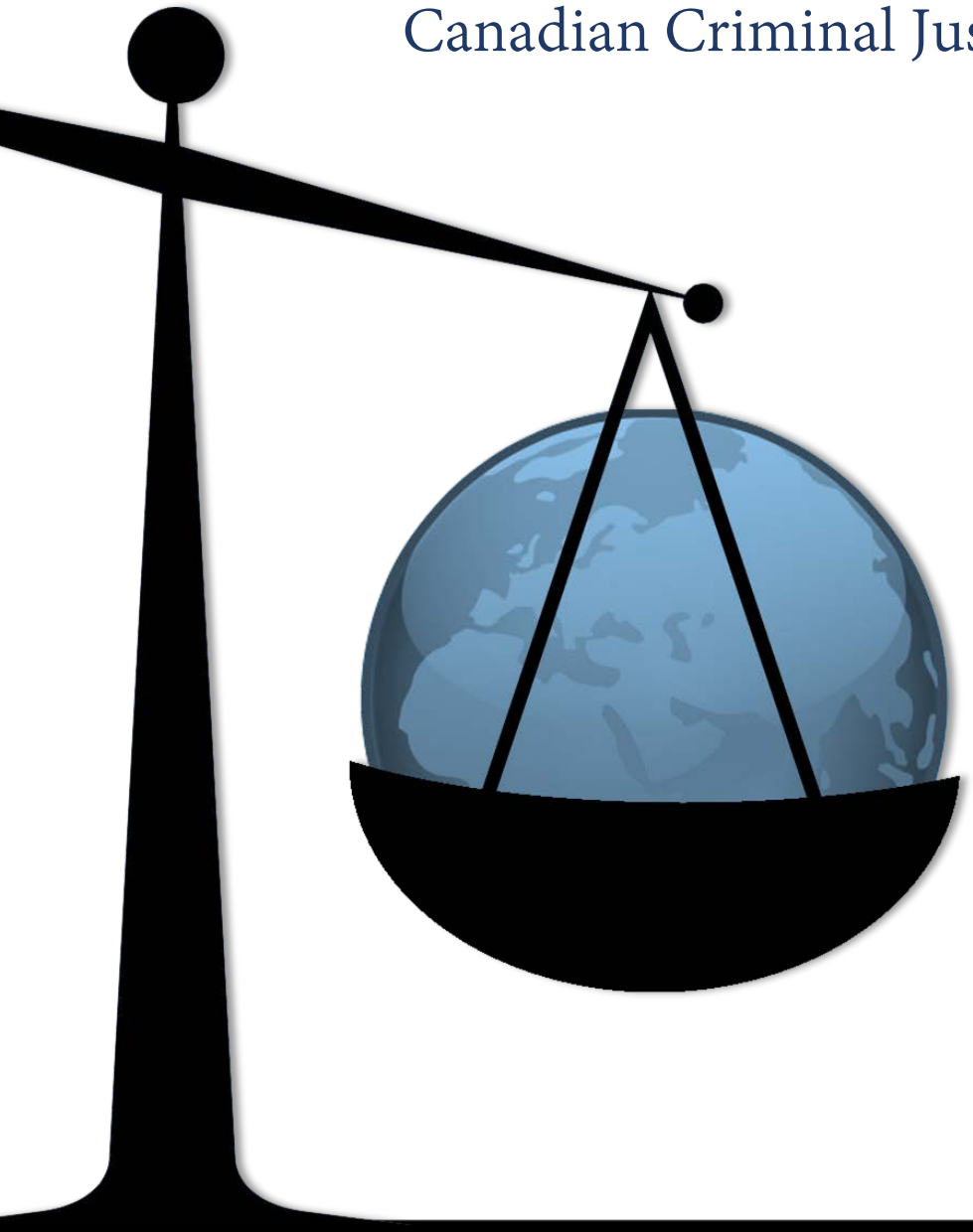
AMELIA PHILPOTT • Volume 5 n° 13 • Spring 2017

Forging a Path toward Self-Determination: Revisioning a Restorative Justice Response to the Crisis of Indigenous Overrepresentation in the Canadian Criminal Justice System



International Human Rights Internships Program - Working Paper Series

McGill Centre for Human Rights and Legal Pluralism

Centre sur les droits de la personne et le pluralisme juridique de McGill

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Abstract

The overrepresentation of Indigenous individuals in the Canadian criminal justice system remains at as critical a level today as it did three decades ago. A report released this year indicates that despite the stated efforts of the federal government to address this crisis for close to two decades now, the disproportionate representation of Aboriginal individuals in custody continues to rise. This paper will explore how mechanisms premised on restorative justice; especially those that propose alternatives to the criminal justice system; can play a role in decreasing the number of Indigenous people in Canadian prisons. Specifically, increasing access for Indigenous Youth to culturally appropriate diversion programs, would keep youth out of the system, and help break the destructive cycle of institutionalization, which Indigenous people have been subjected to by the Canadian government for far too long. This paper explores one solution to this problem: increasing the availability of diversion programs for Indigenous youth through reforming the Youth Criminal Justice Act to curtail police discretion, and mandate them to present diversion to Indigenous youth charged under the Act, as an alternative to the criminal justice system.

Contents

Introduction

We are in crisis. Rates of Indigenous incarceration in Canada have remained disproportionately high over the past decade.[1] Despite the fact that Aboriginal adults make up scarcely more than three percent of the overall Canadian population, a recent report determined that between 2015-2016 twenty-six percent of the prison population were Indigenous.[2] The report also indicates that this number has actually been rapidly rising since 2006.[3] The Truth and Reconciliation Commission of Canada (TRC) has explicitly called upon the federal government to "commit to eliminating the overrepresentation of Aboriginal people in custody," and last year Prime Minister Trudeau promised to do so.[4]

In this paper we will look at how an expansion of the use of restorative justice mechanisms as an alternative to the criminal justice system can play a role in the long-term reduction in the number of Indigenous individuals in custody, and ultimately forge a path toward the only sustainable solution: the self-determination of First Nations in Canada. In the first portion of this essay, we will look at how this crisis fits into the larger context of the disproportionate targeting of racialized and historically marginalized demographics by criminal justice systems in North America. We will then explore the historical relationship between First Nations and the Canadian criminal justice system as intertwined in a colonial continuum of institutionalization by the Canadian government for the dispossession of First Nations from their cultures, and assimilation into Canadian settler society. Once we have grounded ourselves in these dimensions of the crisis, we will turn to explore the theoretical framework of our criminal justice system; identify some of its inadequacies generally, and specifically in relation to Indigenous offenders. We will then briefly touch on how these inadequacies have been acknowledged by the courts

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[2] Auditor General of Canada, *Preparing Indigenous Offenders for Release,* vol 3 (Ottawa: Correctional Services Canada, 2016).

