies which individualism runs rampant are more likely to shun and isolate deviants, hence they endeavour to control crime through stigmatization.”²⁶⁶ In traditional Aboriginal communities the ability to shame wrongdoers was an effective means to maintain social order. Although some communities have qualities of both traditional means of social order and individualism most contemporary communities are becoming individualistic in nature and turning their issues of conflict over to the mainstream system of justice.²⁶⁷

In this chapter the main goal of highlighting the two opposing theoretical perspectives of colonization and social-economic marginalization was achieved through addressing the literature and statistical analysis. After a consideration of the literature it can be concluded that the social-economic/conflict theory analysis is more appropriate at looking at the issues of over-representation as it is broader in its approach. It also highlights the many challenges that Aboriginal communities experience through the loss of traditional culture and social control measures that affect the likelihood of viable restorative justice projects. The colonization perspective does not account for the varying rates of over-representation across the country and the idea that people are not equal and consensual in communities. There are criminogenic factors such as unemployment,

²⁶⁴ *Ibid* at 289.

²⁶⁵ *Ibid.*

²⁶⁶ *Ibid.*

²⁶⁷ *Ibid.*

disadvantaged communities, substance abuse, and family dysfunction that challenge the notion that once communities are involved in restorative justice projects the crime problems will be reduced.

The oppressive policies of the past, with the intrusion of the early Europeans, contributed to the present issues of poverty and criminal behaviour, but the subjugation/colonization perspective is not broad enough to explain current realities of over-representation and issues that affect communities. Thus it is important to take into consideration a broad analysis that allows for an in-depth understanding of the issues affecting Aboriginals. This approach will be used in the next chapter where the discussion will focus on restorative justice projects in Aboriginal communities and their likelihood of success. As the previous chapter showed, although not all-aboriginal people are suffering from the effects of low socio-economic status, overall aboriginal communities are suffering from greater impoverishment when compared to non-Aboriginal people. Thus, it becomes important to ask the question of whether or not communities can restore themselves through restorative justice projects. It was shown here that many Aboriginal communities have lost touch with their traditional social control measures, suffer from low socio-economic status and are marginalized from mainstream society. As a result, achieving the goals of restorative justice faces many challenges. The next chapters will highlight the many challenges of restorative justice projects that take place in Aboriginal communities and the suggestions for reform.

Chapter Five: The Challenges of Restorative Justice Projects from a social, economic and political perspectives

The previous chapters looked at the social/economic/political factors affecting Aboriginal communities and the likelihood of achieving restorative justice goals. The social/economic perspective reveals many challenges that Aboriginal people face such as high unemployment rates, lack of education, single female parenthood, a young population, marginalization on reserves, and loss of social control, power imbalances, and colonization. These factors affect the likelihood of achieving the goals of restorative justice therefore it is important to critique restorative justice projects that neglect to look at the social, economic and political factors.

Within this chapter a critique of restorative justice measures will reveal areas of concern that challenge the likelihood of achieving viable restorative justice projects. Restorative justice projects are often instituted in areas that are suffering from structural

problems that can be correlated to social problems, such as personal conflicts, that lead to the involvement of outside formal control measures. In order to deal with crime that affects communities, many restorative justice projects have gained acceptance as a measure to reduce crime and conflict in communities and to decrease the high over-representation of Aboriginals in the criminal justice system. In the process of these endeavors to create change, many claims have been stated that restorative justice has the potential to satisfy the needs of victims, reduce recidivism, and empower communities through involvement in justice procedures.²⁶⁸ It will be shown that there are many concerns of restorative justice projects and that it is too early to state whether or not communities are offering promising crime prevention strategies that empower individuals.

This chapter will look at sentencing circles and healing circles that have been implemented in many Aboriginal communities. The common critique that can be stated about these restorative justice measures is that there are many limited resources in terms of finances, and “volunteerism” to establish projects that truly makes a difference and prolonged after care for offenders, and protection for victims.

