Indigeneity Through the Eyes of the Colonizer: An Analysis of Sentencing Circles

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Abstract

On the public stage, Canada politically promotes a multicultural agenda that often undercuts or obfuscates historically determined experiences of colonialism that persist contemporaneously in Indigenous communities. Using post-colonial and feminist legal theory, the following essay argues that novel criminal justice processes, such as the 'sentencing circle' employ principles of Henry and Tator's model of 'democratic racism'. This essay argues that sentencing circles engage in 'pan-Indigenous' homogenization, invisibilizes the experiences of Indigenous women, and often leaves Indigenous women exposed to further victimization. Despite the multicultural premise that supposedly characterizes such non-traditional methods, this article reveals that such policies may be uninformed and improperly applied.

Keywords: Sentencing circles, Post-colonial legal theory, Feminist legal theory, Democratic racism, Multiculturalism

INTRODUCTION

The national identity of Canada is synonymous with a constitutional protection of multiculturalism, explicitly written into the *Canadian Charter of Rights and Freedoms* (Tierney, 2007). How then, does the Canadian state propose a 'multicultural' state when Indigenous peoples comprise approximately 25% of admissions to provincial/territorial custody, despite accounting for only 4% of the Canadian population? (Malakieh, 2018). Such facts are synonymous with the settler state's appeal to fast stead coercive assimilation of Indigenous peoples (Coulthard, 2014; Barker, 2014; Macklem, 2016). However, in recent decades the Canadian government has haphazardly *attempted* to address the colonization of Indigenous peoples. Pursuant to governmental commissions on the status of Indigenous peoples in Canada, in 1996, the federal government amended the *Criminal Code* to include Section 718.2(e). These reformations to sentencing law dictate that: "…available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders" (R.S.C., 1985, c. C-46).[1] The implementation of this statute was championed as a meaningful attempt to formally remedy the consequences of colonialism and state-sanctioned assimilatory legislation, which has contributed to the overrepresentation of Indigenous peoples in correctional institutions (Pelletier, 2001; Murdocca, 2013). The Supreme Court of Canada's 1999 ruling in *R v. Gladue* represented a monumental interpretation of Section 718.2(e). The case involved a young Indigenous woman, Jamie Tanis Gladue, convicted of manslaughter in the death of her partner. The Court ruled that the Canadian judiciary *must* consider unique or systemic factors that bring Indigenous individuals before the courts, in addition to reviewing 'appropriate' sentencing procedures and sanctions relevant to an Indigenous person's ancestry (*R v. Gladue*, 1999). Furthermore, the Court set a precedent that *all* Indigenous persons should be assessed through such considerations, regardless of status (*R v. Gladue*, 1999).

[1] The terminology of Section 718.2(e) uses the phrase Aboriginal to homogenize across a wide array of First Nations, Inuit, and Métis peoples. Aside from homogenization, the term Aboriginal is counter-intuitive to recognizing the 'original' of Indigenous peoples, as the pre-fix 'ab' implies that such peoples are *not* original to this land. In place of Aboriginal, this paper uses the term Indigenous peoples to refer to the distinctive nations that originally inhabited the territory now known as Canada.

The unique nature of Section 718.2(e) has inspired the judiciary and legal counsel to seek alternative measures of sentencing that are culturally appropriate. One such method, the sentencing circle, is an Indigenous-inspired method of sentencing that incorporates community leaders, family members, and political dignitaries who express their opinions, concerns, and recommendations regarding a case in the physical layout of a circle (Crnkovich, 1996). However, the 'traditionally Indigenous' elements of the sentencing circle have been criticized by socio-legal scholars for being culturally deft and ahistorical (Goel, 2000; Cameron, 2006a; Cameron, 2006b). Scholars, for instance, criticize sentencing circles for homogenizing a plurality of distinct Indigenous culture identities, and inaccurately employing sentencing circles in communities where the method has no historical precedent (Goel, 2000; Dickson-Gilmore and La Prairie, 2005; Crnkovich, 1996). Similarly, the sentencing circle's inclusion of criminal cases involving intimate partner violence[2] has been chastised by feminist scholars as being ignorant of the gendered circumstances of settler colonialism, and the presence of intimate partner violence in Indigenous communities. Moreover, pragmatic considerations of safety, such as re-victimization and exposure to further emotional trauma remain a point of contention (Crnkovich, 1996; McGillivray and Comaskey, 1998; Goel, 2000; Cameron, 2006a; Cameron, 2006b).

Informed by post-colonial and feminist legal theory, this essay situates the sentencing circle as a neo-colonial process existing in the context of the Western legal system. Thus, Indigenous legal traditions are recursively framed by the Canadian judiciary through colonial language. This is signified by the erasure of Indigenous pluralities into an immutable 'pan-Indigenous' identity and the diffusion of patriarchal assumptions of gender. The neo-colonial signification of the sentencing circle embodies the quality of 'democratic racism': the permeation of 'fairness, justice, and equality' juxtaposed with the continuance of prejudicial attitudes and discriminatory actions (Henry and Tator, 1994). In this essay, I argue that the sentencing circle embodies democratic racism as a hollow, politically-expedient reconciliatory tool to providing the appearance of reconciliation in the absence of legislation actively aspiring to deconstruct the colonialist system of governance that reproduces a marginalized Indigenous population. In

[2] Intimate partner violence here refers to sexual, physical, verbal, emotional, or economic abuse perpetrated in the context of an intimate relationship. Throughout this essay the terms 'intimate partner violence', 'spousal violence', and 'intimate violence' are used interchangeably.