[3] *Ibid.*

[4] See this article for the Trudeau government's commitment to implementing all 94 calls to action from the Truth and Reconciliation Commission of Canada: Susana Mas, "Trudeau lays out plan for new relationship with indigenous people" (8 December 2015), *CBC News*, online: <http://www.cbc.ca/news/politics/justin-trudeau-afn-indigenous-aboriginal-people-1.3354747>.

and federal government, and some of their efforts grounded in restorative justice which have been implemented to account for the systemic nature of this crisis.

In the final portion of this paper I propose the current strategy of the government to make restorative measures available to Aboriginal inmates falls short of their potential to substantially reduce the number of Indigenous people in custody; largely because they are only available once individuals are already being processed in the criminal justice system.[5] I argue that a more effective strategy would place a greater focus on increasing access to culturally appropriate restorative justice *alternatives* to the criminal justice system. I argue that prioritizing the accessibility of culturally appropriate diversion programs for Aboriginal youth would be a more effective strategy and implementation of restorative justice mechanisms in the long-term reduction of Aboriginal individuals in custody. I suggest that changes can be instituted at a legislative level in order to ensure Aboriginal youth have access to these programs where they are available. Specifically, Section 4 of the Youth Criminal Justice Act (YCJA) should be amended to curtail police and prosecutorial discretion by mandating these authorities to provide Indigenous youth offenders with the choice between the criminal justice system and diversion programs.

Taking this decision out of the hands of the police would help keep Indigenous youth out of the criminal justice system and reduce the violent cycle of institutionalization and put justice back in the hands of First Nations.

[5] Nate Jackson notes that most of the restorative efforts to address the crisis of overrepresentation are focussed at the sentencing stage. See "Aboriginal Youth Overrepresentation in Canadian Correctional Services" (2014-2015) 52 Alta L Rev 927 at 934.

I. Painful Parallels: The Broader Racialization of North American Criminal Justice, and the History of Institutionalization as an Assimilative Practice in Canada

Contextualizing the Crisis Within a General Overrepresentation of Racialized Populations in Custody in North America: A Vicious Cycle

In order to understand the problem of overrepresentation of Indigenous individuals in Canada, it is useful to contextualize the issue within the broader North American framework, which sees disproportionately higher incarceration rates among visible minority populations in general.[6] Particularly, there are clear parallels when we compare the role incarceration has played in the colonial context of the United States as an extension of slavery, and the colonial roots of Indigenous overrepresentation as directly related to the residential school system. In both Canada and the United States, looking at data concerning which demographics have the highest rates of incarceration tells a story of a legacy of criminal justice systems which play a role in the ongoing oppression of historically subjugated and colonized groups.[7] Civil rights activist Angela Davis maintains about the situation in the United States that:

> "[w]hile a relatively small percentage of the population has ever directly experienced life inside prison, this is not true in poor black and Latino communities. Neither is it true for Native Americans […]. But even among these people who must regrettably accept prison sentences – especially young people as an ordinary dimension of community life, it is hardly acceptable to engage in serious public discussions about prison life or radical alternatives to prison."[8]

The question is, what happens when communities have to "accept prison sentences as an ordinary dimension of community life?"[9] For one, this has contributed to perceptions of these communities as what Elizabeth Comack refers to as 'problem populations.'[10] Namely, a "binary between 'the criminal' and 'the law-abiding.'[…] inforc[ing] the view that those who are deemed to be criminal are not like 'the rest of Us' – not only in terms of what they have done, but also

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[6] Angela Davis, *Are Prisons Obsolete?* (New York: Seven Stories Press, 2003) at 15.

[7] *Ibid* at 22.

[8] *Supra* note 6.

[9] *Ibid.*

[10] Elizabeth Comack, *Racialized Policing: Aboriginal People's Encounters with the Police* (Halifax: Fernwood Publishing, 2012) at 87.

what they are and the social spaces in which they move."[11] This perception appears to have become somewhat of a self-fulfilling prophecy in ensuring the continuation of high rates of incarceration among racialized populations. For example, Comack notes that "police have come to define Aboriginal people as 'troublesome' and […] in need of control" which leads to the greater likelihood of police surveilling targeted communities with the expectation that someone in that space is bound to commit a crime and require their response as enforcers of the law.[12] Thus, the perception of certain groups as inherently criminal has very real and damaging repercussions, and Davis and Comack are certainly not alone in asserting this racial bias is a major contributing factor to higher incarceration rates among racialized communities.[13]

Residential Schools, Child Welfare, and Prisons: Institutionalization for Assimilation

> *"The state is fully implicated in the violence that exists in Indian communities today."*
>
> –Patricia Monture[14]

The institutionalization of Indigenous peoples in Canada did not start with the criminal justice system. Institutionalization was implemented on a broad scale in the 1870s, when more than 130 residential schools were established across Canada for the assimilation of First Nations children under the 1869 *Act for the gradual enfranchisement of Indians.*[15] The system saw to the forced removal of First Nations children, who were taken under the thinly-veiled premise that they would be given an education in Christian boarding schools. [16] In reality, as has been meticulously documented in the TRC Report, these institutions saw to unspeakable physical and psychological abuse of children at the hands of Catholic teachers and administrators, and the unfolding of a largescale effort to disinherit generations of First Nations children from their

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[11] *Ibid.*

[12] *Ibid.*

[13] *Supra* note 6 at 30; see also Lisa Monchalin, *The Colonial Problem: An Indigenous Perspective on Crime and Injustice in Canada* (North York: University of Toronto Press, 2016) at 145.

