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Instrumentalizing the Expressive: Transplanting Sentencing Circles into the Canadian Criminal Trial

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Instrumentalizing the Expressive: Transplanting Sentencing Circles into the Canadian Criminal Trial

Toby S. Goldbach*

ABSTRACT

This Article examines reforms to criminal sentencing procedures in Canada, focusing on Aboriginal healing circles, which were incorporated as “sentencing circles” into the criminal trial. Using the lens of comparative law and legal transplants, this Article recounts the period of sentencing reform in Canada in the 1990s, when scholars, practitioners, and activists inquired into Aboriginal confrontation with the criminal justice system by comparing Euro-Canadian and Aboriginal justice values and principles. As a way to bridge the gap between vastly differing worldviews and approaches to justice, judges and Aboriginal justice advocates transplanted sentencing circles into the sentencing phase of the criminal trial. This Article presents original data compiled from a review of all published decisions in Canada that mention the term sentencing circle. It reviews judicial treatment of requests for sentencing circles, and tracks sentencing decisions once a circle was held. Additionally, this Article uses sentencing circles as a point of entry into conversations about legal instrumentalism in law reform and legal transplants. It argues that the progress of these reforms points to larger questions about culture and what it currently means to use law as a tool for social change.

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I. INTRODUCTION

Today's legal environment is one of creation, adaptation, and change.¹ Whether in the pursuit of economic development,² democratization,³ or

¹ See John H. Merryman, *Comparative Law and Social Change: On the Origins, Style, Decline and Revival of the Law and Development Movement*, 25 AM. J. COMP. L. 457, 457 (1977); Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 184, 205 (1996) ("Once nations begin to interact, a complex process occurs, whereby international legal norms seep into, are internalized, and become embedded in domestic legal and political processes."); Terence C. Halliday, *Architects of the State: International Financial Institutions and the Reconstruction of States in East Asia*, 37(2) L. & SOC. INQUIRY 265, 266 (2012); Gregory Shaffer, *Transnational Legal Process and State Change*, 37 L. & SOC. INQUIRY 229, 229 (2012); Terence C. Halliday, *Recursivity of Global Normmaking: A Sociological Agenda*, 5 ANN. REV. L. & SOC. SCI. 263 (2009). But see Robert A. Kagan, *Globalization and Legal Change: The "Americanization" of European Law?*, 1 REG. & GOVERNANCE 99, 100 (2007) (challenging the suggestion that law in Western Europe is converging "with the American 'way of law,' particularly at the level of European nation-states, whose domestic legal systems and institutions still bulk large in the lives of individuals, business firms, and other organizations.").

² See, e.g., Ronald J. Daniels et al., *The Legacy of Empire: The Common Law Inheritance and Commitments to Legality in Former British Colonies*, 59 AM. J. COMP. L. 111 (2011) (reviewing the literature on the relationship between legal transplants and economic development); Rafael La Porta et al., *The Economic Consequences of Legal Origins*, 46 J. ECON. LITERATURE 285, 302, 324–25 (2008) (describing the reasons for legal transplants and examining the economic effects of legal origins, in particular the effect of common law legal systems on per capita income, investor protection, and financial development); see generally MICHAEL J. TREBLCOCK & RONALD J. DANIELS, *RULE OF LAW REFORM AND DEVELOPMENT: CHARTING THE FRAGILE PATH OF PROGRESS* 1–12 (2008).

political or social harmonization,⁴ identifying best practices⁵ and transporting them elsewhere has become common-fare. Scholars who focus on “legal transplants”⁶ tend to address two main sets of questions: first, how

³ See, e.g., Kim Seong-Hyun, *The Democratization and Internationalization of the Korean Legal Field*, in LAWYERS AND THE RULE OF LAW IN AN ERA OF GLOBALIZATION 217, 229–35 (Yves Dezalay & Bryant G. Garth eds., 2011); Hiroshi Fukurai, *Japan’s Quasi-Jury and Grand Jury Systems as Deliberative Agents of Social Change: De-Colonial Strategies and Deliberative Participatory Democracy*, 86 CHI.-KENT. L. REV. 789, 791 (2011) (arguing that the introduction of the quasi-jury and grand jury in Japan brought citizen oversight of the politically elite—who were formerly considered political “untouchables”); Zachary Corey & Valerie P. Hans, *Japan’s New Lay Judge System: Deliberative Democracy in Action?*, 12 ASIAN-PAC. L. & POL’Y J. 72, 89 (2010) (considering the potential of the new lay judge system in Japan to generate “legitimizing and civic engagement effects”).

⁴ See, e.g., Mads Andenas et al., *Towards a Theory of Harmonisation*, in THEORY AND PRACTICE OF HARMONISATION 572, 573 (Mads Andenas & Camilla Baasch Andersen eds., 2011) (“Harmonisation has been an important feature of modern legal systems For example, harmonization has been a core instrument of the European Union and Council of Europe, whilst at the international global level, there has been a long and established tradition of harmonisation of commercial law”); see generally John H. Merryman, *On the Convergence (and Divergence) of the Civil Law and the Common Law*, 17 STAN. J. INT’L L. 357 (1981) (outlining the political and cultural factors that both promote convergence of legal systems and provide a force for decentralization); but see Reinhard Zimmermann, *Civil Code and Civil Law: The “Europeanization” of Private Law Within the European Community and the Re-Emergence of a European Legal Science*, 1 COLUM. J. EUR. L. 63, 73, 77–78 (1994) (discussing the implementation of directives— which allow national governments to choose the form and method of compliance—as a mechanism for harmonization and detailing the negative consequences of using directives, such as increased fragmentation as a result of having two sets of rules, or legal ossification as a result of the difficult process in generating initial agreement on the directive).

⁵ David Kennedy, *The “Rule of Law,” Political Choices, and Development Common Sense*, in THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL 95, 155 (David M. Trubek & Alvaro Santos eds., 2006) (discussing development professionals’ turn away from economic analysis after the currency crisis of the 1990s to the identification of “best practices” in economic development and performance); Katharina Pistor, *The Standardization of Law and Its Effect on Developing Economics*, 50 AM. J. COMP. L. 97, 97 (2002) (discussing the expectation that adopting “best practices” and incorporating legal standards into conventions and treaties will have the “double benefit of reducing transaction costs for transnational investors and increasing the quality of legal institutions” in developing countries); see also Jonathan Hill, *Comparative Law, Law Reform and Legal Theory*, 9 OXFORD J. LEGAL STUD. 101 (1989) (discussing the approach of “better solution” comparative law scholars, who advocate for objective evaluation of the various solutions provided by the world’s legal systems, and challenging the premise that there can be objectivity in identifying best practices).