Sentencing Circles and issues surrounding the involvement of the Victim

In *R.v.Moses*²⁶⁹, Judge Stuart stated that sentencing circles encourage the involvement of victims in the process so that offenders are provided the opportunity to understand the pain and suffering that they have caused. This is unlike the mainstream system where the offender is made accountable to the state that punishes offenders. According to Judge Stuart, sentencing circles provide the opportunity for victims to

²⁶⁸ C.LaPrairie & J.V. Roberts, “Sentencing Circles: Some Unanswered Questions,” (1997) 39 *Criminal Law Quarterly* at 61.

participate and express their concerns making the offender accountable to the victim and the community.

In theory this process is to ensure that the needs of victims are met through an environment that is equal. On the other hand, in many cases power imbalances prohibit the adequate participation of the victim. For instance, Mary Crnkovich discusses a sentencing circle that took place with Inuit people in the Nunavik region of Quebec.²⁷⁰ The judge in this case questioned the community on what could be done to help the offender as he was charged with assault against his wife.²⁷¹ Also the offender committed this offence while on probation for the same offence on the same victim.²⁷² Although the accused had received four convictions for the same offence, he had beaten his wife at least fifty times without being charged. Here the focus was on the offender and his needs without reflection on the victim's concerns. In this circle, the victim rarely spoke and was only mentioned once when the discussion turned to the hardships she experiences when her husband is not in the community. The circle did not hear about the pain and suffering that the wife, children and family experienced because of the offender's actions.²⁷³ According to advocates of sentencing circles the participation of victims is essential as their comments are significant and necessary in the process of developing a sentence that rehabilitates the accused and meets the victims' needs and safety concerns.

The issues surrounding power imbalances with victims are shown again, when there were no efforts prior to the circle by the judge, probation officer or mayor to inform

²⁶⁹ *R.v.Moses* (1992), 71 C.C.C. (3d) 347 (Yukon Terr.Ct.)

²⁷⁰ M.Crnkovich, "A Sentencing Circle" (1996) 36 *Journal of Legal Pluralism* 159 at 159.

²⁷¹ *Ibid* at 167.

²⁷² *Ibid.* at 159

²⁷³ *Ibid.* at 167

the victim of the circle sentencing process, or to ensure that she was a willing participant and whether or not she had adequate supports.²⁷⁴

In this circle sentencing proceeding, the assumption that all members are equal is questionable. For example, the belief that because everyone sits in a circle facing each other which apparently allows for more equality among all members ignores many power imbalances.²⁷⁵ Here the circle does not offer victims in many cases of abuse to be heard in the process as there are “very few, if any support services available to women who are victims of violence to provide the necessary support and advocacy to participate.”²⁷⁶ Crnkovich states in sentencing circles that she has observed many judges express the idea that the views of the community and the victim are the same. The assumption is that the community should provide the necessary support that the victims need.²⁷⁷ It is erroneous to assume that the victim and community share the same values, desires, and beliefs as in some cases the community could blame the victim, and focus all their energy on the accused without reflection and empathy for the needs of victims.²⁷⁸ Similarly, the responsibility of the community to provide support for the victim can be limited if individuals in the circle are related or close with the accused because favoritism can be expressed toward the offender resulting in the blaming of the victim.

Are Sentencing Circles able to Reduce Recidivism Rates?

Many claims have been made that sentencing circles can reduce recidivism rates, yet there is a lack of evaluation materials to back these statements up.²⁷⁹ Although Judge

²⁷⁴ *Ibid.*

²⁷⁵ *Ibid.*

²⁷⁶ *Ibid.*

²⁷⁷ *Ibid* at 13.

²⁷⁸ *Ibid.*

²⁷⁹ C.LaPrairie, & Roberts, J.V., “Sentencing Circles: Some Unanswered Questions” (1997) 39 *Criminal Law Quarterly* at 73.