addition, I argue that the sentencing circle operates as a legal process that furthers the colonization of Indigenous culture through the misappropriation of Indigenous culture. A twisted, colonized version of the 'healing circle', the sentencing circle can further reify a normative colonial-patriarchal order through silencing and re-victimizing Indigenous women in cases of intimate partner violence.[3]

To begin, this paper will outline the theoretical principles of post-colonial and feminist legal theories, and the salience of these projects in addressing the use of sentencing circles in cases of intimate partner violence involving an Indigenous female victim. This essay then lays out the dimensions of the Indigenous sentencing circle in Canada (i.e. differences from Western sentencing models, physical layout, community participation, principles and objectives). The essay then transitions into a 'post-colonial-feminist legal' theoretical critique of sentencing circles that considers the ahistorical and homogenizing logic of the sentencing circle. This logic constructs an alternative 'history' of sentencing circles that aligns neatly with settler-patriarchal assumptions of culture and gender representative of a colonized perspective of Indigenous women's agency. In addition, this essay underscores the immediate and practical issues sentencing circles pose to the safety and empowerment of Indigenous female victims of intimate partner violence. To inform said analysis, this essay makes use of a sampling of sparse Canadian case law, in which the judiciary has provided as a written account of the sentencing circle process.

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[3] It is important to note that the literature on the use of sentencing circles for Indigenous offenders is rather sparse over the preceding fifteen years. There are number of confounding issues relating to this sparsity. The foremost reason is the lack of available information regarding judicial proceedings involving sentencing circles. For example, judges are not required to publish their written decisions, nor provide their textual account of the sentencing circle. As a result, it is unknown how commonly sentencing circles are implemented, nor would it be accurate to suggest that the judiciary is consistently publishing an in-depth account of the sentencing circle. Furthermore, the implementation of sentencing circles extends in cases of intimate partner violence only makes up an unspecified fraction of the total usage of sentencing circles. Due to this lack of primary information, this paper utilizes case law that provides a great deal of insight into the process and deliberations of sentencing circles. Unfortunately, however, such public cases are quite dated.

THEORETICAL CONSIDERATIONS

The post-colonial theoretical tradition is situated within the latter half of the 20th century by social theorists, literary figures, and general intellectuals, such as Frantz Fanon, Edward Saïd, and Homi K. Bhaba, among others (Go, 2012). The diversity of theoretical insight from post-colonial theory often results in the inability to produce a precise, exhaustive definition. However, post-colonial theory is broadly understood as an analytical tool for interpreting colonization, particularly as it relates to processes of subjugation, dispossession, and the concrete and abstract transformation of cultures and identities (Roy, 2008). Colonialism has historically permeated the legal sphere through the systematic signification of laws, which has produced a profound cleavage between European colonizers and the alienation of the Indigenous 'Other' (Roy, 2008). The legal ordering of the Canadian settler society is intertwined with this dichotomization through reification processes that legitimize the socio-legal subjugation of Indigenous inhabitants as natural. Moreover, these laws act in a colonizing fashion to provide a semblance of civility, progress, and order to an 'uncivilized' terrain.[4] As a result, the subtext of law in colonized territories reflects the normative language of the colonizer - their practices, their norms, their epistemic truths – each of which reflects Eurocentric enlightenment era ideologies (Roy, 2008).[5] Post-colonial legal theory provides a critical framework for contemplating the manifestations of colonialism in contemporary environments. The extant dynamics of power in the Canadian legal system reveals the surreptitious propagation of the colonial 'ghost' in the multicultural world that blurs cultural identities and national boundaries through discourses of globalization. Such a legal system serves neo-colonial capitalist expansion that further consolidates the power of the colonizer, at the expense of Indigenous inhabitants (Morgensen, 2011; Agozino, 2018). For the purposes of this essay, post-colonial legal theory offers a relevant theoretical project that

[4] Examples of such laws include the banning of the Potlach and Sun Dance ceremonies in Western Canadian provinces in the late 19th century, legally requiring Indigenous children to attend residential schools, restricting mobility off of reserve communities, and the apprehension of Indigenous children by the Canadian state's children's protective services (known as the 'Sixties Scoop'). For more information, see Royal Commission on Aboriginal Peoples. 1996. *Highlights from the Report of the Royal Commission on Aboriginal Peoples*. Ottawa, ON: Minister of Supply and Services Canada.

[5] The most prominent example of this in Canadian history is the Indian Residential School System. According to the findings of the Truth and Reconciliation Commission of Canada (2015: v), intended to "…[separate] Aboriginal children from their families, in order to minimize and weaken family ties and cultural linkages, and to indoctrinate children into a new culture – the cultural of the legally dominant Euro-Christian Canadian society…" For more information, see Truth and Reconciliation Commission of Canada. 2015. *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada.* Ottawa, ON: Library and Archives Canada.

considers the manifestations of settler-colonial sensibilities in purportedly Indigenous traditions. Post-colonial legal theory would posit that the way the sentencing circle has been implemented is chock-full of assumptions, characterizations, and projections of Indigeneity that further the colonial project.