⁶ See ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* 7, 19 (2d ed. 1993) (arguing that comparative law is predominantly the study of a history of legal exchanges between legal systems, which consists of borrowing and modifying legal rules, and thus comparative law methodology should focus on legal transplants—the “borrowing and transmissibility of rules from one society or system to another” for the purpose of legal development); Daniel Berkowitz et al., *Economic Development, Legality, and the Transplant Effect*, 47 EUR. ECON. REV. 165, 174 (2003) (explaining the meaning of a legal transplant could be understood as follows: “[w]hen a transplant country applies a rule that it has transplanted from an origin, it is effectively applying a rule to its own local circumstances that was developed in a foreign socioeconomic order”); THE COMMON CORE OF EUROPEAN PRIVATE LAW (Mauro Bussani & Ugo Mattei eds., 2003); Michele Graziadei, *Comparative Law as the Study of Transplants and Receptions*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW, 441–74 (Mathias Reimann &

legal rules or institutions travel,⁷ and second, how foreign laws interact with domestic legal systems.⁸ Scholars generally do not contest that transplanted legal institutions have the potential to solve socio-legal problems. Transplanting legal institutions is a matter “of usefulness and need. No one bothers to fetch a thing from afar when he has one as good or better at home . . .”⁹

Unfortunately, scholars have not examined institutions that are transplanted, not as a result of their usefulness, but rather because of their cultural and symbolic import.¹⁰ Are the problems raised by using legal transplants to represent cultural and humanistic goals different from other cases where there is a transplant effect?

This Article discusses reforms to Canadian criminal sentencing procedures and the incorporation of Aboriginal methods into the criminal trial. In particular, this Article presents the transplanted “sentencing circle”¹¹ as an example of how legal scholars’ and practitioners’ views regarding legal instrumentalism¹² might be changing. This Article claims

Reinhard Zimmermann eds., 2006) (citing three causes for the movement of law: power, prestige, and institutional change aimed at improving economic performance).

⁷ See, e.g., Ron Harris & Michael Crystal, *Some Reflections on the Transplantation of British Company Law in Post-Ottoman Palestine*, 10 THEORETICAL INQUIRY L. 561 (2009) (examining company law transplants in Palestine in the early 20th Century and arguing that lawyers, legal academics, and colonial legislators influenced the exportation of English company law to countries in the British Empire); see also WATSON, *supra* note 6.

⁸ See, e.g., Berkowitz et al., *supra* note 6, at 174 (arguing that a legal transplant “increases its own receptivity [in the import country] by making a significant *adaptation* of the foreign formal legal order to initial conditions, in particular to the preexisting formal and informal legal order. Changes in the transplanted rules or legal institutions indicate that the appropriateness of these rules has been considered and modifications were made to take into account domestic legal practice or other initial conditions.”) (emphasis in the original); see generally Máximo Langer, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, 15 HARV. INT’L L. J. 1 (2004) (examining the ways that local legal cultures in Germany, Italy, Argentina, and France interacted with the importation of American-style plea bargaining); Toby Goldbach et al., *The Movement of U.S. Criminal and Administrative Law: Processes of Transplanting and Translating*, 20 IND. J. GLOBAL LEGAL STUD. 141, 158–60, 164–67 (2013) (arguing that legal elites in Asia both imported and modified U.S. criminal procedures, such as plea bargaining and procedures for a jury trial for use in the criminal trial).

⁹ KONRAD ZWEIGERT & HEIN KÖETZ, AN INTRODUCTION TO COMPARATIVE LAW 17 (Tony Weir trans., 3d ed. 1998).

¹⁰ See discussion *infra* Part IV. A.

¹¹ I refer to the traditional Aboriginal process and the process incorporated into the criminal trial by the following terms: “healing circle” and “sentencing circle” respectively. Some texts, government documents, and cases use these terms interchangeably. While there is no one form of healing circle that covers all traditional processes, I try to keep the terms separate, in the very least to place an emphasis on the process of transplantation.

¹² On the meaning of legal instrumentalism, see generally Karl N. Llewellyn, *A Realistic Jurisprudence—the Next Step*, 30 COLUM. L. REV. 431, 452 (1930) (“It seems patent that only a

that law reform goals have become more “expressive,”¹³ in that they include cultural and normative goals in addition to, or instead of, sociological goals. The effect is to “instrumentalize”¹⁴ culture and normativity.¹⁵ In

gain in realism and effectiveness of thinking can come from consistently (not occasionally) regarding the official [legal] formulation as a tool, not as a thing of value in itself; as a means without meaning save in terms of its workings, and of meaning in its workings only when those last are compared with the results desired.”); John Dewey, *Logical Method and Law*, 10 CORNELL L.Q. 17, 23, 26 (1924) (“As matter of actual fact, we generally begin with some vague anticipation of a conclusion (or at least of alternative conclusions), and then we look around for principles and data which will substantiate it or which will enable us to choose intelligently between rival conclusions. No lawyer ever thought out the case of a client in terms of the syllogism. He begins with a conclusion which he intends to reach, favorable to his client of course, and then analyzes the facts of the situation to find material out of which to construct a favorable statement of facts, to form a minor premise.”); PATRICK S. ATIYAH & ROBERT S. SUMMERS, FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW: A COMPARATIVE STUDY OF LEGAL REASONING, LEGAL THEORY AND LEGAL INSTITUTIONS 93 (1987) (“rules are conceived essentially as instruments as means to sound goals . . .”). On the place of legal instrumentalism in legal scholarship, see ROBERT S. SUMMERS, INSTRUMENTALISM AND AMERICAN LEGAL THEORY 31, 35, 60 (1982) (the most sustained and prominent belief about law in the last hundred years has been that law is a social instrument; social reality is malleable and can be altered “by humans for human purposes in the course of solving problems”); BRIAN Z. TAMANAHA, LAW AS A MEANS TO AN END: THREAT TO THE RULE OF LAW 118 (2006) (“Almost all of the major theoretical and empirical perspectives toward law that circulate today . . . characterize law in fundamentally instrumental terms.”); Mark Kelman, *The Past and Future of Legal Scholarship*, 33 J. LEGAL EDUC. 432, 433 (1983) (“The instinct of most law professors—again when discussing big concepts, like the nature of property—is unquestionably to be highly positivistic and instrumentalist”); Austin Sarat & Susan Silbey, *The Pull of the Policy Audience*, 10 L. & POLY 97, 104 (1988) (“At the beginning of the 20th century, the modest reform efforts of legal realism advanced an instrumentalist concept of law. In this, legal realism reacted against then prevailing formalist conceptions of law and worked to adapt legal thought to . . . one in which the state came to assume a much more explicit role in steering society); see generally Bryant G. Garth & Austin Sarat, *Studying How Law Matters: An Introduction*, in HOW DOES LAW MATTER? (Bryant G. Garth & Austin Sarat eds., 1998); Richard L. Abel, *Law and Society: Project and Practice*, 6 ANN. REV. L. & SOC. SCI. 1 (2010); Daphna Hacker, *Law and Society Jurisprudence*, 96 CORNELL L. REV. 727, 742 (2011) (examining the place of legal instrumentalist thought and the “preoccupation” with “legal reforms aimed at achieving social goals” in the Law and Society movement in Israel). On the distinction between “law as a tool” and legal techniques, see Annelise Riles, *A New Agenda for the Cultural Study of Law: Taking on the Technicalities*, 53 BUFF. L. REV. 973, 975 (2005) [hereinafter *Taking on the Technicalities*] (arguing that both instrumentalist and cultural/humanistic studies of law ignore the technical dimensions of legal form: “To the instrumentalist . . . the technical details of doctrine are interesting only insofar as they are relevant to what lawyers sometimes term ‘building a better mousetrap.’ They do not become the subject of any deeper or more critical inquiry.”); and see generally Alain Pottage, *Law After Anthropology: Object and Technique in Roman Law*, 31 THEORY, CULTURE & SOC’Y 147 (2014).

