

WILL THE CIRCLE BE UNBROKEN? ABORIGINAL COMMUNITIES, RESTORATIVE JUSTICE, AND THE CHALLENGES OF CONFLICT AND CHANGE, JANE DICKSON-GILMORE & CAROL LA PRAIRIE (TORONTO: UNIVERSITY OF TORONTO PRESS, 2005)

*Will the Circle be Unbroken?*¹ is an important and timely contribution to the ongoing debates about restorative justice practices in Canada. In particular, it begins the essential task of closely examining particular *models* of restorative justice in context, rather than the generalist approach that much of the literature within this debate has taken. In this case, Carol La Prairie and Jane Dickson-Gilmore take an in-depth look at sentencing circles, a practice that usually takes place within Aboriginal communities, but that is initiated and controlled by the non-Aboriginal judiciary.

The basic premise of the book is that restorative justice generally, and sentencing circles in particular, have made huge promises of healing and rejuvenation to vulnerable and dependant Aboriginal communities without delivering. La Prairie and Dickson-Gilmore assert rightly that restorative justice practices such as the sentencing circle have not been sufficiently scrutinized and evaluated up to this point. Central to their argument is the notion that Aboriginal culture is a problematic fulcrum on which to rest legal reforms such as sentencing circles.

While I agree with much of the book's analysis, particularly its critique of the on-the-ground practice of sentencing circles, there are a number of places where the authors and I part company. Specifically, the authors posit the notion that Aboriginal culture and tradition are depleted and dead due to colonialism, and no longer a viable basis for legal reform. The roots of my discomfort with this assertion lie in two places, first in their definitions and understandings of what actually constitute restorative justice, and second in the notion that colonialism has decimated and rendered impotent Aboriginal "culture."

**CULTURE, ABORIGINAL LAWS AND LEGAL ORDERS,
AND RESTORATIVE JUSTICE**

Essentially the authors argue that recent political and policy emphasis on the importance of Aboriginal culture in dealing with recidivist Aboriginal offenders is misguided. Instead, they assert that other social factors, particularly poverty, can and should be addressed to much greater effect. In fact, they label sentencing provisions that take Aboriginality into account as "positive discrimination."² La Prairie and Dickson-Gilmore argue that Aboriginality alone is not sufficient to differentiate between offenders. Instead they argue that the rehabilitative focus should instead be on achieving social justice for all Canadians who come before the justice system due to poverty, alcohol, or drug addiction, regardless of their cultural roots.³

¹ Jane Dickson-Gilmore & Carol La Prairie, *Will the Circle be Unbroken? Aboriginal Communities, Restorative Justice, and the Challenges of Conflict and Change* (Toronto: University of Toronto Press, 2005).

² *Ibid.* at 85.

³ *Ibid.*

The term culture, as it is deployed by the authors, is static and “pre-colonial,” evoking oversimplified notions of “ancient customs” eroded by time. Like the Canadian common law, Aboriginal laws and legal orders *are* cultural constructs rooted in history. However, like the Canadian common law they can and do respond critically and rigorously to contemporary forces of internal and external change.⁴ In my opinion, social justice for Aboriginal people must include a robust (re)conceptualization of Aboriginal laws and legal orders, rather than an emphasis on “culture” as it is understood by the authors. First, because Aboriginal people themselves repeatedly assert that there *is* an integral role for their own laws and legal orders in re-building Aboriginal individuals and groups. Secondly, because Aboriginal people have, amongst others, an inherent right to self-government, and have clearly expressed a desire that Aboriginal laws and legal orders be part and parcel of this devolution of powers. I heartily agree that an approach to justice that includes social justice concerns is what we should be aiming for in sentencing for all Canadians. I also think, however, that for Aboriginal offenders, their victims, and their communities, this must include Aboriginal laws and legal orders.

The authors also elide a number of important concepts; namely restorative justice, Aboriginal justice, and culture.⁵ The crucial point is that the particular models the authors discuss are restorative justice practices that *call* themselves Aboriginal justice, but fall badly short of the mark. Aboriginal justice can be defined as methods of dealing with crime that are designed and run by and for Aboriginal peoples. Like restorative justice, Aboriginal justice takes place partly or completely outside of the conventional criminal justice system, and includes several different models and approaches. Despite some important similarities, there are fundamental differences between the restorative justice movement and Aboriginal justice; politically, historically, socially, philosophically, and at a “nuts and bolts” functional level.⁶ Aboriginal justice is not immune to criticism, and I am not asserting here that it is normatively better than restorative justice, only that it is different in important ways, *and must be evaluated on those terms*.