In addition to post-colonial legal theory, feminist legal theory is a salient theoretical tool for deconstructing the legal embedding of hierarchical gender binaries that service patriarchal governance. In practice, feminist theory is distinguishable as a field that methodologically integrates the voices of marginalized populations to transform male-dominated institutions and to equitably incorporate female subjectivities (Albertson-Fineman, 2005; Levit and Verchick, 2016; Ferguson, 2017). From a critical perspective, the law operates to legitimize the unequal allocation of material resources and immaterial power through ideological framing (Hunt, 1993; Carbado and Roithmayr, 2014; Akhtar, 2015). Essentialist gender assumptions permeate the legal sphere and are challenged by legal feminist scholars as an indication of the affixed nature of patriarchy within the social consciousness. Some feminist scholars opine that the law is effectively beyond repair due to the grip of patriarchal determinations (Naffine, 2000). Nevertheless, legal feminist praxis has resulted in the lobbying and production of significant alterations to the law. In the Canadian context, substantive legal victories include the abolishment of impunity in marital rape, and the implementation of 'no-drop' intimate partner violence policing which discursively reconstituted spousal abuse from a private act to a social ill (Brown, 2002; Boyd and Parkes, 2017). The mobilization of feminist legal theory illustrates the intersection of theory and activism to produce legal change with respect to women's issues. Feminist legal theory acts as a salient analytical tool to addressing the 'silencing' and discursive framing of Indigenous female victims of intimate partner violence in sentencing circles as 'passive bystanders'. In addition, feminist legal theory is essential to critiquing institutional failures in implementing mechanisms which would ensure the protection of female victims' physical, mental, and emotional well-being (Cameron, 2006a; Cameron, 2006b). Feminist legal theory would posit that such failures are representative of a patriarchal legal framework that marginalizes and discounts the violent victimization of women.

Post-colonial and feminist legal theories are both instrumental for re-evaluating the normalization of social relations founded upon social inequalities. As a result, there is significant overlap that establishes a nascent understanding of the law. Both are critical of the hegemonic legal framework, which has continuously replicated patriarchal values – the domination of men at the expense of women – and colonial values – the domination of the colonial master over subjugated bodies (Moyo, 2012). Indigenous peoples and women are categorized as the 'Other' in a mutually exclusive terminology. For example, women are defined as what men are not; the Indigenous inhabitant is defined as what the colonizer is not. The constitution of this terminology lies in the hands of the oppressor: the legal apparatus of the state that functions to protect the interests of the dominant class of Canadian society (historically speaking wealthy, property owning, white men) (Hunt, 1993; Carbado and Roithmayr, 2014; Akhtar, 2015). Melded together, post-colonial and feminist legal theories can intersectionally address the way the settler-colonial project of cultural domination, assimilation, and marginalization have had particularly deleterious effects for Indigenous women. Settler-colonialism has and continues to inflect the logics of European patriarchal values that have systematically stripped political and social power from Indigenous women and relegated them to a position of an infantile subordinate, beholden to male authority (Kirkness, 1987; Razack, 2002; Kuokkanen, 2008). A 'post-colonial feminist legal theory' is pertinent to addressing the interconnectedness of settler colonialism and patriarchal authority that is evident in the marginalization of Indigenous women in sentencing circles.

Written law in Canada carries the gendered and cultural histories of centuries-long nation building. The expression of inequality, therefore, penetrates beneath the surface layer, often hidden from view. The implementation of the sentencing circle as a legitimate object of criminal law is crucial to demonstrating the meta-narratives of historically contrived colonialism, which brought forth a Eurocentric epistemology. The European episteme subsequently has sought to devalue and delegitimize indigenous systems of knowledge worldwide (Chakrabarty, 2000).[6] This mode of knowledge continuously operates through legal governance that regulates what

[6] For more information, see Chakrabarty, D. 2000. Provincializing Europe: Postcolonial Thought and Historical Difference. Princeton, N.J.: Princeton University Press.

ought to be identified as Indigenous. Of course, this postulation as truth is false; rather the legal expression of Indigeneity presents an ahistorical view whereby Indigenous women are infantilized by normative patriarchal language. The textual accounts of the sentencing circle privatize intimate partner violence, invisiblize the victim's experience, and paternalistically dictate what the 'appropriate' healing process is (Cunliffe and Cameron, 2007).

SENTENCING CIRCLES – AN OVERVIEW

The sentencing circle is a judicially convened alternative to standardized practices of criminal sentencing that is rooted in Indigenous principles of healing and restoration of equilibrium, whereby the sentencing phase occurs in a circle with input from legal officials, the offender, the victim, family members, and community members. However, there is no standardized model for how a judge facilitates a sentencing circle. In fact, the original proponent of sentencing circles, former Yukon judge Barry Stuart, suggests that each circle *should* be unique to the community in which it is undertaken. However, the circle can broadly be defined as one that may only take place in cases which the offender has accepted fully responsibility for their actions (Stuart, 1996). This presupposition of responsibility has been challenged as a prerequisite for sentencing circles because the circle itself may have the power to illuminate the weight that the offender's conduct carries upon the community (Benevides, 1994). Upon the admission of guilt, a sentencing circle may be requested by the guilty party, to which an application may be accepted or rejected on a case-by-case basis (Stuart, 1996).