¹³ See Annelise Riles, *Law as Object*, in LAW & EMPIRE IN THE PACIFIC: FIJI AND HAWAII, 187–212 (Sally Engle Merry & Donald Brenneis eds., 2004) [hereinafter *Law as Object*].

¹⁴ Alain Pottage, *The Socio-Legal Implications of the New Biotechnologies*, 3 ANN. REV. L. & SOC. SCI. 321, 324 (2007).

¹⁵ See generally JUTTA BRUNNÉE & STEPHEN J. TOOPE, LEGITIMACY AND LEGALITY IN INTERNATIONAL LAW: AN INTERACTIONAL ACCOUNT 33–55, 85 (2010) (providing an account of the role of procedural fairness values in international law and international relations: “Interactional law undercuts the ability of powerful actors to put forward utterly self-serving or perverse normative claims, because the claims will have to be measured against the eight criteria of

transplanting Aboriginal justice methods into Euro-Canadian criminal trials, justice advocates intended to recognize Aboriginal peoples' rights in the administration of justice.¹⁶ This then poses the following questions: How do

legality, and will have to fit within shared understandings generated through inclusive participation of all social actors.”). For the most obvious example of melding instrumental and normative goals as the rule of law in Law and Development projects, see Kennedy, *supra* note 5, at 156–57 (providing an account of how human rights and the rule of law have been incorporated into the meaning of development); TREBILCOCK & DANIELS, *supra* note 2, at 4 (2008) (examining the role of the rule of law in development: “the claim that the robustness of a country’s commitment to the rule of law is an important determinant of its development trajectory rests upon both instrumental foundations and on intrinsic or deontological foundations.”). Another example is the proliferation of new jury and lay judge systems in Eastern Europe and East Asia in support of democratic reforms. See Hiroshi Fukurai et al., *The Resurgence of Lay Adjudicatory Systems in East Asia*, 12 ASIAN-PAC. L. & POL’Y J. i, iii (2010) (comparing the “wave” of legal reforms to introduce lay judges in East Asia to trial by jury in the 19th Century, which “became an integral part of the emerging democratic societies in the U.S. and other nations on the European Continent”); Fukurai, *supra* note 3; Ryan Park, *The Globalization of the Jury Trial: Lessons and Insights from Korea*, 58 AM. J. COMP. L. 525, 534–35, 546 (2010) (examining the connection between lay participation in judicial decision-making and “broader democratic governance,” and recounting the introduction of the jury trial as part of efforts to democratize Eastern Europe in the 1990s and South Korea in the late 1990s and early 2000s); Richard O. Lomport, *The Internationalization of Lay Legal Decision-Making: Jury Resurgence and Jury Research*, 40 CORNELL INT’L L.J. 477, 479 (2007); NIKOLAI KOVALEV, CRIMINAL JUSTICE REFORM IN RUSSIA, UKRAINE AND THE FORMER REPUBLICS OF THE SOVIET UNION: TRIAL BY JURY AND MIXED COURTS 2–3 (2010) (noting that many countries formerly part of the Soviet Union are introducing lay judge reforms, “transitioning” their criminal justice systems at the same time as undertaking political and economic transitions to democracy and free market economy). For more traditional portrayals of legal transplants as a consequence of pressure, prestige, or instrumental rationality, see generally Graziadei, *supra* note 6; La Porta et al., *supra* note 2; Ugo Mattei, *Efficiency in Legal Transplants: An Essay in Comparative Law and Economics*, 14 INT’L REV. L. & ECON. 1, 16 (1994).

¹⁶ MINISTRY OF THE SOLICITOR GENERAL, OTTAWA (ONTARIO), TASK FORCE ON ABORIGINAL PEOPLES IN FEDERAL CORRECTIONS, FINAL REPORT 10–11 (1988); PAUL L.A.H. CHARTRAND, ROYAL COMMISSION ON ABORIGINAL PEOPLES, BRIDGING THE CULTURAL DIVIDE: A REPORT ON ABORIGINAL PEOPLE AND CRIMINAL JUSTICE IN CANADA 3 (1996) [hereinafter BRIDGING THE CULTURAL DIVIDE] (“The right of Aboriginal self-government is argued to be a common law right in Canada, one that is protected by the Constitution. Aboriginal control over the substance and process of justice flowing from the Aboriginal right of self-government would permit the contemporary expression of Aboriginal concepts and processes of justice.”); ROYAL COMMISSION ON ABORIGINAL PEOPLES, 1 REPORT OF THE ROYAL COMMISSION ON ABORIGINAL PEOPLES 610, 679–81 (1996); John Giokas, *Accommodating the Concerns of Aboriginal People Within the Existing Justice System*, in ABORIGINAL PEOPLES AND THE JUSTICE SYSTEM 184, 184 (Royal Commission on Aboriginal Peoples eds., 1992) (“This paper has been written against the backdrop of this national and international drive of Aboriginal peoples for a greater degree of control over their own affairs. The basic theme of this paper can be summarized in one word: emergence. A new order is emerging in Canada that will cover most important aspects of the new relationship between Aboriginal and non-Aboriginal Canadians . . . Justice administration is one of those areas.”); Donald Clairmont, *Alternative Justice Issues for Aboriginal Justice*, 36 J. LEGAL PLURALISM & UNOFFICIAL L. 125, 125 (1996); see *R. v. Morin* (I.) (1995), 134 Sask. R. 120, para. 27 (Can. Sask. C.A.) (“The very purpose of sentencing circles seems to be to fashion sentences that will differ in some mix or measure from those which the courts have up to now imposed in order to take into account aboriginal culture and traditions, and in order to permit and to take into account direct community participation in both imposition and administration of

we measure the impact, effects, or the extent of “translation”¹⁷ in such cases? What is the effect of transplanting legal institutions that are intended to fulfill both sociological and corrective justice goals? What if, in addition to being an example of best practices, the legal transplant is also meant to signify a move toward repairing historical injustices?

In 1992, Justice Barry Stuart of the Yukon Territorial Court used an approach based on local First Nations’ methods of dealing with crime.¹⁸ This was the first instance of adapting an Aboriginal healing circle for use in a Canadian criminal trial.¹⁹ Following Justice Stuart’s example, other trial judges began to conduct sentencing circles on an ad hoc basis as part of the discretion they had in sentencing decisions.²⁰ By the mid-1990s, judicial innovation, legislative reform, and bureaucratic efforts effectively “transplanted” Aboriginal healing circles into the criminal trial. Presently, sentencing circles contribute to the institutionalized landscape to such an extent that in April 2014 the Ministry of the Attorney General (Ontario) unveiled a new courthouse with rooms specifically designed for Aboriginal conferencing and ceremonies.²¹

Sentencing circles are a legal procedure in which “the community offers its input to the sentencing court.”²² During a sentencing circle, criminal justice participants and members of the community have an opportunity to speak about the crime in question and its impact on the community.²³ The

the sentence.”); see also discussion of the Aboriginal Justice Initiative and Aboriginal Justice Strategy *infra* Part II.B.

¹⁷ Langer, *supra* note 8, at 13–14.

¹⁸ This first sentencing circle took place in Mayo, Yukon in *R. v. Moses*, [1992] B.C.W.L.D. 1294 (Can. Y.K.T.C.), additional reasons provided in *R. v. Moses*, [1992] 71 C.C.C. (3d) 347 (Can. Y.K.T.C.) and were as a result of consultations between the Kwanlin Dun First Nation and justice officials. THE CHURCH COUNCIL ON JUSTICE & CORRECTIONS, SATISFYING JUSTICE: A COMPENDIUM OF INITIATIVES, PROGRAMS AND LEGISLATIVE MEASURES (1996); see also BRIDGING THE CULTURAL DIVIDE, *supra* note 16, at 110.