[14] *Ibid.*

[15] http://www.trc.ca/websites/trcinstitution/index.php?p=4; Canada, Truth and Reconciliation Commission of Canada, *Truth and Reconciliation Commission of Canada: Final Report* (Ottawa: Public Works and Government Services Canada, 2015) vol 1 at 151.

[16] *Ibid.*

languages and ways of life. The TRC Final Report states that the "institutionalization of Aboriginal children in residential schools in Canada was part of a broader, European-based movement to regulate members of what were described as 'the dangerous classes' in society."[17]

Children in the residential school system were often separated from their siblings, prohibited from speaking their languages, or engaging in any activity which was grounded in their Indigenous identities.[18] The entire system was established "on the assumption that European civilization and Christian religions were superior to Aboriginal culture," and was a part of a broader effort of the Canadian government to erase First Nations as distinct sovereign peoples.[19] It was also premised on doctrine of *terra nullius;* the assumption that this land was "void of political and social structure" prior to European settlement.[20] Aside from alienating entire generations of First Nations children from their languages, identities, and families, the system also subjected children to widespread verbal, physical and sexual abuse, starvation, and ultimately, in far too many cases, death.[21] While the residential school system started declining in the 1940s, the last school did not close until 1996.[22]

The closing of residential schools did not, however, mark an end to the removal of First Nations children from their communities by the Canadian government. The process simply continued by way of the child welfare system. The term "Sixties Scoop" has been used to describe the widespread practice of the removal of Indigenous children from their communities to be placed with non-indigenous foster parents; a practice the rise of which coincided with the decline in the government's enforcement of the residential school system.[23] In 1977, 20 percent of children in the child welfare system in Canada were Indigenous, and in the Western

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[17] *Ibid* at 133.

[18] *Ibid* at 164-165.

[19] Canada, Truth and Reconciliation Commission of Canada, *Truth and Reconciliation Commission of Canada: Final Report* (Ottawa: Public Works and Government Services Canada, 2015) Executive Summary at 4.

[20] Nate Jackson, "Aboriginal Youth Overrepresentation in Canadian Correctional Services" (2014-2015) 52 Alta L Rev 927 at 929.

[21] *Ibid* note 14 at 169.

[22] *Supra* note [TRC vol 5].

[23] Holly A McKenzie et al, "Disrupting the Continuities Among Residential Schools, the Sixties Scoop, and Child Welfare: An Analysis of Colonial and Neocolonial Discourses" (2016) 7:2 International Indigenous Policy Journal 1 at 2.

provinces, such as Manitoba, these numbers were as high as 60 percent.[24] To say the child welfare system continues to apprehend children from Indigenous households at disproportionately higher rates than non-Aboriginal children would be an understatement. Currently, it is estimated that "three times as many Indigenous children are in the care of the state."[25] Like the residential school system, the mass apprehension of children from Indigenous communities via child welfare is responsible for breaking up families, and denying too many children an upbringing that is rooted in their own languages and cultures. Monture identified that the failure of the state to consider the "indigenous factor" is indicative that the goal of the child welfare system, like the residential school system, is the assimilation of First Nations children into Canadian settler society.[26] Moreover, in 2008, Indigenous children in state custody were 4.2 times more likely to be subjected to abuse than non-indigenous children in the system, and 3 times as likely to be sexually abused.[27]

Given the traumatic impacts on the child welfare system has had on so many apprehended Indigenous youth, it should come as no surprise that the overrepresentation of Indigenous children in the child welfare system has been linked to severe mental health issues as a result of this suffering, which has been a contributing factor in higher rates of criminal activity.[28]

We see why Monture referred to the mass institutionalization of Indigenous individuals as a "vicious circle."[29] The complex web of neo-colonial policies and socio-economic factors continue to reinforce one another, and to deepen the intergenerational trauma for which this mass institutionalization has been – and continues to be – responsible.

Contextualizing the Indigenous overrepresentation in the criminal justice system within a broader framework which has seen the use of institutionalization a colonial tool for the

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[24] Patricia Monture, "A Vicious Circle: Child Welfare and the First Nations" in *Thunder in my Soul: A Mohawk Woman Speaks* (Halifax: Fernwood Publishing, 1995) at 192.

[25] *Supra* note 23 at abstract.

[26] *Supra* note 24 at 192.

[27] Vandna Sinha, "Understanding the investigation-stage overrepresentation of First Nations children in the child welfare system: An analysis of the First Nations component of the Canadian Incidence Study of Reported Child Abuse and Neglect" (2013) 37 Child Abuse and Neglect 821 at 828.

[28] Mark Totten, "Aboriginal Youth and Violent Gang Involvement in Canada: Quality Prevention Strategies" (2009) 3 IPC Review 135 at 137

[29] *Supra* note [Monture] at 191.

assimilation of First Nations communities into Canadian settler society, reinforces the assertion by Monture et. al. that the only solution to the problem is a move towards self-determination. Notably absent from the plethora of reports, commissions, and efforts on the part of the government to address the crisis is one important assertion: that the inherent right of First Nations to self-determination includes their right to make decisions about the administration of justice in their own communities.[30] What is missing from the acknowledgement of the colonial legacy, the resulting individual and collective trauma, and reconciliation efforts is a greater acknowledgement that Canadian authorities do not have the right to incarcerate Aboriginal individuals to begin with.[31]

II. Restorative as Opposed To Retributive Justice & Restorative Measures Taken so Far to Address the Crisis

The above exploration illustrates a disturbing characteristics of the criminal justice system in Canada as it relates to First Nations communities: the institution is built on racist colonial foundations, and continues to play a major role in the dispossession of Indigenous identities and cultures.[32] This is not a revolutionary observation by any stretch, but it warrants repeating until it has been properly addressed.