The sentencing circle differs from the Western model of sentencing in terms of physical space, participants, and objectives (Jones and Nestor, 2011). In the traditional courtroom, physical markers of tables and benches delineate the hierarchal organization of the criminal justice system. For example, the judge presides upon an elevated bench, to which the defence and prosecution face, each occupying their own table. The sentencing circle ostensibly abolishes this hierarchy by removing tables and chairs from the process and arranges all participants in a circle facing one another (Goel, 2000). The spatial organization of the circle is intended to promote an equal status among participants (Crnkovich, 1996). However, this is a contentious description as hierarchical ordering is still present: the presiding Justice can abort any

communally agreed disposition (Goel, 2000). Beyond the physical dynamic of the sentencing circle, the participatory dynamic is radically different. The family of the offender, the victim and their family, Indigenous Elders, Indigenous band members, and municipal officials may participate, in addition to traditional actors such as probation officers, psychologists, and counsellors. Each member of the circle voices their knowledge of the case - the offender, the victim, or the community - until everyone has participated. Once all opinions are submitted, an unanimously agreed upon sentence is crafted, to which the presiding Justice may accept (Goel, 2000). Punishments do not preclude imprisonment but strive to enforce non-carceral Indigenous and institutional dispositions that may include: banishment from the community, a sweat-lodge retreat, house arrest, curfews, community service, monetary donations, restriction of rights in relation to firearms, mobility, or vehicular operation, or rehabilitative treatment (Stuart, 1996).

The judicial usage of sentencing circles was sparse prior to legislative reform of sentencing law in 1996 (Goldbach, 2015). In Canadian case law, Justice Stuart of the Yukon Territorial Court – presiding upon the criminal case of *R v. Moses* (1992) – convened the first judicial sentencing circle. The guilty party, Philip Moses, a 26-year old Indigenous man who had a troubled relationship with the law, accrued approximately 43 criminal charges prior to 1992, for which he was imprisoned for several years and subjected to numerous probation orders. In a sobering analysis, Justice Stuart noted the failure of the criminal justice system to efficaciously rehabilitate Moses (*R v. Moses*, 1992). In consultation with Moses' probation officers, local authorities, and members of the community, a circle sentencing hearing was ordered (*R v. Moses, 1992*). In his justification of the usage of a circle, Justice Stuart noted that traditional space of the courtroom was adversarial, and promoted an institutional monopoly of the legal proceedings, whereby the knowledge of laypersons was not afforded equal consideration (*R v. Moses*, 1992). Justice Stuart further indicated that this model may increase the accuracy of information collected, promote a 'shared' sense of community responsibility, increase offender and victim participation, and challenge the 'monolithic' notion of a 'typical sentence' by accessing Indigenous understandings of justice (*R v. Moses*, 1992). Using commentary from Moses and his family, Justice Stuart, the Crown prosecutor, defence counsel, probation officers, the RCMP, First Nations officials and community members, an agreed upon disposition was submitted: a

suspended sentence, and two years' probation (*R v. Moses*, 1992). The sentence required Moses to attend an Indigenous addictions rehabilitation facility and live with his family in an alcohol-free environment (*R v. Moses*, 1992).

Prior to 1996, sentencing circles were geographically isolated to northern and western Canadian Indigenous communities (Benevides, 1994). The introduction of Section 718.2(e) – resulting from *R v. Gladue* – encouraged sentencing judges to use alternative measures in the sentencing of Indigenous offenders, primarily those that are 'culturally appropriate'. For Indigenous people, the Canadian criminal justice system is often "alien" and "repressive"; a system that explicitly serves colonial governance (Royal Commission on Aboriginal Peoples, 1996: 58). Historically, Indigenous rooted models of justice de-emphasize an adversarial approach to which the offender has violated the normative conduct of the state; rather the offender is conceptualized as a 'spiritually-imbalanced' individual (Goldbach, 2015). A return to spiritual equilibrium occurs through holding the offender accountable for their conduct through a process of community-led support (Goldbach, 2015). It is worthwhile to note that the underlying logics of the sentencing circle closely align, in a philosophical sense, with the principles of Western restorative justice practices that similarly emphasize offender rehabilitation (Griffiths, 1996; Goldblach, 2015).

The installation of 'authentic' Indigenous values of rehabilitation, community, and respect remains suspicious to some scholars (Dickson-Gilmore and La Prairie, 2005). The common criticism of sentencing circles is their simplicity, and assumptive quality of what may be helpful for Indigenous peoples (Dickson-Gilmore and La Prairie, 2005). A related issue is the lack of empirical assessment in the measurement of outcomes within sentencing circles. For example, do sentencing circles reduce recidivism? Does the sentencing circle alter the offender's perception of self? Is there a sense of equilibrium, or a restoration of normative conditions, following a sentencing circle? Unfortunately, very little information is present to guide a comprehensive evaluation of sentencing circles. The transcriptions of sentencing circles provide one manner to assess, although judges are not required to publicly issue these accounts (Benevides, 1994). Consequently, there is a prevalent fear that sentencing circles are indicative

of a rush to restorative justice which does not thoroughly explicate the effects of such alternative measures, particularly in matters of victim protection (Cunliffe and Cameron, 2007).

The Canadian judiciary strictly suggests numerous guidelines for when sentencing circles are *not* suitable, including where "there have been frequent repeat offenses," and where "a term of incarceration in excess of two years is realistic" (Goel, 2000: 318). In addition, it is suggested that the victim be willing to participate where they have not been "subjected to coercion or pressure in so agreeing," (Goel, 2000: 319). The use of sentencing circles in cases of intimate partner violence is inherently problematic. The controversy here is expressed through the Canadian judiciary's colonized ascertainment of the sentencing circle as 'authentically-Indigenous'. This distinction of cultural-authenticity is ahistorical, and projects a spectre of colonizing-patriarchal discourse upon the sentencing process. As a result, the sentencing circle can be conceptualized as a legally pluralistic model of settler-colonial 'reconciliation' whereby, on a surface level, there is an 'effort' to incorporate pan-Indigenous cultural artefacts, irrespective of the diversity of Indigenous nations (Dickson-Gilmore and La Prairie, 2005). Yet 'Indigenous' artefacts, such as sentencing circles, extend the colonial enterprise through an appropriation of culture that is inherently colonized. As a result, the underlying dynamic of colonizing Indigenous bodies within the legal sphere remains a ubiquitous process.