¹⁹ *R. v. Nicholas* (B.L.) (1996), 177 N.B.R. 2d 124 (Can. N.B.P.C.); BARRY STUART, BUILDING COMMUNITY JUSTICE PARTNERSHIPS: COMMUNITY PEACEMAKING CIRCLES 124 (1997), http://publications.gc.ca/collections/collection_2009/justice/J22-12-1997E.pdf.

²⁰ Heino Lilles, *Circle Sentencing: Part of the Restorative Justice Continuum*, INT’L INST. FOR RESTORATIVE PRACTICES (Aug. 9, 2002), www.iirp.edu/article_detail.php?article_id=NDQ3. The common law authority for conducting sentencing circles was found by Justice Sherstobitoff of the Saskatchewan Court of Appeal in *R. v. Morin* (I.) (1995), 134 Sask.R. 120 (Can. Sask. C.A.).

²¹ MINISTRY OF THE ATTORNEY GENERAL, ABORIGINAL CONFERENCE SETTLEMENT SUITE FINAL REPORT (2009); *Thunder Bay Courthouse—Adamson Associates Architects*, ARCHDAILY, <http://www.archdaily.com/511799/thunder-bay-courthouse-adamson-associates-architects/> (last visited Feb. 2, 2016).

²² *R. v. Cooper* (2010), 101 O.R. 3d 1 (Can. Ont. C.A.).

²³ Maureen Linker, *Sentencing Circles and the Dilemma of Difference*, 42 CRIM. L.Q. 116, 117 (1999) (“The judge’s role is to oversee discussion and seek out answers to the following kinds of questions: What are the underlying causes of the crime? What impact has the crime had on the

number of participants can vary from ten to fifty individuals.²⁴ In sentencing circles, which may last several hours, participants often make sentencing recommendations. At the conclusion of a sentencing circle that the court holds as part of an adult criminal trial, the participants return the matter to the court for final submissions and judicial decision. The law does not require the judge to follow the sentencing circle's recommendations.²⁵ In many ways, though, sentencing circles represent an exception to the trend currently underway in common law countries to curtail lay participation in sentencing.²⁶ Therefore, because sentencing circles involve significant community participation, it is important to analyze whether, and how, judges respond to sentencing circle recommendations in the final sentencing stage.

An additional goal of this Article is to identify and present a cultural turn in legal thinking, one in which the *expressive* genre of law (which generates and produces meaning)²⁷ serves to mark and achieve other goals. This Article presents a story of legal pluralism, attempts at multiculturalism, Aboriginal law, and alternatives to criminal sentencing procedures. On a deeper level, however, it provides an account of legal instrumentalism and what it currently means to use law as a tool for social change.

In Canadian sentencing reform, through an exercise in comparative criminal law,²⁸ scholars, practitioners, and activists made Aboriginal culture into an object of knowledge²⁹ and then constructed expressions of Aboriginal culture as instruments of legal value. Government studies and legal reports compared Euro-Canadian and Aboriginal approaches to justice, and

victim, his or her family, and the community? What are the details of all the potential sentences . . . ?"). See, e.g., *R. v. Van Bibber*, [2010] Y.K.T.C. 49 (Can.); *R. v. MacKendrick*, [2007] B.C.W.L.D. 6450 (Can. B.C.P.C.) (finding that the "unusual nature and number of victims in the Langley community who were adversely affected" by the crime made the use of a sentencing circle even more poignant). But see Mary Crnkovich, *A Sentencing Circle*, 36 J. LEGAL PLURALISM & UNOFFICIAL L. 159, 165 (1996) (describing a sentencing circle that took place in the Nanuvik region of Quebec where the community's role was unclear).

²⁴ Lilles, *supra* note 20.

²⁵ *R. v. Taylor* (1995), 132 Sask. R. 221, para. 10 (Can. Sask. Q.B.) ("It must be remembered that the recommendation of a circle is not binding on the sentencing judge."); see also BRIDGING THE CULTURAL DIVIDE, *supra* note 16, at 110, 113–14; *infra* note 41 and accompanying text. discussion *infra* note 41.

²⁶ See Nancy J. King & Rosevelt L. Noble, *Felony Jury Sentencing in Practice: A Three-State Study*, 57 VAND. L. REV. 885 (2004); Toby S. Goldbach & Valerie P. Hans, *Juries, Lay Judges, and Trials*, in ENCYCLOPEDIA OF CRIMINOLOGY AND CRIMINAL JUSTICE (Gerben Bruinoma & David Weisburd eds., 2014) (showing how in Canada, juries may give recommendations for parole in first and second degree murder trials; the law restricts lay participation to those circumstances, and jury recommendations are not mandatory).

²⁷ *Law as Object*, *supra* note 13.

²⁸ Markus D. Dubber, *Criminal Law in Comparative Context*, 56 J. LEGAL EDUC. 433 (2006).

²⁹ *Law as Object*, *supra* note 13; see generally MARIANA VALVERDE, *LAW'S DREAM OF A COMMON KNOWLEDGE* (2003).

connected sociological and political adversity with the need for justice reform. Advocates explicitly distinguished Aboriginal healing circles from official state procedures and then presented the former as an alternative dispute resolution process with equally legitimate jurisdictional claims. With that legal authority, culturally appropriate processes became an instrument that law reformers could use to address normative and sociological goals.

Though often thought of as progressive in its pragmatic approach to law, there is a sense that legal instrumentalism, “the hegemonic logic of means and ends,”³⁰ risks destabilizing developments in its effort to deem everything up for instrumental grabs. Therefore, *instrumentalizing the expressive*—fashioning constructed expressions of culture into an instrument for use—may present new and troubling implications for what it means to employ the law as a tool metaphor. Scholars, practitioners, and reformers should become more familiar with the ways that back and forth movement between the instrumental and the expressive present a moment of jeopardy for unmet expectations. In the very least, they should make use of the technical legal devices and knowledge practices to which legal intermediaries regularly appeal.³¹

This Article employs a mixed methodology; it looks at government, task force, and law reform commission reports, as well as all published decisions where sentencing circles were requested and/or used. Part II reviews more thoroughly the background and situates the reforms in comparative law literature in order to give context to the kinds of conversations that were going on about how to change criminal sentencing in Canada. Readers might react negatively towards Aboriginal law analyzed within the framework of comparative law and legal transplants. Clearly, the histories of colonial relations and confrontations with indigenous communities, marked by paternalism and overt efforts to suppress culture, preclude adopting the “a-political” comparative law analysis.³² However, one of the underlying goals of

³⁰ Annelise Riles, *Anthropology, Human Rights, and Legal Knowledge: Culture in the Iron Cage*, 108 AM. ANTHROPOLOGIST 52, 60 (2006).

³¹ See, e.g., *Taking on the Technicalities*, supra note 12; see generally Alain Pottage, *The Materiality of What?*, 39 J.L. & SOC’Y 167 (2012) [hereinafter *The Materiality of What?*].