Barry Stuart argues that he has completed over 400 sentencing circles, there is no data showing any significant changes in recidivism rates.²⁸⁰ Stuart notes that “in about half of those cases, the people have not committed further offences”.²⁸¹ In this regard, Stuart states that, “Circle sentencing and other community justice processes do spectacularly better than formal justice agencies.”²⁸² Here Roberts and LaPrairie, state that in order to systematically find out if recidivism was reduced in half and whether or not community justice measures are more effective than the mainstream system a thorough analysis is needed.²⁸³ LaPrairie and Roberts state that there would have to be a study that looks at individuals sentenced in circles compared to offenders sentenced in a conventional courtroom to truly find out if sentencing circles are more effective. The authors state that, “Unfortunately (and incredibly) in light of the interest that sentencing circles have generated no such a study has been conducted.”²⁸⁴

Involvement and Individual Rights of Sexually Assaulted Victims in Healing Circles

Emma LaRocque, in her article, “Re-examining Culturally Appropriate Models in Criminal Justice Applications” expresses concerns about individual rights of victims in community restorative justice such as the Hollow Water Justice Project that emphasize healing through tradition.²⁸⁵ For example, she states that there are many assumptions about Aboriginal communities as being concerned more for the collectivity than individual rights. The assumptions of traditional perspectives that all Aboriginal communities focus on forgiveness, healing, social harmony and concern for the

²⁸⁰ *Ibid.*

²⁸¹ *Ibid.*

²⁸² *Ibid.*

²⁸³ *Ibid.* at 73-74.

²⁸⁴ *Ibid.* at 73.

collectivity often ignores differences among Aboriginal communities.²⁸⁶ LaRocque states that although most Aboriginal communities have historically been based on egalitarian ideals it does not mean that individual rights were not valued.²⁸⁷ LaRocque looks at anthropological knowledge to address the idea that individuals were “highly regarded in Native societies...and their safety and dignity were, as a rule, not sacrificed for the collectivity.”²⁸⁸ La Rocque pulls out examples of different Aboriginal groups such as “the independent Metis, the daring culture of the coup among the Plains, the competitive haranguing traditions of important leaders in the potlatch system.”²⁸⁹

In the rhetoric of restorative justice and the focus on ‘healing’ of all affected members the focus is on bringing victims and offenders together for the opportunity of forgiveness for the purposes of social harmony and the collective good. This can run the risk of subverting the rights and wishes of individuals.²⁹⁰ Another concern is that encouraging forgiveness and discouraging incarceration can weaken protection of victims especially within the family context. Keeping offenders at home in small communities can raise many issues about the health and wellbeing of victims.²⁹¹ Not only is there a great risk of re-victimization but, according to LaRocque, “studies on sexual abuse also strongly indicate it is psychologically destructive for victims to be subjected to their

²⁸⁵ E.LaRocque, “Re-Examining Culturally Appropriate Models in Criminal Justice Applications” in M.Asch, *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality and Respect for Difference*. (Vancouver: UBC Press, 1997) at 73.

²⁸⁶ *Ibid.* at 74.

²⁸⁷ *Ibid.* at 83.

²⁸⁸ *Ibid.* at 81.

²⁸⁹ *Ibid.*

²⁹⁰ *Ibid.* at 84.

²⁹¹ *Ibid.* at 79-80.

attacker's presence.”²⁹² Similarly, encouraging victims to forgive their aggressor causes stress and guilt especially in cases of sexual assault.²⁹³

In looking at the Hollow Water experience, there are concerns for the rights of sexual assault victims who may feel pressured and reluctant to give consent to participate in a justice project where facing their attackers could contribute to psychological harm and stress.

Restorative justice theory has also emphasized that there is a “Focus on repair of social injury and restoration of social equilibrium and healing” in communities.²⁹⁴ LaRocque critiques this statement, put forth by Sawasky, and states that many Aboriginal communities punished severe offences through the philosophy of ‘an eye for an eye’.²⁹⁵ LaRocque states that, “[t]raditionally, there was swift justice for transgressions such as murder, physical assault, theft, or personal injury, indicating that ‘healing’ was not the means of dealing with criminals.”²⁹⁶ LaRocque discusses the Ojibway of northern Manitoba where people could be punished by illness, death, or psychic manipulation in cases of murder or injury to persons.²⁹⁷

Similarly, another area that raises concern for the safety of the victim is in the aftermath of the 1993 healing circle in Hollow Water Manitoba, where many individuals disclosed that they were responsible for sexual assaults. Here very few sentencing hearings were conducted and there was no increase in sexual assault charges. As noted by Green, this shows that the community is diverting offenders out of the mainstream criminal justice system, but could also mean that offenders are not being dealt with. This

²⁹² *Ibid.* at 79.