CRITIQUING THE 'CULTURE' OF CANADIAN SENTENCING CIRCLES

Sentencing circles have been widely lauded by legal scholars through their implementation of the 'circle' – a significant cultural symbol in Indigenous tradition – to the framework of the Western criminal justice system (McNamara, 2000; Bressan and Coady, 2015; Goldblach, 2015). The Canadian judiciary regards the implementation of sentencing circles as a viable model to addressing the 'unique' historical factors that bring Indigenous peoples before the criminal justice system (Wall, 2001). On the legal-political spectrum, there is an assumption that utilizing a holistic sentencing mechanism will afford the Indigenous offender an opportunity to address the underlying effects of colonialism that are commonly experienced within Indigenous communities. Similarly, an inference has been drawn that community-led justice initiatives, such as sentencing circles, will increase the visibility, control, and responsibility of

the Indigenous community in justice affairs (Wall, 2001). This meta-narrative of 'community-justice' is likewise enamoured for existing outside of any 'legislative framework' of the Canadian government (McNamara, 2000). Indeed, sentencing circles are a collaborative concoction of circuit court judges and members of the respective community to which the circle is founded within (McNamara, 2000). Despite the theoretically positive principles of amalgamating Indigenous justice within Western justice, there are notable shortcomings.

The circular formation is rooted in the traditional healing circle – which has conventionally been used as an approach to dispute resolution (Jones and Nestor, 2011). However, Crnkovich (1996) notes that the simplistic notion of appropriating the circle as a universal artefact of Indigeneity is ignorant of extant cultural specificities. Crnkovich (1996) engaged with a sentencing circle in Nunavik, a northern region of Québec where large contingents of Inuit peoples reside. In Crnkovich's (1996) estimation, the sentencing circle has no historical precedent for the Inuit peoples of that community. As a result, the participating members expressed confusion regarding the implementation and purpose of the sentencing circle, and their role in it, particularly as Justice Dutil did not brief participants on the process of sentencing circles (Crnkovich, 1996). Therefore, the sentencing circle may be conceptualized as an alternative derivation of justice from the consciousness of reform-minded judges in certain Indigenous communities (McNamara, 2000). This claim may be countered through a proclamation of simply 'melding' two cultural belief systems into a singular framework of justice (Goel, 2000). Alternatively, it has been suggested that the sentencing circle does not facilitate a historically accurate return to pre-contact traditions, but rather a contemporary reconstruction of Indigenous traditions by the Canadian state (Goel, 2000). However, as Razack (1998: 58) notes, it is important to assess the context of culture institutionally:

> Indeed, the notion of culture that perhaps has the widest currency amongst both dominant and subordinate groups is one whereby culture is taken to mean values, beliefs, knowledge, and customs that exist in a timeless and unchangeable vacuum outside of patriarchy, racism, imperialism, and colonialism.

It is thus appropriate to question the superimposition of Indigenous justice upon Western justice without contextualizing that imposition in a relationship of unequal power relations between the

settler-state and Indigenous peoples. For example, the formulation of sentencing circles as a precursor of reconciliation is questionable when considering the historically paternalistic role of Canadian law in governing Indigenous communities. Implementing 'talking sticks', 'feathers', or being engaged spatially in a circular dimension as a signification of plurality can lead to the simple reification of the dominant culture (Mohanty cited in Razack, 1998).

In a legal context, the appearance of a legal 'plurality' is vexing due to the state's acclaim of multiculturalism. The Canadian judiciary has operationalized Indigenous heritage into a static, timeless, and homogenous singularity. This framing of Indigenous culture in law is a colonizing technique of stereotyping that falsely depicts 'social histories' – which is immensely useful in legitimizing relations of power (Frideres cited in LaRocque, 2010). Misrepresentation or misinformation regarding social histories can function as a discursive socio-political tool that effectively erases the distinctive identities of Indigenous nations, thereby, producing binary oppositions of 'us' (the colonizing settlers) and 'them' (Indigenous people). Inequities in social, political, and legal power has resulted in the colonizing society maintaining authority regarding the recognition of identity (see the Indian Act, and the implementation of Section 718.2(e)). Indigenous scholars such as Glenn Coulthard (2007, 2014) and Taiaiake Alfred (2005) are critical of such 'politics of recognition' that serve liberal doctrines of multiculturalism and celebrate cultural diversity. Notwithstanding rudimentary engagements with Indigenous nations to 'accommodate' their heritage, such efforts are criticized for their hollowness as they do not actively deconstruct the white, settler hegemonic socio-political configuration that has, and continues to, marginalize Indigenous populations (Coulthard, 2007).[7] Discounting the heterogeneity of Indigenous culture is a form of cultural reductionism that allows the settler colonial state, and the judiciary, to act as a gatekeeper of authenticating what is Indigenous.