In the following sections I explore generally some arguments for why the retributive principles upon which our criminal justice system is largely built are not the most effective approach to curbing criminal activity in general; and in fact contribute to the exacerbation of a cycle of criminality. Compounded with the colonial dimensions of the relationship between First Nations and the criminal justice system, this further builds on the argument that Indigenous individuals should not be incarcerated to begin with. When we compare the foundations of the criminal justice model to responses to crime premised on principles of

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[30] See the inherent right to self-determination entrenched in the Canadian Constitution: *Constitution Act*, RSC 1982, Schedule B to the Canada Act 1982 (UK), c 11 at section 35

[31] *Ibid.*

[32] *Supra* note 13 at 12.

restorative justice, we will look at how the latter approach is far better suited as a response to criminal activity in Indigenous communities.[33]

Incarceration as a Response to Crime Generally: Is it Working?

If a primary purpose of incarceration as a response to criminal activity is to deter types of behaviour determined by governments to be morally or socially unacceptable enough to warrant criminalization, then we should ask ourselves; is incarceration actually achieving what is purported to do?[34] When we look to the emergence of institutionalization as a response to crime, we see that factors completely unrelated to criminal activity played a significant role the rise of incarceration. For example, Thomas Mathieson points out that the exponential growth in prison populations in North America, particularly in the 1970s, was more attributable to a "tough on crime policy [and] a more active use of prison as a response to criminality" than to a rise in criminal activity per se.[35] Mathieson contends that from early on, in sixteenth century Europe, prisons were part of a larger scheme of using institutionalization as a "'solution' to social problems," noting that "[t]hose incarcerated were not just criminals, but a broad range of unemployed beggars and vagrants."[36] When we look critically at our own criminal justice system in Canada, as we are doing now, we see that prisons are still being used for this purpose.

As Nate Jackson notes "[t]the fact that an internally diverse array of Indigenous nations exists in North America since time immemorial has […] always been problematic from a settler perspective." [37] Monchalin maintains that in the Canadian context, the criminal justice system is being used as a tool by the federal government to further their colonial agenda of achieving "Indigenous peoples' silent surrender.[38]

Mathieson tells us that not only have states used prisons to deal with what they deem to be social problems from the early days of their widespread use, but also that structurally the system

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[33] *Supra* note 24 at 193.

[34] Thomas Mathieson, *Prisons on Trial: A Critical Assessment* (London: SAGE Publishing Ltd, 1990) at 18.

[35] *Ibid* at 10.

[36] *Ibid* at 11.

[37] Nate Jackson, "Aboriginal Youth Overrepresentation in Canadian Correctional Services: Judicial and Non-Judicial Actors and Influences" (2014-2015) 52 Alta L Rev 927 at 927 at 929.

[38] *Supra* note 13 at 145.

is set up to ensure that those incarcerated have a very difficult time breaking out of a cycle of criminality, exacerbated by the prison industrial complex. Specifically, prisons are, according to Mathieson, supposed to fulfill a partially rehabilitative function by "reinstat[ing] [the prisoner to] his or her old dignity and privileges before the 'fall.'"[39] However, he identifies fundamental structural issues which make rehabilitation difficult to achieve via the retributive model:

> "Prisoners are not rehabilitated through an act of will, a set of actions or a decision, on the part of some authority. To be sure, if the prisoner returns to what we consider acceptable social life, we are quick to attribute this to a system or programme established by the authorities. But as a primary point (perhaps especially if return to acceptable social life does not occur), the prisoners themselves are held responsible for the outcome. We conceive of rehabilitation of prisoners as taking place in a process in which prisoners themselves have the primary – if not sole- responsibility for a happy ending. […] Precisely because the issue is conceived as a damage and a consequent disparagement for which the prisoners themselves are responsible, it follows that it is not primarily up to the authorities to act or decide in a way which restores, but primarily up to the prisoners themselves.[40]

As Mathieson points out, prisons deprive inmates of personal autonomy. The act of incarcerating is, after all, an instance where the state "exercise[s] a form of power" over an individual,[41] given that those incarcerated are forced by the state to live in confinement. The contradiction he points to, is that while inmates are stripped of the authority and power to make decisions for themselves, they are simultaneously held responsible for their own "restoration" and reintegration into society. This contradiction makes social re-integration all the more difficult.

In Canada, unsurprisingly perhaps, evidence shows that this problem is particularly severe in relation to Indigenous former-inmates, due to a serious dearth in transitional and rehabilitative social programming. A 2016 report released by Correctional Services Canada noted multiple failings on the part of the federal government to implement adequate social programming for newly release Indigenous inmates' to aid their transitions back into their communities. For example, in the past year "three quarters of Indigenous offenders who were

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[39] *Ibid* at 20.

[40] *Ibid.*

[41] *Supra* note 10 at 8.

released at their statutory release dates were released directly into the community from maximum security and medium security institutions."[42]

The report indicates that the lack of transitional services available to Indigenous individuals reintegrating into life on the outside is concerning, because a lack of proper support means there is a higher probability of reoffending.[43]

While this shortcoming cannot be seen as the only factor contributing to the cycle which sees many of the same people being processed in and out of custody it certainly points to a structural failing of the Canadian criminal justice system. It provides further proof that the criminal justice system itself contributes to a cycle of criminality, and reinforces the need for us to look for alternative means for addressing crime.

What is Restorative Justice, and How Can It Help Us Address the Crisis?

The paradigm of restorative justice is often juxtaposed against the retributive model upon which our criminal justice system is built, because the two have almost opposite approaches to addressing harm. Carmela Murdocca calls restorative a "philosophical and conceptual" framework and political practice.[44] The United Nations has adopted a working definition as "[a] process whereby all the parties with a stake in a particular offense come together to resolve collectively how to deal with the aftermath and its implications for the future."[45]

Whereas the Canadian and other European models of criminal justice system are built upon a retributive ideology, traditional First Nations' justice systems are built on frameworks of restorative justice. For example, Monture described First Nations' as societies "based on cooperation and consensus."[46] She explains that generally when someone has committed an offense, community leaders, offenders and victims come together to address crimes committed

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[42] *Supra* note 2.