³² See David Kennedy, *New Approaches to Comparative Law: Comparativism and International Governance*, 2 UTAH L. REV. 545, 554 (1997) (Comparative law “see[s] itself as precisely not about politics or governance, as existing rather in the realm of history or thought, as an intellectual project of understanding between cultures whose similarities and differences are foregrounded.”). In particular, legal anthropologists might be concerned that commissions and task forces constructed an Aboriginal sentencing process. See, e.g., Martin Chanock, *The Law Market: The Legal Encounter in British East and Central Africa*, in EUROPEAN EXPANSION AND LAW (W. J. Mommsen & J. A. de Moor eds., 1992); Marilyn Strathern, *Discovering ‘Social Control’*, 12 J. L. & SOC’Y 111, 111 (1985); Peter Fitzpatrick, *Traditionalism and Traditional Law*, 28 J. AFR. L. 20 (1984). However, a sole focus on the *expressive* or meaning-making genre of law can overlook results of the second genre of law-making where law is a thing in the world. See *Law as Object*,

this Article is to present the example of transplanted Aboriginal methods as a means to disturb convenient encampments. By invoking the transplant metaphor and examining the types of questions comparative law scholars ask,³³ this Article seeks to confront divisions between comparative law,³⁴ legal pluralism,³⁵ and law and development literature.³⁶ Sitting at the intersection of those three disciplines, sentencing circles are uniquely positioned to prompt readers to consider assumptions about whose law is fit for transplanting and the kinds of questions that are asked in certain areas of law.

Part II chronicles a period of intense government scrutiny into Aboriginal confrontation with the criminal justice system, the initial legislative and judicial reforms, the subsequent transplantation, and the institutionalization of sentencing circles into the criminal trial.

Part III adopts the typical comparative law and legal transplant approach, examining the process of transplantation and how sentencing circles fared once transplanted into the Euro-Canadian legal system. This Part presents a brief qualitative report of findings from all published Canadian decisions that dealt with sentencing circles, ranging from the first time a sentencing circle was held during a criminal trial in 1992 to decisions as recent as 2010.³⁷ This Article analyzes the outcomes of requests to hold a

supra note 13, at 190. Put most simply, sentencing circles have been incorporated, transplanted, and used in the criminal trial. So, it still bears worth to investigate how this played out.

³³ See Mitchel Lasser, *The Question of Understanding*, in *COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS* 197, 197–239 (Pierre Legrand & R. J. C. Munday eds., 2003).

³⁴ Each of those sub-disciplines explores the movement of law and the interaction between culture, local needs, and official (state) legal orders, but they tend to adhere to their own constituencies: Comparative Law to European and North American audiences. See, e.g., THE COMMON CORE OF EUROPEAN PRIVATE LAW, *supra* note 6; Pierre Legrand, *The Impossibility of Legal Transplants*, 4 *MAASTRICHT J. EUR. & COMP. L.* 111 (1997); Mathias Reimann, *The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century*, 50 *AM. J. COMP. L.* 671 (2002).

³⁵ Legal Pluralism explores African or Western informal, customary, or religious legal orders as objects of study. See, e.g., MARTIN CHANOCK, *LAW, CUSTOM, AND SOCIAL ORDER: THE COLONIAL EXPERIENCE IN MALAWI AND ZAMBIA* (Jim Lance ed., 1998); Chanock, *supra* note 32; Fitzpatrick, *supra* note 32; Strathern, *supra* note 32; Sally Engle Merry, *Legal Pluralism*, 22 *L. & SOC'Y REV.* 869 (1988).

³⁶ Law and development scholars examine developing states (as opposed to developing communities) in Latin America, Eastern Europe or North Africa. See, e.g., Pistor, *supra* note 5; Alvaro Santos, *The World Bank's Uses of the "Rule of Law" Promise in Economic Development*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL* 253–300 (David Trubek & Alvaro Santos eds., 2006); César Rodríguez-Garavito, *Toward a Sociology of the Global Rule of Law Field: Neoliberalism, Neoconstitutionalisms, and the Contest Over Judicial Reform in Latin America*, in *LAWYERS AND THE RULE OF LAW IN AN ERA OF GLOBALIZATION* 156–83 (Yves Dezalay & Bryant G. Garth eds., 2011).

³⁷ I chose December 2010 as the date to end data collection to provide a clean cut off point. I was also able to ensure I could access all the reported cases for that period, in case there was any

sentencing circle at the sentencing phase, as well as outcomes on sentencing after a sentencing circle was conducted. Part III proceeds within a framework of lay participation in law,³⁸ arguing that the outcomes of incorporating these procedures should be judged against the kinds of goals that normally underlie lay and community participation in shaping sentences for convicted offenders. In this view, the ambiguous results become less important than the way those results were achieved.

The discussion in Part IV challenges legal intermediaries to address the “transplant effect.”³⁹ It suggests that judges have tools that can be employed to assess and process sentencing circle recommendations.⁴⁰ Lay participation in sentencing has been all but eliminated in many jurisdictions—including Canada—so the ultimate authority for sentencing defendants resides with the judge.⁴¹ Nevertheless, this Article suggests that where lay participation and culture is instrumentalized, judges may need to employ the law’s technical contributions.⁴² The suggestion to use formalities or technical legal approaches to distill Aboriginal procedures may seem odd. However, part of this Article’s is to query whether decoupling legal formalism from legal techniques⁴³ might mediate the risks associated with instrumentalizing normative and expressive goals.

delay between the decision and the reporting of the case. Admittedly, 2010 is an arbitrary cut off point, but, as there have not been any significant changes to the Criminal Code or to the way sentencing circles are being conducted, I have no reason to believe that the conclusions that I will draw are in any way affected by this cut off point.

³⁸ See Goldbach & Hans, *supra* note 26.

³⁹ Berkowitz et al., *supra* note 6, at 167.

⁴⁰ See *infra* Part IV.

⁴¹ Criminal Code, R.S.C. 1985, c. C-46, s. 720, s. 745, c. 27 (1st Supp.), s. 155; 1995 c. 22, s. 6; 2015, c. 13, s. 23. Sentencing proceedings are carried out by the court, except where a jury finds an accused guilty of second degree murder, guilty of murder where the accused has a prior conviction for murder, or where the accused was under the age of sixteen; in those cases, the judge must give the jury the option to make a non-binding recommendation on the period the accused is required to serve before being eligible for release on parole. See Neil Vidmar, *The Canadian Criminal Jury: Searching for a Middle Ground*, 62 L. & CONTEMP. PROBS. 141, 148 (1999); Goldbach & Hans, *supra* note 26, at 2721.

⁴² See, e.g., Karen Knop, Ralf Michaels & Annelise Riles, *From Multiculturalism to Technique: Feminism, Culture, and the Conflict of Laws Style*, 64 STAN. L. REV. 589, 594–95 (2012); *Law as Object*, *supra* note 13, at 1026–27.

⁴³ See ANNELEISE RILES, COLLATERAL KNOWLEDGE: LEGAL REASONING IN THE GLOBAL FINANCIAL MARKETS 70–71 (2011) [hereinafter COLLATERAL KNOWLEDGE] (arguing that an ethnography of legal expertise must include a close examination “of the skill and the art, the aesthetics and the bricolage, the satisfaction of rehearsing and perhaps innovating upon or adding to a set of moves and postures one has observed, apprenticed, debated with other initiates,” which is distinguishable from legal formalism, “the view that legal form constrains politics”); see also VALVERDE, *supra* note 29, at 28 (distinguishing between socio legal scholarship, which examines the ways that law, formally applied, reproduces forms of power relations, and the study of the “mechanisms” by which law produces or “constitutes” knowledge).