²⁹³ *Ibid.*

²⁹⁴ *Ibid.* at 77.

²⁹⁵ *Ibid.* at 81.

raises serious concerns for the welfare and safety of victims if offenders are not held accountable for their wrongdoing.

Community Social, Economic and Political Issues and Involvement in Restorative Justice Projects

This section will look at the claims made by the proponents of restorative justice that once community is involved, the problems identified with the mainstream system of justice are “automatically alleviated.”²⁹⁸ It will be argued that this approach is too simplistic and there are many concerns about community that should be addressed before the strengths of restorative justice projects can be articulated. For example, a few concerns will be expressed here such as community representation, involvement, empowerment and resources that sustain the intent of restorative projects in terms of providing support for victims, offenders, and reducing crime and social problems.

Many commentators suggest that there is a need for a broad section of community members to contribute to justice projects so that different views are expressed. For example, LaPrairie discusses the importance of the involvement of many members, as in some cases, there are only victim and offender supporters involved in the circle. She quotes from Retzinger and Scheff’s work where there can be an “engulfment” of offenders.²⁹⁹ LaPrairie states, “[t]his is a process by which supporters protect the offender through a series of exculpatory remarks, effectively discouraging the offender

²⁹⁶ *Ibid.*

²⁹⁷ *Ibid.*

²⁹⁸ *Ibid.* at 64.

²⁹⁹ *Ibid.* at 66.

from taking responsibility for his or her behaviour.”³⁰⁰ Similarly, the legitimacy of the circle process is maintained if there are an equal number of different perspectives heard.

Another element of restorative justice projects has contributed to the argument that once community is involved resources and energy can be instituted to protect the victim and provide rehabilitation for the offender.³⁰¹ In many communities with limited resources, it can be challenging to provide enough resources and skilled individuals to work with individuals who are repeat offenders with high criminogenic need factors. For example, LaPrairie’s research in LaLoche, Saskatchewan shows that the crime rates are the highest in that province where many macro and micro factors account for crime and disorder.³⁰² She addresses the macro level factors such as leadership, economy, and informal social controls and micro factors involving the personal realm, such as violence, addictive behaviour, and personal communication.³⁰³

In LaPrairie’s study she consulted individuals for interviews. A common concern was expressed that leaders should unite rather than divide people, especially in promoting the interests of individuals in restorative justice projects so that it truly empowers community members.³⁰⁴ It was also found that leadership was disinterested for the most part in community issues unless it was election time. Similarly, leaders need to be concerned and interested in taking on the issues of violence and crime problems in communities with a focus on empowering members.³⁰⁵

³⁰¹ *Ibid.*

³⁰² C.LaPrairie, “Seeking Change: Justice Development in LaLoche Saskatchewan” (Ottawa, Department of Justice 1997) at i.

³⁰³ *Ibid.*

³⁰⁴ *Ibid.* at 15.

³⁰⁵ *Ibid.*

Another macro issue that contributes to a crime problem concerns economic factors. For example, Laloche is mostly maintained financially by the Saskatchewan government where the costs approach 20 million dollars or more a year.³⁰⁶ According to LaPrairie and other authors such as Boldt, state that this creates dependency “and expectation of being serviced is created among the population.” LaPrairie goes on to state, “Long-standing dependence on the benefits of social assistance may weaken individual incentive to work, particularly at low paying jobs.”³⁰⁷ LaPrairie gathered from the community members that although the incentive to work and to hunt and trap was quite strong among older people, it was weakening among younger groups of people who often support themselves through social assistance.³⁰⁸ This is troubling from a crime and disorder perspective, as a large group of people in Laloche are in their prime working years and lack of work can lead to boredom. LaPrairie states, “Enforced idleness and lack of structure, lead this group into a variety of situations involving alcohol, drugs and/or gambling.”³⁰⁹

Although many people want to work there are not enough jobs for everyone to occupy and “chronic external financial support is not conducive to the creation of self-esteem and pride.” Therefore there is a need for development of employment opportunities and industries.³¹⁰

The last area to discuss involving crime problems is the reduction of informal social control that challenges this notion that once community is involved the needs of victims and offenders are met. According to LaPrairie, the second half of this century

³⁰⁶ *Ibid.* at 16.