[43] *Ibid.*

[44] Carmela Murdocca, *To Right Historical Wrongs: Race, Gender, and Sentencing in Canada* (Vancouver: UBC Press, 2014) at 29.

[45] Definition adopted by the UN; Paul McCold, "The Recent History if Restorative Justice: Mediation, Circles, and Conferencing" in *Handbook of Restorative Justice* (New York: Routledge, 2006) at 23.

[46] *Supra* note 24 at 194.

in communities. "The aim and result is to restore balance in the community, which includes balance in the relationships among the individuals involved."[47] Restorative justice mechanisms therefore have to play a central role addressing the over-representation of Aboriginal individuals in custody, as it contributes to a process of cultural reconnection and healing.[48]

The fact that restorative justice represents a return to cultural practices is the most compelling argument for why it can respond to the crisis of Indigenous overrepresentation in the criminal justice system. Reinforcing this the fact that the restorative approach to offenders is preferable to the retributive model in one important way: whereas the retributive model exercises power over the offender, the restorative model is premised on the idea that "one person cannot impose a decision upon another."[49] This means that offenders who go through a restorative justice process are empowered in the process to decide how they think they can remedy the wrong they committed.[50] Another difference is the restorative model's noted focus on healing.

Restorative circles, such as the one implemented by Hollow Water First Nation in Manitoba create spaces for offenders to express themselves, and to hear from parties who were affected by their actions.[51] For example, participants at the Hollow Water healing program, including the victims, had reported that the hurt and animosity they felt towards offenders prior to engaging in the circle process dissipated when they had a chance to see that the offender was not a monster, rather, just a human being.[52] The opportunity for closure and healing is notable absent from the retributive structure of the Canadian criminal justice system. Not only does the adversarial structure of the court process actually incentivize heightened animosity between parties, but the TRC final report noted that incarcerated Aboriginal individuals reported they

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[47] *Ibid.*

[48] Ted Wachtel, Terry O'Connell & Ben Wachtel, *Restorative Justice Conferencing: Real Justice & The Conferencing Handbook,* (Pipersville: Piper's Press, 2010) at 64.

[49] *Supra* note 46 at 23.

[50] *Supra* note 49 at 72. This assumes that the offender ascribes to the ideology in which the crime is rooted. A further complication, is that even in a restorative contexts, the crimes have been defined by a colonial system, and therefore might be rejected entirely by the offender on the basis that the crime might not be so defined by their own traditional conception of social wrongs.

[51] Rupert Ross, *Returning to the Teachings: Exploring Aboriginal Justice* (Toronto: Penguin Books, 1996) at 352.

[52] *Ibid.*

felt they had to become "hardened and tough" in order to survive in prison; ultimately contributing to their necessitated identification with characteristics that encouraged criminal activity.[53] As such, while restorative approaches such as the program at Hollow Water provide a space to process and heal from infractions, which has been linked to significantly lower reoffender rates, the basis of the retributive model encourages inmates to identify themselves as criminals.

Finally, restorative justice is notably different from the retributive model because it encourages accountability on the part of the offender for the wrong they committed.[54] Accountability is markedly absent from the retributive model, in particular because the adversarial structure of our court system encourages those accused of crimes to go on the offensive and essentially do their very best to not have to take responsibility for the crime (assuming they did actually commit it). Therefore, on both a substantive and procedural level, if implemented properly, restorative justice mechanisms hold promise in their potential to halt the cycle of criminal institutionalization.

When we look to the causes underlying the overrepresentation of indigenous peoples in custody, we see that not only is there no opportunity to heal from the intergenerational colonial trauma in the Canadian criminal justice system, but it actually exacerbates and ensures that the trauma will continue to be relived through the continuation of the institutional cycle of dispossession. As stated in the TRC Final Report, "Violence and criminal offending are not inherent in Aboriginal people. They result from very specific experiences that Aboriginal people have endured including the intergenerational legacy of residential schools."[55] As long as this overrepresentation crisis persists, the legacy of the residential school system, as we explored above, will be afforded the opportunity to continue its destructive process of cultural genocide by continuing the systematic largescale institutionalization. According to Monture:

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[53] *Supra* note [TRC Final Report Executive Summary] at 171.

[54] *Supra* note 49 at 79.

[55] Canada, Truth and Reconciliation Commission of Canada, *Truth and Reconciliation Commission of Canada: Final Report* (Ottawa: Public Works and Government Services Canada, 2015) vol 5 at 170-71.

> "whatever the issue, be it child welfare, criminal justice, family violence, alcohol and drug abuse, or lack of education and employment, the same path can be traced to a conflict in the basic values of the two societies – force and coercion versus consensus and cooperation."[56]

If we accept that addressing the problem of overrepresentation of Aboriginal people in custody must occur in a framework which seeks to halt the cycle of colonial abuses more broadly – then we cannot deny that the only sustainable solution to the problem is Indigenous self-determination.

Monture was not the only one to identify the fundamentally irreconcilable cultural differences which underlie to problematic relationship between Aboriginal people and the Canadian criminal justice system, nor is she the only one to conclude that the only sustainable solution is self-determination. This sentiment was even expressed by the Saskatchewan provincial government in 1987, when former minister of justice of Saskatchewan Robert Mitchel acknowledged that justice reform responding to overrepresentation had to consider it "part and parcel of the inherent right of Aboriginal peoples to govern themselves."[57] To this end, restorative justice frameworks have been implemented in the Canadian justice system by the courts and government.