II. COMPARATIVE CRIMINAL LAW

A. *Justice Studies 1967–1995*

The Canadian government transplanted Aboriginal healing circles into the Canadian criminal trial following a cross-national exercise that analyzed Aboriginal confrontation with the criminal justice system using a comparative law methodology. Starting from the position that the relationship between Aboriginal peoples and the criminal justice system needed to change, government sponsored inquiries focused on the conflict between justice values and principles by comparing Aboriginal and Euro-Canadian approaches to crime.⁴⁴

Between 1967 and 1995, provincial and federal levels of government sponsored more than thirty justice studies⁴⁵ regarding the causes and effects of systemic discrimination against Aboriginal people.⁴⁶ For example, the Task Force on the Criminal Justice System and its Impact on the Indian and Metis People of Alberta assigned former Chief Judge of the Provincial Court, Justice Allan Cawsey, a mandate “to complete a review of the criminal justice system in Alberta as it relates to Indian and Metis people.”⁴⁷ The Alberta Task Force combined submissions from law organizations, researchers, and native groups with statistical data. Similarly, the Royal Commission on Aboriginal Peoples (“RCAP”) heard testimony at public hearings, accepted submissions from organizations funded through an intervener participation program, sponsored research studies, and organized national “round tables” on Aboriginal issues, which brought together academics, practitioners, politicians, and community leaders.⁴⁸

First, task forces, inquiries, and royal commissions sought to understand why and how the criminal justice system negatively affected Aboriginal

⁴⁴ Individual scholars also took on the task of investigating the conflicts between justice and values. See, e.g., JAMES S. FRIDERES & RENÉ R. GADACZ, *ABORIGINAL PEOPLES IN CANADA* (7th ed. 2004); RUPERT ROSS, *DANCING WITH A GHOST: EXPLORING INDIAN REALITY* (1992).

⁴⁵ Dara Culhane, *Justice and Healing: Aboriginal Peoples in Canada*, 6 J. HUM. JUST. 140, 151 (1995).

⁴⁶ In addition to the reports and commissions cited in the text, see GOV'T OF CANADA ET AL., *REFLECTING INDIAN CONCERNS AND VALUES IN THE JUSTICE SYSTEM* (1985); CHIEF JUSTICE T. ALEXANDER HICKMAN ET AL., *ROYAL COMMISSION ON THE DONALD MARSHALL, JR., PROSECUTION: DIGEST OF FINDINGS AND RECOMMENDATIONS* (1989); JUDGE PATRICIA LINN, *FED'N OF SASK INDIAN NATIONS ET AL., REPORT OF THE SASKATCHEWAN INDIAN JUSTICE REVIEW COMMITTEE* (1992); TASK FORCE ON FEDERALLY SENTENCED WOMEN, *CREATING CHOICES: THE REPORT OF THE TASK FORCE ON FEDERALLY SENTENCED WOMEN* (1990).

⁴⁷ TASK FORCE ON THE CRIMINAL JUSTICE SYSTEM AND ITS IMPACT ON THE INDIAN AND METIS PEOPLE OF ALBERTA, *JUSTICE ON TRIAL: REPORT OF THE TASK FORCE ON THE CRIMINAL JUSTICE SYSTEM AND ITS IMPACT ON THE INDIAN AND METIS PEOPLE OF ALBERTA*, 1-1 (1991).

⁴⁸ James S. Frideres, *The Royal Commission on Aboriginal Peoples: The Route to Self-Government?*, 16 CAN. J. NATIVE STUD. 247, 247–53 (1996).

offenders.⁴⁹ They examined feelings of alienation, as well as the disproportionate representation of Aboriginal offenders in provincial and federal prisons.⁵⁰ For example, RCAP's comprehensive report found that, in Saskatchewan, a treaty Indian boy of sixteen had a 70 percent chance of serving a prison term by the age of twenty-five, while a non-Native Saskatchewan boy only had an 8 percent chance.⁵¹ Comparing populations with penal statistics also illustrated the extent of over-incarceration.⁵² In the

⁴⁹ See, e.g., MINISTRY OF SOLICITOR GENERAL, OTTAWA (ONTARIO), *supra* note 16, at 23, 28; ALVIN HAMILTON, *A FEATHER, NOT A GAVEL: WORKING TOWARDS ABORIGINAL JUSTICE* 49, 61 (2001) (describing the efforts of the Aboriginal justice inquiry in Manitoba to learn about structural impediments to justice and the particular discrimination in effect in Winnipeg: "Aboriginal city residents . . . described their personal experiences with police brutality, the courts' indifference and the oppression of bigotry and discrimination . . ."); see also Daniel Kwochka, *Aboriginal Injustice: Making Room for a Restorative Paradigm*, 60 SASK. L. REV. 153, 154–55 (1996).

⁵⁰ MINISTRY OF SOLICITOR GENERAL, OTTAWA (ONTARIO), *supra* note 16, at 5, 23; JAMES DUMONT, JUSTICE AND ABORIGINAL PEOPLE 29–32 (1990) (examining the differences between Aboriginal approaches to justice and "expectations of the legal system" in a paper written for the Public Inquiry into the Administration of Justice and Aboriginal People. Practices common in the Euro-Canadian legal system may seem "culturally and ethically foreign and opposing," and "[d]ifferences in value orientation causes [sic] significant differences in behavior, and where Native people come into the legal context of the dominant society the situation appears to foster behavioral conflicts within the courtroom as well as with enforcers of the law."); Ciokao, *supra* note 16, at 187 ("Aboriginal over-representation is affirmed by report after report documenting the high contact rates of Aboriginal people with police and their disproportionately high rates of arrest, conviction and imprisonment. Over-representation in prisons and jails is now an acknowledged fact, and there is every indication that the problem may be worsening, given that the federal Aboriginal inmate population is increasing at more than twice the national rate."); Carol LaPrairie, *The Role of Sentencing in the Over-Representation of Aboriginal People in Correctional Institutions*, 32 CANADIAN J. CRIMINOLOGY & CRIM. JUST. 429, 429 (1990) ("For the past two decades, virtually, everything written and discussed in the area of aboriginal people and the criminal justice system has used as its starting point the over-representation of aboriginal people as inmates in federal, provincial, and territorial correctional institutions.").

⁵¹ William D. Coleman, *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada*, 29 CAN. J. OF POL. SCI. 784, 785 (1996).