While La Prairie and Dickson-Gilmore allude to the fact that restorative justice and Aboriginal justice are not necessarily the same thing, they go on to conflate the two. The result is that their very apt critiques of restorative justice are also written as critiques of Aboriginal justice. For instance, the authors make extensive reference to Canada’s 1996 sentencing reforms, which include conditional sentences, alternative measures, and a clause that mandates that these non-incarceral options be particularly considered for Aboriginal offenders.⁷ La Prairie and Dickson-Gilmore note that these restorative justice models, which focus on “culture,” devalue and hurt Aboriginal women and children who are victims of violence, and create an unfair disparity between Aboriginal and non-Aboriginal offenders who commit similar crimes. These assertions are well-founded and are borne out in practice.

⁴ My thanks to Professor Val Napoleon for her patient mentorship, and for sharing her thoughts on Aboriginal “culture” and law with me. Of course any errors or omissions are completely my own.

⁵ Dickson-Gilmore & La Prairie, *supra* note 1 at 92-93.

⁶ See e.g., Craig Proulx, *Reclaiming Aboriginal Justice, Identity and Community* (Saskatoon: Purich, 2003); Kathleen Daly, “Restorative Justice: The Real Story” (2002) 4 *Punishment & Society* 55; and Chris Cunneen, “Thinking Critically about Restorative Justice” in Eugene McLaughlin *et al.*, eds., *Restorative Justice: Critical Issues* (London: SAGE, 2003) 182.

⁷ Dickson-Gilmore & La Prairie, *supra* note 1 at 83.

These models of restorative justice have indeed failed in exactly the ways that are discussed. It is a mistake, however, to assert that these sentencing provisions, nested as they are inside the criminal justice system, and the *Criminal Code*⁸ itself, constitute a meaningful effort to act upon Aboriginal culture, laws, or legal orders. Aboriginal culture has virtually nothing to do with these sentencing provisions, and they do not represent any Aboriginal group's best efforts to do Aboriginal justice. The fact that colonial regimes attacked Aboriginal laws and legal orders does not mean that, given the resources and the autonomy, Aboriginal groups would fail to apply their laws in ways that deal effectively with contemporary issues such as domestic violence and sexual abuse. The fact that Western models such as sentencing circles have failed to do so is not a clear indicator that Aboriginal legal orders will also fail.

The application and evolution of Aboriginal laws and legal orders should not be free from scrutiny, or evaluation, including answering questions about violence, the role of women, and notions of fairness and democracy. Nor is it to say that Aboriginal groups, faced as they are with the fallout of colonialism, do not have a huge job to do. However, it is fair to note that the failure of restorative justice models does not indicate an inherent weakness of Aboriginal cultures, laws, or legal orders. These have yet to be tested in the context of an autonomous, well-resourced Aboriginal group.

THE PRACTICE OF RESTORATIVE JUSTICE: SENTENCING CIRCLES AND COMMUNITIES

Having said this, however, La Prairie and Dickson-Gilmore's critiques of restorative justice are some of the most rigorous, well-researched, and theoretically sophisticated in recent literature.⁹ They bring a wealth of first-hand knowledge and research experience to the book. It is meticulously cited, and makes reference to the most recent social science materials on restorative justice in Canada. The authors point out the serious difficulties in doing justice in communities that continue to be battered by colonial practices, and raise questions that both restorative justice practitioners, and those developing Aboriginal justice models, must ask themselves.

In particular, Chapter 6 on sentencing circles, and Chapter 1 on notions of "community" lay out problems that restorative justice models have seriously failed to address, and obstacles that Aboriginal justice must overcome. The authors rightly emphasize the ways that Aboriginal groups are deprived of human, financial, and cultural resources, and point to the impacts this can have on doing justice.

CONCLUSION

La Prairie and Dickson-Gilmore have raised concerns regarding restorative justice practices that urgently require restorative justice practitioners to critically evaluate their work and its context. Having clearly demonstrated that sentencing circles are *not* an effective form of Aboriginal justice, however, the authors fail to point us in the direction of what does

⁸ R.S.C. 1985, c. C-46.

⁹ See also Annalise Acorn, *Compulsory Compassion: A Critique of Restorative Justice* (Vancouver: University of British Columbia Press, 2004).

constitute an Aboriginal justice practice. In my opinion the answer to this — and to improving restorative justice itself — lies with Aboriginal self-governance, and continued support of Aboriginal groups. While it is undeniable that the state-sponsored program of genocide against Aboriginal peoples has had a profound and harsh impact on Aboriginal laws and legal orders, it is equally undeniable that it is only through their application, alongside self-government, that true Aboriginal (social) justice can be found.

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