This cultural reductionist view is part and parcel of the Canadian legal system's persistent attempts to regulate Indigenous culture. Historical examples include criminalizing Indigenous ceremonies in Western Canada and the disenfranchisement of non-reserve 'Indians' under

[7] Examples of on-going colonization include but are not limited to: the encroachment of Indigenous territories for resource extraction and business development that violate treaty rights, the abstraction or explicit removal of Indigenous histories from the education system, the Canadian judiciary's over-reliance upon incarceration for Indigenous offenders, and media portrayals of missing and murdered Indigenous women.

legislation of the Indian Act (Goel, 2000). Thus, the law has been a temporally pervasive agentic force in partitioning Indigenous bodies into a conquerable whole through the attempted impoverishment of culture. Illustrated through the sentencing circle is a form of 'cheap justice' that operates to meet a quota of legal alternatives to appease the multicultural identity of Canada.[8] The system of the colonizer, or the oppressor, to which institutional oppression occurs economically, politically, and socially is unchanged (Henry and Tator, 1994). The mere presence of a superficial plurality within the law satisfies the myth of "multicultural policies [being] sufficient," (Henry and Tator, 1994: 10). This absolves the colonizer of reflexively reviewing the normative institutional discourse of law to which social inequality is rooted.

Outwardly, sentencing circles represent a return to 'tradition' for Indigenous peoples. Inwardly, however, sentencing circles may simply illustrate the status quo of colonization, albeit in subtler forms which operate in the psychological subconscious by categorizing what is Indigenous. Paternalistically delineating what constitutes the 'Indigenous' identity is a longstanding policy of the Canadian state that dates to the Indian Act of 1876 (Milloy, 2008). If Indigenous subjectivities, heritages, and cultural practices exist as a legal manifestation, defined by non-Indigenous actors, then colonization is *not* being combatted, rather reified. Therefore, it is questionable to suggest that decolonization of the Canadian criminal justice system could ever occur without the state relinquishing paternalistic authority over Indigenous nations.

THE INTERACTION OF GENDER IN CANADIAN SENTENCING CIRCLES

In the textual accounts of sentencing circles, colonization significantly influences the participation of Indigenous women. One of the most controversial applications of sentencing circles is their use in mediating intimate partner violence (Cameron, 2006b). Across Canada, approximately 9% of Indigenous peoples reported being a victim of spousal violence in the preceding five years compared to 4% of the non-Indigenous population (Boyce, 2014). Spousal violence is further elevated within Indigenous communities in the territories, as 18% of Indigenous peoples reported being a victim of spousal violence (Boyce, 2014). More specifically,

[8] Cheap justice' here refers to policies of criminal justice that do not consider the broader environment to which they are attempting to regulate. The ideation of sentencing circles from circuit-court judges – not autonomous Indigenous governments – fails to consider the broader history of law that has left Indigenous peoples categorized 'Other' within their territories. This extension of colonialism reflects the Canadian state's inability to reconcile relations with Indigenous communities.

Indigenous women (10%) were three times more likely than non-Indigenous women (3%) to report being a victim of spousal violence (Boyce, 2014). Moreover, Indigenous women qualitatively experience more severe forms of violence compared to non-Indigenous women. Over 60% of Indigenous female victims of spousal violence reported being "sexually assaulted, beaten, choked or threatened with a gun or knife" compared to 32% of non-Indigenous female victim (Boyce, 2014). However, quantifying spousal violence can be difficult. For example, in some Northern Ontario communities, it is suggested that some 75 to 90% of Indigenous women have experienced intimate partner violence (Ontario Native Women's Association, 2007). Moreover, these rates may be lower due to a naturalization of violence and distrust of police that result in non-reporting of crimes (McGillivray and Comaskey, 1999).

A theoretical compendium of feminist legal theory and post-colonial theory explicates the critical conceptual nexus between gender, culture, and colonialism in play within sentencing circles. One criticism levied against sentencing circles is the 'invisiblization' of Indigenous women within the circles' discourse (Cameron, 2006a). While sentencing circles are championed for their progressive approach in holistically healing the offender, the victim, and the community, victims often find themselves in a precarious position. In *R v. Taylor* (1996), Justice Milliken of Saskatchewan suggests that the "primary purpose of a circle […] is to help an accused person change lifestyles with community involvement." As a result, "the presence or absence of the victim at a circle is not crucial for the having of a circle," (*R v. Taylor*, 1996). This type of institutional language places the often-female survivor of intimate violence on the fringe of the healing process, to which their emotional rehabilitation is secondary or tertiary. The sub-textual meaning of this is significant, as it demarcates who is legally recognized and who is not. The absence of Indigenous women within the judiciary's textual account of the circle is not isolated to merely one case – but is a recursive process (Cunliffe and Cameron, 2007). In reviewing the available text-accounts of sentencing circles, Cunliffe and Cameron (2007) note that there is a persistent failure of indicating whether the female survivor of intimate violence was present within the circle. As such, the survivor is mitigated to a perfunctory designation through non-acknowledgement of their mere presence (Cunliffe and Cameron, 2007). The failure to legislatively regulate sentencing circles means that the circle is built through the trial-and-error

of legal precedence – a common law tradition. Routinely placing the victim 'outside' of the circle creates an institutional chain of legitimation, whereby the sentencing circle can exist without the insight of the survivor of intimate violence. Failure to include the voices of a marginalized population in legal-institutional representations further disenfranchises the voices and experiences of Indigenous women, and women in general. Meaningful consideration of their truths and experiences are paramount to creating an equitable legal system that systematically incorporates the experiences of all marginalized groups to facilitate the democratization of justice.