⁵² MINISTRY OF THE SOLICITOR GENERAL, OTTAWA (ONTARIO), *supra* note 16, at 5, 24; TASK FORCE ON THE CRIMINAL JUSTICE SYSTEM AND ITS IMPACT ON THE INDIAN AND METIS PEOPLE OF ALBERTA (CANADA), *supra* note 17, at 6–4 ("It is a well known and historically persistent fact that the Aboriginal peoples of Alberta have been dramatically and proportionately over-represented in jails and penitentiaries. Task Force research has determined that, over the past five years, the percentage of Aboriginals in jail has ranged from 29.7% to 31.5% for the total Aboriginal population. For 1989, the most recent year, the percentage is 31.1% compared to a 4% to 5% representation of the general population of Alberta."); see also Tim Quigley, *Are We Doing Anything about the Disproportionate Jailing of Aboriginal People?*, 42 CRIM. L.Q. 129, 157 (1999) (noting the proportion of Aboriginal offenders who are incarcerated rather than fined greatly exceeds their population); LaPrairie, *supra* note 50, at 429 ("aboriginal people comprise approximately 1.5–2% of the Canadian population but make up approximately 8–10% of the federal correctional institutional population and considerably more in provincial and territorial institutions . . . for certain aboriginal groups such as women and juveniles, the rates may be even more extreme"); DEPT OF JUSTICE CAN., FINAL EVALUATION ABORIGINAL JUSTICE STRATEGY 12 (2000), http://publications.gc.ca/collections/collection_2007/jus/J3-6-2000-1E.pdf [hereinafter ABORIGINAL JUSTICE STRATEGY EVALUATION 2000] ("Aboriginal people continue to be overrepresented among admissions to adult correctional facilities, as 15% of provincial/territorial

early 1990s, Aboriginal people made up between 2–3 percent of the total population of Canada, yet they made up 10–15 percent of the penitentiary population.⁵³ In certain areas, the proportions may have been much higher. In 1992, in the prairie provinces of Manitoba, Saskatchewan, and Alberta Aboriginal people represented approximately 15 percent of the population, but their percentage of total prison population might have been as high as 60 percent.⁵⁴

Initially, researchers attributed this over-incarceration of Aboriginal offenders to high levels of crime and facially neutral policies that negatively impacted Aboriginal offenders.⁵⁵ In particular, researchers blamed sentencing practices for over-incarceration and Aboriginal offenders' feelings of alienation.⁵⁶ Carol LaPrairie, who worked as a researcher for the Department of Justice, wrote:

admissions are Aboriginal peoples, while they represent 2.8% of the general Canadian population The [Canadian Centre for Justice Statistics] reported that in 1997/98, the total percentage of Aboriginal peoples sentenced to provincial/territorial probation was 12%—over four times the proportion of Aboriginal people in the Canadian population.”); *see generally*, A. C. HAMILTON & C. M. SINCLAIR, REPORT OF THE ABORIGINAL JUSTICE INQUIRY OF MANITOBA ch. 4 (1991).

⁵³ POPULATION BY ABORIGINAL GROUPS AND SEX, SHOWING AGE GROUPS, FOR CANADA, 1996 CENSUS (20% SAMPLE DATA), STATS. CAN. CATALOG NO. 93F0025XDB96002, www.statcan.gc.ca/c1996-r1996/jan13-13jan/c1996-r1996-eng.pdf (last visited Feb. 12, 2010); CANADIAN CENTRE FOR JUSTICE STATISTICS PROFILE SERIES, ABORIGINAL PEOPLES IN CANADA (2001); *see* ROYAL COMM'N ON ABORIGINAL PEOPLES, ABORIGINAL PEOPLES AND THE JUSTICE SYSTEM 30, 41 (1993); *R. v. Gladue*, [1999] 1 S.C.R. 688, 719 (Can.) (“If overreliance upon incarceration is a problem with the general population, it is of much greater concern in the sentencing of aboriginal Canadians. In the mid-1980s, aboriginal people represented about 2 percent of the population of Canada, yet they made up 10 percent of the penitentiary population. In Manitoba and Saskatchewan, aboriginal people constituted something between 6 and 7 percent of the population, yet in Manitoba they represented 46 percent of the provincial admissions and in Saskatchewan 60 percent. The situation has not improved in recent years. By 1997, aboriginal peoples constituted closer to 3 percent of the population of Canada and amounted to 12 percent of all federal inmates.”).

⁵⁴ ROYAL COMM'N ON ABORIGINAL PEOPLES, *supra* note 53.

⁵⁵ *See, e.g.*, BRIDGING THE CULTURAL DIVIDE, *supra* note 16, at 41 (citing reports that found Aboriginal offenders more likely than non-Aboriginals to plead guilty even when they do not believe themselves to be guilty, and they were also less likely to benefit from plea bargains).

⁵⁶ ROBERT A. SILVERMAN & MARIANNE O. NIELSEN, ABORIGINAL PEOPLES AND CANADIAN CRIMINAL JUSTICE 122–23 (Robert A. Silverman & Marianne O. Nielsen eds., 1992) (“Dealing with courts means dealing with the central most important issue to Native people (or others) who find themselves facing a conviction for a violation of criminal law and that is sentencing.” The Crown was less likely, in 1975, to offer a plea bargain to Aboriginal offenders and Aboriginal “cultural traits” were misinterpreted, negatively impacting Aboriginal offenders); REPORT OF THE TASK FORCE ON THE CRIMINAL JUSTICE SYSTEM AND ITS IMPACT ON THE INDIAN AND METIS PEOPLE OF ALBERTA, *supra* note 47, at 6-1 (reviewing submissions and statistical data on recidivism and concluding that “the imposition and enforcement of sentences had very little impact on Aboriginal persons.”); BRIDGING THE CULTURAL DIVIDE, *supra* note 16, at 309 (“The Canadian criminal justice system has failed the Aboriginal peoples of Canada—First Nations, Inuit and Metis people, on-reserve and off reserve, urban and rural—in all territorial and

Nowhere else is the use of the criminal justice system to address a major social and economic problem so potentially problematic as it is in relation to [A]boriginal people. It is this group which appears to be incarcerated for less serious offences because its members do not qualify for probation, and few options but incarceration are available to judges.⁵⁷

Ultimately, reports explained Aboriginal confrontation with the criminal justice system as a conflict between two sets of justice values.⁵⁸ By comparing Euro-Canadian and Aboriginal justice principles and approaches to crime, inquiries revealed the extent to which the criminal justice system was alien and oppressive to Aboriginal people.⁵⁹ For example, Judge Murray Sinclair, Co-Commissioner of the Aboriginal Justice Inquiry of Manitoba, compared Euro-Canadian punishment and deterrence approaches to Aboriginal justice principles. While acknowledging that there was no universal Aboriginal conception of justice, he explained an Aboriginal conception of justice “would be that of restoring peace and equilibrium to the community through reconciling the accused with his or her own conscience and with the individual or family that [was] wronged.”⁶⁰ By comparison, Euro-Canadian justice considers offenders to be harmful to society and punishes them in order to deter harmful, deviant behavior by that offender and others in the future.⁶¹

governmental jurisdictions. The principal reason for this crushing failure is the fundamentally different world views of Aboriginal and non-Aboriginal people with respect to such elemental issues as the substantive content of Justice and the process of achieving Justice.”)

⁵⁷ LaPrairie, *supra* note 50, at 437.