Restorative Measures Taken to Address the Crisis: Gladue, Healing Lodges and Diversion Programs

As far back as 1996, when the Royal Commission of Aboriginal Peoples (RCAP) conducted research and recommended solutions for this crisis, the federal government had acknowledged the unique and problematic circumstances surrounding the relationship between Aboriginal inmates and prisons. This acknowledgement lead them to introduced measures based on restorative principles into the criminal justice system. For example, the use of Gladue principles at the sentencing stage, the availability of healing lodges for Aboriginal inmates, and diversion programs, have all been implemented with a view to mitigate the ongoing damage of the colonial legacy imbued in the relationship between Aboriginal communities and prisons. In the following

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[56] *Supra* note 24 at 195.

[57] *Ibid* at 54.

section, we will look at these mechanisms, discuss to what extent they have been effective, and explore some shortcomings.

Gladue Principles: Restorative Measures in the Sentencing of Indigenous Offenders

R v Gladue is a 1999 Supreme Court decision, in which it was held that Section 718.2(e) of the Criminal Code of Canada "require[d] sentencing judges to consider all available sanctions other than imprisonment and to pay particular attention to the circumstances of [A]boriginal offenders."[58] These duties imposed on Canadian judges have been dubbed "gladue principles." The 2012 *Ipeelee* decision ironed out some problems which had been limiting the scope of application; namely that judges were requiring "offender[s to] establish a causal link between background factors and the commission of the […] offence before being entitled to have those matters considered by a sentencing judge."[59] *Ipeelee* clarified that the history of colonial abuse via the largescale cycle of institutionalization was grounds enough for 718.2(e) to apply.[60] The court held that judges are now required to consider "such matters as the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples."[61]

Overall, despite efforts on the part of the Supreme Court to introduce restorative measures via section 718.2(e) of the Criminal Code, David Milward and Debra Parkes note that "the sentencing of Aboriginal offenders continues to follow a punitive trajectory."[62] One reason for this could be that judges are not obligated to provide a detailed analysis for their consideration of Gladue principles, and ultimately have the discretion to decide whether or not lessen an Aboriginal offender's sentence. Another issue noted by a probation officer in the Mohawk First

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[58] *R v Gladue*, [1999] 1 S.C.R. 688 at para 4 [*Gladue*].

[59] *R v Ipeelee,* [2012] SCC 13 at para 81 [*Ipeelee*].

[60] British Columbia, Office of the British Columbia Provincial Health Officer, *Health, Crime, and Doing Time: Potential Impacts of the Safe Streets and Communities Act (Former Bill C-10) on the Health and Well-being of Aboriginal People in BC* (Victoria: British Colombia Provincial Health Officer, 2013) at 26.

[61] *Supra* note 60 at para 7.

[62] David Milward & Debra Parkes, "Colonialism, Systemic Discrimination, and the Crisis of Indigenous Over-Incarceration: Challenges of Reforming the Sentencing Process" in Elizabeth Comack ed, *Locating Law: Race Class Gender Sexuality Connections* (Halifax: Fernwood Publishing, 2014) at 134.

Nation of Akwesasne, is the fact that Gladue courts and services, such as Gladue report writers, are often inaccessible. In Akwesasne, for example, Mohawk community members who are charged with a crime under the Criminal Code do not have access to these services, the result of which is that in most cases Gladue considerations in their sentencing is unavailable.[63]

Healing Lodges

Healing lodges have been made available to some Aboriginal inmates as alternative to facilities that hold general prison populations. The goal of these programs is to provide Aboriginal inmates who have been dispossessed of their indigenous identities with a means of cultural reconnection, and to provide those who were already more closely connected to their cultural identities with an alternative to the Euro-American criminal justice system which seeks to be more culturally appropriate.[64] Because Aboriginal inmates come from diverse cultural backgrounds, these programs are built on "symbolic healing" and "predicated on the ability of Elders and inmates to negotiate meaning in ritual [and] to establish common cultural ground and understanding of the symbols to be used."[65]

One shortcoming noted in the GA Report released this year was that Aboriginal offenders had to wait on average five months in order to access these programs, which means that they were often unavailable to Aboriginal inmates serving shorter sentences.[66] An Elder from the Akwesasne Mohawk First Nation who facilitates one of these programs in Ontario also noted that many inmates only have access to the programs towards the end of their sentences, when they can access them at all. This, in his opinion means that sometimes inmates serve years on their sentences in the general prison populations first, compounding the trauma of institutionalization.[67]

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[63] Interview with Russ Jock, Ontario Probation Officer (August 23 2016).

[64] James B Waldram, *The Way of the Pipe: Aboriginal Spirituality and Symbolic Healing in Canadian Prisons* (Peterborough: Broadview Press, 1997) at 29-31 and 43.

[65] *Ibid* at 79.

[66] Supra at note 2.

[67] Interview with Elder from Akwesasne (16 October 2016).

Diversion Programs

Diversion programs are being implemented in an increasing number of First Nation communities, and by municipal and provincial governments across Canada to serve, in most cases, as an alternative to the court system. The Royal Commission for Aboriginal Peoples (RCAP) defines diversion programs as follows:

> "Diversion programs are best understood as alternatives to the judicial process. In general, a person must accept responsibility for the offence with which he or she is charged before having access to the program. Diversion programs do not determine guilt or innocence. In some jurisdictions in Canada matters are diverted before a charge is laid; in others, diversion occurs after the charge but before the plea is entered. When a matter is diverted from the courts, the offender has no criminal record for the particular offence, since the court has made no finding of guilt."[68]

Generally, diversion programs are available for offenders of "minor criminal offences – theft under $5,000 (shoplifting), transportation fraud (not paying for a taxi), and similar non-violent offences."[69] Serious offences are not typically diverted, although the Hollow Water Healing Program in Manitoba was initially founded to provide a traditional restorative alternative for offenders and victims of sexual assault, and other violent offences.[70] According to McCold, "[a] recent study by Native Counseling Services of Alberta confirmed that their approach is a highly cost-effective response to sexual offending."[71]

Overall, diversion programs premised on restorative justice have proven to be effective responses to dealing with criminal activity; particularly among youth.[72] They hold a great deal of promise in their ability to address the crisis of overrepresentation of Aboriginal individuals in custody for three reasons: Firstly, because they provide an alternative to the criminal justice system; thereby helping break the cycle of institutionalization. Secondly, it has been noted that offenders who have had their infractions addressed by these programs were much less likely to

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[68] *Supra* note 31 at 104.