³⁰⁷ *Ibid.* at 17.

³⁰⁸ *Ibid.* at 18.

³⁰⁹ *Ibid.* at 18.

has seen a rise in public institutions that deal with social problems and conflicts through police, social workers, churches, and schools.³¹¹ With the many changes in Aboriginal communities the involvement of outside agencies have contributed to a break down of informal mechanisms of social control that hinder the community's efforts to reduce crime and disorder through restorative justice projects.³¹² For instance when LaPrairie asked community members in Laloche what actions they take when conflicts occur and the police are not involved people stated that issues often go unresolved.

LaPrairie, also mentions many micro factors that relate to macro factors. She discusses violence, personal communication, apathy and lack of volunteerism as factors that relate to the crime problem.³¹³ In her interviews with various people, violence and alcohol abuse was a common aspect of life in Laloche and many members of the community expressed concern about child sexual abuse. The amount of violence is exemplified in the fact that person offences (especially spousal assaults and level one assaults) are the most common *Criminal Code* offences heard in LaLoche court.³¹⁴

Some of the contributing factors relating to violence are jealousy and gossip. Since there are few opportunities in communities there is often jealousy expressed towards those who are moving up in the world. Similarly gossip contributes to spousal/partner assaults when members of the community are spreading rumours about the couples. As a result of these conflicts, "People are often reluctant to attend public meetings for fear they will deteriorate into people taking 'shots' at one another."³¹⁵

³¹⁰ *Ibid.*

³¹¹ *Ibid.* at 21.

³¹² *Ibid.*

³¹³ *Ibid.* at 22.

³¹⁴ *Ibid.*

³¹⁵ *Ibid.*

Lack of personal communication between families and community members can often lead individuals into conflict with the law. “Because there is an absence of informal social controls, tensions and disputes between people often remain unresolved and can lead to greater conflict, especially when people are drinking”.³¹⁶ There are often power imbalances and jealousy in male and female relationships, where the male in the relationship does not like the fact that his ex-girlfriend has moved on with another male.³¹⁷

The final challenge to establishing restorative justice projects is lack of volunteerism, associated with the difficulties facing unemployed people who donate their time without financial gain.³¹⁸ There is often apathy expressed by members of the community especially when they feel that leaders are not doing a good job. This thought expressed by one community member said: “People won’t be involved unless paid. It’s because of leadership. Some people in leadership positions get money but don’t do a good job. Other people see this and say why should I volunteer when this is happening?”³¹⁹

This idea of frustration and apathy towards dealing with crime problems can also be explained through conflict theory. In the case of Laloche, a large group of community members are unemployed compared to a few members of the community with power and employment. Apathy is engendered when individuals feel unequal and marginalized compared to others with money and employment. When there are large differences between individuals there is often resentment expressed towards those with power. This

³¹⁶ *Ibid.* at 24.

³¹⁷ *Ibid.* at 25.

³¹⁸ *Ibid.* at 26.

³¹⁹ *Ibid.*

is shown in Laloche where many of the community members resent those who have become economically stable through employment opportunities on the reserve. There are so few jobs that life on social assistance has become the norm where obtaining an education does not seem to be reasonable in light of the fact that there is such a high unemployment rate.

Issues of Equality and Rights of Individuals in Community Justice

One of the subsidiary questions stated was whether or not restorative justice projects take on many characteristics of the mainstream criminal justice system in terms of individuals experiencing inequality. The proponents of restorative justice often state that community justice is a better outcome for communities as it creates empowerment and is culturally sensitive to the needs of Aboriginal people. Other researchers have made comments about the many challenges of social, political and economic issues that Aboriginal communities face in terms of developing viable restorative justice projects. Andersen discusses the marginalized individual and his or her experiences within community justice measures. For instance, he quotes from Boldt when he states that, “larger structural factors potentially creates unwittingly or not, a situation in which more marginalized members of Aboriginal communities are forced to acquiesce to the wishes of those controlling the reigns of power in the community.”³²⁰ With the push for restorative justice projects and the encouragement of accused to accept responsibility and pursue healing creates “peaceful” and “non-disputory” individuals.³²¹ As a result there are many experiences where the offender has limited opportunities to challenge their

³²⁰ C Andersen, “Governing aboriginal justice in Canada: constructing responsible individuals and communities through ‘tradition’ (1999) 31 *Crime Law & Social Change* at 313.