The absence of Indigenous women is an extension of historically determinant relations existing within a state of colonialism and patriarchy. Prior to European contact, women were highly revered within Indigenous societies (Kirkness, 1987). Gender was not situated hierarchically, but rather equally through interdependence (Kirkness, 1987). The assimilatory teachings of Judeo-Christian values derided these values by professing that women were created for men (Kirkness, 1987). The installation of patriarchal values is implicated in the socio-legal realm within the 19th and 20th centuries. Indigenous women became derogatorily mythologized as the sexualized 'squaw': a downtrodden, unkempt, sexually promiscuous Indigenous woman invariably available to the white man (Carter cited in Razack, 2002; Kuokkanen, 2008; Robertson, 2013; Coward, 2014). The Canadian state is entangled in this process, as accounts exist in the Northwest Territories of RCMP agents withholding food rations in exchange for sex (Razack, 2002). Furthermore, in 1951 the Canadian law amended the *Indian Act* to dictate that Indigenous women would lose their recognized status as Indigenous, in addition to their children, if they married a non-Indigenous man (R.S.C., 1951, c. 29). This diametrically opposes the matrilineal heritage of many Indigenous cultures prior to contact (Kirkness, 1987).

These examples produce a landscape where Indigenous women are objectified and subjugated by the language of the colonizer. Here, the law directly intervenes in the identity of the Indigenous woman and fractures each component that made her historically *her*. The remaining consciousness is preoccupied with the inscription of violence and assimilation which threatens her existence, and the survival of her culture. Thus, sentencing circles are contested for

their dubious masculinization of Indigenous culture. An authentic representation of Indigenous culture would see a gendered hierarchy abolished in the production of a space that valorizes the knowledge possessed by Indigenous women, and fruitfully amalgamates these perspectives within the discussion. As currently constructed, the sentencing circle reproduces the normative institutional discourse regarding Indigenous populations. The organizational structure is complicit in reproducing colonial discourses of the passivity of Indigenous women by effectively excluding their voices from the textual accounts. Exclusion within legal discourse contributes to the definition of what constitutes the 'reality' or account of the alleged crime (Tator and Henry, 2000). It is a projection of Western mythos of the 'Canadian' upon Indigenous cultures. This projection reveals the extant cleavages of incongruence between Euro-Canadian justice and Indigenous justice, whereby the amelioration of colonialism cannot be located. The by-product of this is the promulgation of disingenuous laws that simultaneously entrench the narrative of multiculturalism alongside colonizing, racist and sexist institutions.

Beyond a theoretical critique, there are enormous pragmatic concerns regarding victim safety. In the context of intimate partner violence, the presence of the survivor means engaging with their abuser. The formal engagement with the abuser may be conducive to 'silencing' the survivor (Cunliffe and Cameron, 2007). In *R v. Naappaluk*, Crnkovich (1996) notes that the Indigenous female survivor of spousal violence was not 'prepared' for the circle, and was emotionally distraught; thus, leading her to silence. In the case, Justice Dutil indicates that the defendant had previously been charged three times for abusing his wife (*R v. Naappaluk*, 1993). However, the defendant indicated within the circle that he had assaulted his spouse on 50 separate occasions (*R v. Naappaluk*, 1993). The continual experience of spousal violence is replicated in the qualitative accounts of battered Indigenous women in Manitoba:

> It started off very slow, like a slap here or a slap there, name calling. From then on, I should have got out, but I didn't realize at the time, you know? I was trying to change him to someone he was not … It started getting worse and worse … He knew I would always take him back … I try not to remember, I don't want to remember I guess. (McGillivray and Comaskey, 1999: 64-65).

The cumulative effects of spousal violence on silencing the victim cannot be understated in the context of the sentencing circle. Intimate partner violence is an act of physical, emotional, or sexual violence to exert economic, social, political, physical or emotional control upon another individual (Cameron, 2006b). This exertion of power does not simply end upon the intervention of the justice system. As a result, sentencing circles are criticized for trivializing the lived experience of violence, which refutes the work of second-wave feminists who publicized the extent and severity of spousal violence (Cameron, 2006a). This is symptomatic of a legal system entrenched within a patriarchal-settler society that normalizes violence against racialized women and fails to consider the gendered connotations of intimate partner violence. An inability to communicate the voice of the racialized female actor within a legal system produces an 'echo chamber' whereby the perspectives of white men continuously layer upon each other. Indeed, the published decisions of sentencing circles involving spousal violence are frequently framed in 'gender-neutral' terms (Cameron, 2006b).

Inequality is conceptualized through placing the Indigenous offender in cultural opposition of the non-Indigenous justice system (Cameron, 2006b). It is this type of language that subtly obfuscates any real discussion of gender or racial domination; instead, the conversation is fixated upon the legitimation of a cultural hierarchy (Razack, 1998). Thus, the historical language of colonialism is re-packaged in less explicit terms to maintain a discourse of Western superiority, whereby the sentencing circle is an empty gesture.