[69] *Ibid.*

[70] *Supra* note 46 at 29.

[71] *Ibid.*

[72] Interview with Rena Smoke from the Akwesasne Criminal Program (23 July 2016).

reoffend than those who had to be processed through the criminal justice system.[73] And finally, diversion programs address criminal offences in a manner which provides parties to a crime with a space to heal; and therefore address the intergenerational trauma which has been exacerbated by the cycle of institutionalization. I suggest that if the federal government is serious about responding to the call to address this crisis, they should focus on increasing access and availability of Aboriginal individuals – and particularly Aboriginal youth – to diversion programs.

III. We Need to Go Further: Reforming The Youth Criminal Justice Act to Increase Access to Diversion Programs for Indigenous Youth

Despite the fact that measures have been implemented with an aim to address the crisis, the most recent statistics tell us that the overrepresentation rate of Aboriginal offenders has not declined, and has in fact actually been steadily rising.[74] The complex interrelated web of socio-economic determinants and ongoing colonial struggles is certainly not something to which a quick one dimensional solution can be applied. However, restorative justice does have the potential to play a role in aiding with the long-term decarceration of Aboriginal peoples. I am confident that Gladue and healing lodge programs, though serving an important function, will not substantially contribute to a solution to this crisis for one simple reason: they are only available to offenders once they are already *in* the criminal justice system - and facing incarceration. If we are working towards the ultimate goal of self-determination, we need to prioritize restorative measures which provide an alternative to this system, and help keep communities together.

Diversion Programs

Diversion programs are particularly well-suited to the task for two reasons: Firstly, they play an important role in Aboriginal decarceration because they exist for the purpose of diverting offenders away from the court system and eventual conviction in favour of a process

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[73] *Ibid; Supra* note 46.

[74] *Supra* note 2.

which does not force them to leave their communities. Secondly, as illustrated in the diversion programs that exist in First Nation communities today, they have been adapted to reflect the traditional principles of justice of the communities in which they operate, thus serving as platforms for healing and rebuilding from legacy of the residential school system, and working toward self-determination.

The question is, how do we increase the availability of diversion programs as an alternative to the criminal justice system? An increase in funding to implement more programs is obviously a crucial requirement. We will accept this as a given necessity, and move on to explore a potential legislative solution. Specifically, we will explore in the following portion of this paper how reforming the Youth Criminal Justice Act (YCJA) to mandate that where police apprehend Indigenous youth, they must allow the them - and other parties involved in the incident – to choose between recourse in the criminal justice system or diversion.

Increasing Access to Diversion Programs for Indigenous Youth: Reforming the Youth Criminal Justice Act to Curtail Police and Prosecutorial Discretion

Contextualizing the Problem

Indigenous youth also continue to experience unacceptably high representation in the criminal justice system. Aside from socio-economic factors contributing to the higher level of criminal activity among Indigenous youth, Comack notes that racial bias has played a role in the higher incarceration rates much like their adult counterparts via the identification of Indigenous youth as belonging to a "problem population […] in need of control."75 A study conducted by Samual Perrault found that among Aboriginalzs` adults aged 20 to 34 "the incarceration rates […] still remained higher than for their non-Aboriginal counterparts, even when high school graduation and employment [were] considered."76 This lead him to conclude that there were factors beyond education levels and income levels which contribute to the problem of overrepresentation.77 Like adults, there is also a much greater likelihood of apprehension in

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[75] Nate Jackson, "Aboriginal Youth Overrepresentation in Canadian Correctional Services: Judicial and Non-Judicial Actors and Influences" (2014-2015) 52 Alta L Rev 927 at 927; *Ibid* [Comack] note 8.

[76] *Supra* note 10 at 86.

[77] *Ibid* at 87.

the criminal justice system compared with their non-Indigenous counterparts. For example, Comack notes that:

> "[a]ccording to a one-day snapshot conducted in 2003, the Aboriginal youth incarceration rate was 64.5 per 10,000 population compared to 8.2 per 10,000 populations for non-Aboriginal youth. Aboriginal youth were almost eight times more likely to be in custody than their non-Aboriginal counterparts. Aboriginal youth in Saskatchewan were thirty times more likely to be incarcerated then their non-Aboriginal counterparts. In Manitoba, Aboriginal youth were sixteen times more likely to be incarceration than were non-Aboriginal youth."[78]

Whatever the reason for this disproportionate representation, an obvious solution to the problem is dealing with infractions by Indigenous youth through diversion programs, as opposed to criminal justice system.

Curtailing Police Discretion with Aboriginal Offenders: Reforming the Youth Criminal Justice Act

In 2003 the federal government implemented legislative reforms which emphasized the importance of providing youth in Canada with alternatives to the criminal justice system. This was instituted by replacing the Young Offenders Act (YOA) with the Youth Criminal Justice Act (YCJA). Specifically, Section 4 of the current Act states in part that "extrajudicial measures are often the most appropriate and effective way to address youth crime," and asks police to consider these measures first before referring a youth to be dealt with by the criminal justice system.[79] While the predecessor of this provision in the YOA merely stipulated that under section 4(1) that "[a]lternative measures *may* be used to deal with a young person alleged to have committed an offence instead of judicial proceedings," section 4 of the YCJA is worded in such a way as to encourage police officers to consider extrajudicial avenues first.[80]

Overall, since the YCJA came into force, there has been a noted decrease in the number of youth processed through the criminal justice system. However, Jackson notes that Indigenous youth have not benefitted from this reform at the same rate as their non-Indigenous peers.

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[78] *Ibid* at 85.

[79] Canada, Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada,* (Ottawa: Minister of Supply and Services Canada, 1996) at 177.

[80] *Supra* note 37 at 927.