³²¹ *Ibid* at 304

charges and “community interpretations of their actions”.³²² In many Aboriginal communities, Andersen states, restorative justice projects do not have formalized procedures for contesting charges if individuals are encouraged to take responsibility.³²³ Therefore, a system of justice that is outside the mainstream system runs into problems that deny the rights of individuals. These concerns are highlighted despite the fact that many restorative justice projects engender the myth that everyone is equal in the community.

In this chapter the goal was to discuss restorative justice projects with the main focus on sentencing circles and the Hollow Water Justice Project. Without examining and critiquing restorative justice projects from a social, economic, political perspective many concerns are not brought to the forefront that affect the viability of restorative justice projects. It was also argued that just because community is involved does not mean that the problems of the system and conflict in communities are automatically reduced. There is a need for critiquing systems of justice in order to express concerns and promote change for the better. In this chapter, several subsidiary questions were addressed by looking at equality issues and the potential for the reduction of recidivism rates.

In the next concluding chapter the focus will be on suggestions for creating effective restorative justice projects through a look at relevant literature.

Chapter Six: Concluding thoughts on Restorative Justice and a look at reforming the system

³²² *Ibid.* at 309

³²³ *Ibid* at 313.

Throughout this thesis the main goal was emphasizing the need for reflecting on community and the many challenges such as economic, political, and social that contributes to high crime rates, and social problems on reserves. Here the ideal is often expressed that once the community is empowered to develop their own justice measures through a restorative justice regime crime is diminished and replaced with informal social control and healthy communities. To the contrary, communities face many challenges that need to be worked through before the restorative justice ideal is realized. LaPrairie comments on the lack of research about communities and restorative justice when she states,

The belief in the ability of aboriginal community justice to respond more effectively to crime in that community must be based on documentation of how well these objectives have been achieved and such research has not been forthcoming.³²⁴

Similarly, through the practice of restorative justice projects there is not enough evidence to show that recidivism is reduced, that victims and offenders are more satisfied, and equality is engendered or restored. In reality, it was shown through the macro and micro community, over-representation statistics and the structural factors contributing to this that many, but not all, Aboriginal communities have limited personal and financial resources. These factors place a strain on establishing the ideal of restorative justice projects.

It was shown through restorative justice endeavours such as sentencing circles and the Hollow Water Justice Project that there are many issues of victims not being heard, a too simplistic view of community and its powers to restore social order and

³²⁴ C.LaPrairie, "The impact of aboriginal justice research on policy: A marginal past and an even more uncertain future." (1999) 41 *Canadian Journal of Criminology* at 249.

rehabilitation, and evaluations are needed to show how effective projects are at reducing recidivism. Also by examining community and urban social, economic and political issues there are many issues of violence, conflict management concerns, dependence on social assistance, and lack of volunteerism that contribute to high crime rates as shown through LaPrairie's study in Laloche, Saskatchewan.

Suggestions for the Future of Restorative justice Projects

Within this section there will be a few suggestions from relevant literature that could be utilized for establishing restorative justice projects that are viable in Aboriginal communities that suffer from social, political and economic problems. These suggestions will be highlighted with respect to victims' involvement, community participation and involvement, evaluation studies to show any differences in recidivism rates, equality issues, and increasing social and economic resources for individuals and communities to make restorative justice projects a viable alternative from the mainstream system of justice.

Within restorative justice projects that are to encourage the involvement of all members, there should be a facilitator or Justice Coordinator that offers supports and trained staff to aid victims in preparing them for the project. At the same time this involvement of the victim should be on a voluntary basis especially in cases of sexual assault. For example, it was stated earlier that in a sentencing circle that Mary Crnkovich observed, there was no effort on the part of the judge, probation officer and mayor to prepare the victim for the circle.³²⁵ Similarly, the victim's concerns were rarely heard as she was seen as part of the community holding a consensual opinion.³²⁶ In this circle, the

³²⁵ Crnkovich *Supra* note 270.