Furthermore, coerced acceptance of the submitted disposition is a noteworthy attribute of prior sentencing circles. In earlier cases, it is noted that the female survivors were implicitly coerced into accepting the sentence submitted. In *R v. Naappaluk* the circle was the first in Nunavik, and was supported by local Inuit political leaders, along with local justice officials (Crnkovich, 1996). As such, a rejection of the proposed sentence is an indictment upon the entire process. The survivor may ultimately be blamed for being too vindictive or spiteful – signifying a trivialization of the survivor's needs and desires. In addition, survivors are coerced through a barrage of discursive techniques that accentuate her 'responsibility' to see through the rehabilitation of her partner. For example, in *R v. Naappaluk*, Justice Dutil was adamant that the

victim attends counselling alongside her abuser, and support him throughout the rehabilitative process (Crnkovich, 1996). Similar instances of the "forgiving, nurturing" woman are present throughout other textual accounts of sentencing circles (Cunliffe and Cameron, 2007). The "forgiving, nurturing" woman as a character reifies the passivity inscribed upon Indigenous women through Victorian-era patriarchal values. It is a significant statement regarding the gendered discourse situated in the Canadian justice system to which women are *expected* to forgive their abusers, and simultaneously remain by their side, *despite* the repetitive traumatization of abuse. Law thus has the ability to weaponize patriarchal gender norms – such as 'feminine' qualities of nurturance, forgiveness, and passivity – to maintain the status quo of the dominant group.

CONCLUSION

Sentencing circles have become entrenched in a burgeoning environment of restorative justice – intended to reduce the over-representation of Indigenous peoples within correctional institutions and simultaneously decrease ballooning costs of the criminal justice system (Roberts, 1998). However, ameliorating the over-representation of Indigenous peoples through Section 718.2(e) and alternative sentencing practices has not come to fruition. In fact, the percentage of Indigenous peoples has increased from 15% of provincial and territorial admissions into custody in 2001, to 26% in 2015 (Roberts and Reid, 2017). Contributing to this fact is the judiciary's uneven application of Section 718.2(e). As Rudin (2008) notes, the judiciary appears to sentence Indigenous offenders to incarceration through referencing a component of *R v. Gladue* that argues for sentence parity between Indigenous and non-Indigenous offenders. Similarly, national spending on maintaining correctional facilities has increased from 2.5 billion dollars in 1995 to 4.6 billion dollars in 2015 – an increase of approximately 1 billion dollars when accounting for inflation (Roberts, 1998; Reitano, 2016). Beyond these demonstrable failures, this essay has contextualized sentencing circles as a legal apparatus of 'Indigeneity' produced within the hegemonic discourse of the Canadian state. Cowlishaw (2003: 107) suggests that Indigenous people occupy two mutually-exclusive identities: "objects of worry and the consultants to their own problems." There is a desire of the state to investigate the dire spaces that Indigenous peoples inhabit. However, accessing Indigenous voices occurs in the colonizer's space of the

courthouse and parliamentary buildings. Within these spaces, the Indigenous voice transforms through the discourse of the colonizer to elucidate the suffering of their people. This solicitation reifies the subconscious role of the 'white saviour' who must fix Indigenous suffering – obfuscating their continual role in creating these conditions (Cowlishaw, 2003).

Nestled quite comfortably into this 'white saviour' role is the sentencing circle. The circle is a manifestation of governmental inquiries and judicial ideations of alternative practice to Western sentencing law. Ostensibly, the purpose of which is to meld 'Indigeneity' principles of equilibrium, restoration, and truth within a Western framework of law while simultaneously incorporating the surrounding Indigenous community within the process. However, it has presented a reductionist view of Indigenous culture in a 'one-size-fits-all' typology that may have no grounding within the community in question (Dickson-Gilmore and La Prairie, 2005). Furthermore, the sentencing circle utilizes several gendered schemata that pervasively operate to partition Indigenous women as passive outsiders. Their participation as victims of spousal violence is, in the words of Justice Milliken, not necessary to the process of offender rehabilitation (*R v. Taylor*, 1996). In failing to provide a respectful platform for illuminating the experiences and knowledge possessed by Indigenous women, the sentencing circle fails wholly. A qualitative study of Indigenous women in Manitoba suggests that these women actually *desire* imprisonment for their abusers, and would prefer to see harsher punishments for intimate partner violence (McGillivray and Comaskey, 1999).[9] Despite the vociferous concerns of women – Indigenous and non-Indigenous alike – circles are used for a wide assortment of offenses that are gendered in nature, such as intimate partner violence.

Thus, the sentencing circle can be conceptualized as a legal concession to the broader movement of self-determination for Indigenous peoples. Legitimization of the law requires occasional concessions from the dominant group to mystify the presence of inequality (Thompson, 1975). Therefore, the implementation of the sentencing circle can act as a legal response to redressing the atrocities of settler-colonialism through liberalizing the justice system to include marginalized groups. As this essay has demonstrated, this tactic is morally bankrupt.

[9] Research that is more comprehensive is needed to quantitatively measure how Indigenous women feel about the institutional response to intimate partner violence before any generalizations can be made.

The sentencing circle does not exist in a vacuum – free from the historical layering of colonialism, racism, and patriarchy. On the contrary, it subconsciously reflects these very tendencies to reduce the 'Other' into a singularity, through the utilization of hegemonic discourse. In the context of sentencing law, Indigenous culture is reduced to a pan-Indigenous artefact of the 'circle', the voice of Indigenous women is constricted, and ultimately no substantive effort is made to decolonize the criminal justice system. The state publicly champions their effort to 'diversify' and incorporate varying cultural perspectives into law. However, the present relations of power – to which inequality flourishes on a concomitance of racial, gendered, and colonial discourse – remain non-negotiable. Operating through the concept of democratic racism, egalitarian principles permeate concurrent to an order that reproduces these discourses to maintain the status quo. As a result, it is questionable if Indigenous law can ever truly exist independently from colonizing discourse *within* a Western framework. It is a question that must be addressed by Indigenous communities and the Canadian state as the perpetuation of trauma can no longer be treated with half-measures.

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