While there was a noted decline in youth incarceration rates generally, the rate for non-Aboriginal offenders dropped at almost twice the rate as it did for Indigenous youth. For example, between 2004 and 2009 "the male non-Aboriginal youth custody rate dropped by 41 percent" while "the number of male Aboriginal youth admitted to custody decreased by 26 percent."[81] On the contrary, he notes that "Aboriginal youth are increasingly being held in remand custody for longer periods of time than non-Aboriginal youth."[82] This statistic supports Monchalin's assertion that Aboriginal individuals are more likely to be disadvantaged by "policies which seem race neutral" on their face.[83]

Aside from the demonstrated failings on the part of police to ensure that Indigenous youth benefit from the reforms enshrined in section 4 of the YCJA, it should also alarm us that the noted disparity in the rate of decline between Indigenous and non-Indigenous youth offenders in custody continues despite the fact that *Gladue* principles must also be considered at sentencing stages for Aboriginal youth under Section 38(2)(d) of the Act. The provision stipulates that:

> "all available sanctions other than custody that are reasonable in the circumstances should be considered for all young persons, with particular attention to the circumstances of aboriginal young persons"[84]

Jackson notes that despite the fact that there has been a decline in Aboriginal youth in custody, and that the federal government has been quick to attribute this to Section 38(2)(d), in fact "the *proportion* of Aboriginal youth admitted to correctional services has grown under the YCJA."[85]

This brings us back to the original topic of this essay: addressing the disproportionate overrepresentation of Aboriginal individuals in custody. If we are working towards the ultimate solution of First Nation self-determination, then we need to focus more on measures which will create alternatives to the criminal justice system, rather than focussing mitigating measures on the sentencing stage, as is currently the case.[86]

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[81] *Ibid* at 936.

[82] *Ibid* at 929.

[83] *Supra* note 13 at 145.

[84] Youth Criminal Justice Act, RSC 2002, c 1, section 38(2)(d).

[85] *Supra* note 37 at 934-935.

[86] *Ibid* at 932.

A serious response to the crisis must include measures which increase access to diversion programs, particularly for Indigenous youth. Section 4 of the YCJA should be amended to mandat*e* police to let Indigenous youth offenders and other individuals impacted by the act choose between community diversion programs or the criminal justice system. The discriminatory attitude of police towards Indigenous youth noted by Comack, and the corresponding higher processing rates in the criminal justice system has led to an underutilization of these programs, and essentially denying these youth the possibility of having their infractions addressed by their own communities. For example, a facilitator of the diversion program in the Mohawk First Nation of Akwesasne remarked that even among tribal police, there are officers who have never referred youth to diversion.[87] Similarly, a "lack of cooperation" was noted on the part of authorities in the Cree community of Attawapiskat with regard to referring offenders to the community's diversion program. As noted in the RCAP report:

> "The decision to have a case diverted to an Aboriginal program is ultimately the responsibility of a Crown attorney. Thus diversion is not seen as a right of Aboriginal peoples, but as an exercise of prosecutorial discretion in favour of Aboriginal-specific programs. [T]he fact that these programs exist at all is a tribute to the hard work of the Aboriginal communities and the willingness of Crown attorneys, police and provincial and federal justice officials to look for alternatives to the current system."[88]

The question remains: how can diversion programs actually present a viable alternative to the criminal justice system when they are not being made available to offenders, simply because a police officer or prosecutor has decided not to make them so?

Curbing police discretion in Section 4 of the YCJA as it pertains to diversion recommendations would eliminate the possibility of racial bias standing in the way of restorative justice mechanisms being utilized on a wider scale, as an alternative to the criminal justice system. Such a reform would defer back a small slice of sovereignty to First Nation communities, and help work towards the ultimate goal of self-determination by halting the cycle of institutionalization. Aside from the fact that this is a more effective stage at which to

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[87] Interview with Erin from the Akwesasne Justice Department Community Justice Program (16 October 2016).
[88] *Supra* note 80 at 37.

implement restorative measures from the perspective of ultimately achieving sovereignty, ensuring Aboriginal youth access to diversion programs where possible, could also help with the long term reduction of crime in communities overall: Youth offenders have been proven to have an almost negligible reoffender rates when their offences are dealt with through diversion.[89] Secondly, it could help achieve the long-term goal of decarceration of Aboriginal people as a whole, by helping to break at least a portion of the cycle of colonial institutionalization.

Conclusion

In this paper we have explored the colonial legacy and cycle of institutionalization which is at the root of the crisis of Indigenous overrepresentation in carceral facilities; contextualized within the broader systemic racism which characterizes criminal justice systems in North America. I compare responses to criminalized behaviour rooted in retributive and restorative frameworks, and argue that restorative justice mechanisms must play a key role in solutions to the crisis. This is the case not only because they they have been proven to be better suited as response to many infractions currently processed through the criminal justice system, but also because the restorative justice paradigm; as the basis for many Indigenous justice systems, must be allowed to flourish as they play an important role in self-determination.

We looked at some restorative measures which have been implemented in the criminal justice system in an effort to address the crisis, such as Gladue principles and healing lodge programs for Indigenous prison inmates. We saw that aside from some of their specific shortcomings, one key structural failing of these measures is that they are only available once they are already in the criminal justice system. I argued that more focus needs to be placed on making restorative measures available *before* Indigenous offenders enter the system, and be made

[89] This assessment is based on anecdotal evidence from the Akwesasne Diversion program, where the reoffender rate is very low (only one or two re-offences in the ten years or so years it has been in operation), and anecdotal evidence from the teacher at a restorative justice facilitator training I attended in Akwesasne in the fall – who said he only experienced one case of reoffending in the over 100 circles he facilitated.

available as alternatives to the retributive model. I suggested that this could be done by increasing access for Indigenous youth to culturally appropriate diversion programs.

We noted that one of the impediments to achieving this goal, is the fact that the decision as to whether Aboriginal youth have the option of having their infractions addressed through diversion rests police and prosecutors. I suggest that a reform of the Act to take away police discretion as it pertains to Aboriginal offenders in Section 4, and mandate law enforcement officers to provide the option of deferral to a diversion program to parties involved in the offence.

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