³²⁶ *Ibid.*

discussion centered on the offender and what could be done regarding his abusive behaviour; there was little concern with the victim, her needs and the possibility of negative impacts of the circle process.³²⁷

As part of restorative justice theory there is an emphasis on reducing the use of punishment and encouraging the community to be involved in rehabilitating the accused through a healing apparatus as shown through the CHCH. Here there are concerns for the victim's protection and safety as often communities are small and without adequate resources. This protection and concern for safety could extend to family members and children. Emma LaRocque emphasizes the importance of protection when addressing victims of sexual abuse, as she has stated that it is often psychologically harming to be in the vicinity of their attacker.³²⁸

In order to deal with these many issues of victim involvement, rehabilitation of the accused and community empowerment there is a need for resources that contribute to training interested community members, and establishing evaluation techniques to understand the satisfaction rates. For example, the importance of adequate resources, particularly funding, was identified as an important issue by the *Royal Commission on Aboriginal Peoples*. The Commission recommended "at a minimum, funding for new initiatives should be guaranteed for at least the period required for serious and proper evaluation and testing."³²⁹ The Commission also suggested that there is not a great deal

³²⁷ *Ibid.*

³²⁸ *Supra* note 285.

³²⁹ Canada, Royal Commission on Aboriginal Peoples. *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada*. Ottawa: Minister and Supply Services at 269.

of new money needed and that there could be money re-allocated that is already being spent to “process and in many cases warehouse a small segment of the population.”³³⁰

In order to create jobs and empowerment of some community members the work of Andrea Kamin and Romeo Beatch describe a promising community based approach to developing counseling services required for both victims and accused.³³¹ In this example, professional agencies were brought into the community to work with individuals so that they could in turn help their fellow community members through counseling. This could be a viable option as long as the staff trained to help their fellow community members are healthy and motivated to make a difference.³³² On the other hand, there are some concerns with bringing trained professionals into the community for a short period of time to help train in developing new skills as there is a need for ongoing support and development.³³³

At the same time that communities establish resources to deal with offenders there may be some offenders who should be deferred to the mainstream criminal justice system. This can occur in cases where there may not be enough resources to protect victims and to offer intensive rehabilitation for the wrongdoer.³³⁴

There is also a need for continuous research of programs in order to realize the promises of restorative justice especially in ensuring equality and balancing power structures. Research and careful attention to the way in which Aboriginal communities practice restorative justice is important for

...the realization of more civil societies where genuine

³³⁰ *Ibid.*

³³¹ C. Levis, “Circle Sentencing: The Silence Speaks Loudly, Considering Whether the Victims’ Needs Can be met through Circle Sentencing (M.A. Thesis, University of Northern British Columbia, 1998) at 6.

³³² *Ibid.*

³³³ *Ibid.*

³³⁴ *Supra* note 298 at 75.

forms of partnership, representation, and participation can occur in collaboration with strategies that balance power imbalances and promote a more even distribution of advantage and disadvantage in communities.³³⁵

In this focus for equality and developing viable restorative justice projects there is a need for a “Canadian knowledge base” to understand what programs work in terms of meeting the needs of victims, offenders, communities, and reducing recidivism.³³⁶ In the long term the development of programs should focus on working through the underlying causes of crime and developing social services that are preventative in nature. Developing programs that are preventative would work towards parenting skills, job promotion that creates and establishes self esteem, educational endeavours, and other areas that promote healthy lifestyles.

The suggestions for increasing the viability of restorative justice projects take time, effort and planning so that the goals of restorative justice are met. Also it was shown that just because a community is empowered to deal with criminal justice issues does not mean that the problems of this approach are eliminated. There are many need areas that should be addressed such as effective research, training of staff to facilitate projects, increasing resources for rehabilitation and victim protection, understanding satisfaction rates of victims and offenders, and ensuring that the rights of individuals and reducing power imbalances is realized. There are many long term goals such as creating employment and educational opportunities for people as well.

³³⁵ *Supra* note 325 at 251

³³⁶ *Ibid* .at 256

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