⁵⁸ See, e.g., DUMONT, *supra* note 50, at 28; Leonard Mandamin, *Aboriginal Justice Systems, in ABORIGINAL PEOPLES AND THE JUSTICE SYSTEM* 275, 281 (Royal Commission on Aboriginal Peoples eds., 1993) (“For Aboriginal people the emphasis is on restoration and healing rather than punishment”); BRIDGING THE CULTURAL DIVIDE, *supra* note 16, at 309; Murray Sinclair, *Aboriginal Peoples, Justice and the Law, in CONTINUING POUNDMAKER AND RIEL’S QUEST: A COMPILATION OF THE PRESENTATIONS MADE AT A CONFERENCE ON ABORIGINAL PEOPLES AND JUSTICE* 178 (Richard Gosse et al. eds., 1994) (“... the question should be restated as: ‘What is wrong with our justice system that Aboriginal people find it so alienating?’ [The starting point] requires one to come to terms with the concept that Aboriginal Peoples of North America, for the most part, hold world views and life philosophies fundamentally different from those of the dominant Euro Canadian society, and that these belief systems and approaches to life are so fundamentally different as to be inherently in conflict.”); see generally REPORT OF THE TASK FORCE ON THE CRIMINAL JUSTICE SYSTEM AND ITS IMPACT ON THE INDIAN AND METIS PEOPLE OF ALBERTA, *supra* note 47; HAMILTON & SINCLAIR, *supra* note 52, at ch. 2; see also Kwochka, *supra* note 49, at 159–60.

⁵⁹ See, e.g., DUMONT, *supra* note 50, at 32; MINISTRY OF SOLICITOR GENERAL, OTTAWA (ONTARIO), *supra* note 16, at 28–31; BRIDGING THE CULTURAL DIVIDE, *supra* note 16, at 58 (“It is difficult and disturbing to realize that Aboriginal people see the non-Aboriginal justice system as alien and repressive, but the evidence permits no other conclusion.”).

⁶⁰ Sinclair, *supra* note 58.

⁶¹ *Id.*

In its position paper on incarceration, the Community Holistic Circle Healing Program: Hollow Water First Nation,⁶² also compared the two approaches to justice as follows:

Our tradition, our culture, speaks clearly about the concepts of judgement and punishment. They belong to the Creator. They are not ours People who offend against another (victimizers) are to be viewed and related to as people who are out of balance—with themselves, their family, their community, and their Creator. A return to balance can best be accomplished through a process of accountability that includes support from the community through teaching and healing. The use of judgement and punishment actually works against the healing process. An already unbalanced person is moved further out of balance

The adversarial approach also places the victimizer against his or her community. As we see it, this goes against the very essence of the healing process. For us, healing (breaking the cycle) is based on (1) the victimizer taking full responsibility for his/her actions, (2) the victim understanding and integrating this into day-to-day living, and (3) the COMMUNITY being able to support, assist, and/or hold accountable all the parties of the victimization. Until this can happen, and as long as incarceration is seen as the solution, the community will not be a safe place.⁶³

Because of these fundamentally different worldviews of justice, Aboriginals participating in the non-Aboriginal justice system was itself an experience of colonization.⁶⁴ Task forces and commissions found that assuming greater responsibility for the delivery and administration of justice

⁶² The Hollow Water Initiative serves First Nation and Metis in four communities: Manigotagan, Aghaming, Seymourville, and Hollow Water. For additional information about the Community Holistic Circle Healing Program, see ED BULLER, *ABORIGINAL COMMUNITY HEALING PROCESSES IN CANADA* 3–8 (2005).

⁶³ THE CHURCH COUNCIL ON JUSTICE & CORRECTIONS, *supra* note 18, at XXIII-XXV.

⁶⁴ BRIDGING THE CULTURAL DIVIDE, *supra* note 16 (“In making the case for Aboriginal control of ‘Justice’, the RCAP begins by recognizing that [it] has been through the law and the administration of justice that Aboriginal people have experienced the most repressive aspects of colonialism. The RCAP then proposed that it is in Aboriginal law, with Aboriginal law and through Aboriginal law that Aboriginal people aspire to regain control over their lives and communities. The establishment of systems of Aboriginal justice is seen as a necessary part of throwing off the suffocating mantle of a legal system imposed through colonialism.”). These issues are examined more closely in Toby S. Goldbach, *Sentencing Circles, Clashing Worldviews, and the Case of Christopher Pauchay*, 10 ILLUMINE: J. OF THE CTR. FOR STUD. IN RELIGION AND SOC’Y GRADUATE STUDENTS ASS’N 53, 66–68 (2011).

was imperative, and⁶⁵ most agreed that Aboriginal people possessed the legal and constitutional authority to administer justice.⁶⁶ Canada identified two options: (i) recognize the right to a separate parallel justice system for Aboriginal people, or (ii) incorporate Aboriginal justice into the existing criminal justice system.⁶⁷

B. Bridging the Gap

During the 1990s, Canadian authorities effectively transplanted Aboriginal healing circles as “sentencing circles” into the criminal trial. This alternative sentencing theory, and others, presented an attractive remedial approach that recognized Aboriginal authority to administer justice. Since Canadian criminal scholars and practitioners were already attacking the foundations of deterrence and incarceration in response to crime,⁶⁸ Aboriginal

⁶⁵ See COMMUNICATION DIVISION, MINISTRY OF THE SOLICITOR GENERAL, NATIVE PEOPLES AND JUSTICE: REPORTS ON THE NATIONAL CONFERENCE AND THE FEDERAL-PROVINCIAL CONFERENCE ON NATIVE PEOPLES AND THE CRIMINAL JUSTICE SYSTEM 14–16, 25–26, 38 (1975) (explaining that many of the reports and commissions attribute sentencing conflict to Aboriginal exclusion from the design and delivery of justice services in Canada. It was at the National Conference on Native Peoples and the Criminal Justice System that concern about Aboriginal experience was first linked to Aboriginal exclusion from the design and delivery of justice services: “The following guidelines . . . were regarded and adopted . . . as a statement of general philosophy underlying any approach to the problems of natives within the criminal justice system. 1. Native persons should be closely involved in the planning and delivery of services associated with criminal justice and native peoples. 2. Native communities should have greater responsibility for the delivery of criminal justice services to their people . . .”).

⁶⁶ See, e.g., BRIDGING THE CULTURAL DIVIDE, *supra* note 16; James C. MacPherson, *Report from the Round Table Rapporteur*, in ABORIGINAL PEOPLES AND THE JUSTICE SYSTEM 1, 6 (“One of the more promising themes of the Round Table was the absence of potential jurisdictional impediments to reform in the justice area . . . most of the participants at the Round Table appeared to agree with Patrick Macklem’s analysis in his paper dealing with the relationship between the current constitutional framework in the justice field and new Aboriginal justice systems. Professor Macklem stated, ‘In my view, neither the current distribution of legislative authority nor the judicature provisions pose any serious impediment to the establishment of a separate or parallel system of justice for Aboriginal people, although federal-provincial co-operation may be required to vest Aboriginal courts with jurisdiction over certain subject matters.’”).

⁶⁷ Giokas, *supra* note 16, at 201 (“The solutions most commonly discussed are a separate justice system for aboriginal peoples, parallel systems or considerable accommodation within the existing justice system.” Giokas argued that both projects “must be undertaken to eliminate systemic discrimination . . . there must be movement on these two simultaneous projects: developing internal community justice structures; and improving the overall justice system. The latter can be accomplished on the basis of the many recommendations to this effect in the various inquiry reports and can be begun on a unilateral basis by government. Both levels of government have already started on this latter project, however haltingly, and will no doubt outline their efforts to this Commission in another forum.”); ROYAL COMM’N ON ABORIGINAL PEOPLES, *supra* note 53; see also SILVERMAN & NIELSEN, *supra* note 56.

⁶⁸ See CANADIAN SENTENCING COMMISSION, SENTENCING REFORM: A CANADIAN APPROACH: REPORT OF THE CANADIAN SENTENCING COMMISSION xxviii (1987) (Deterrence, rehabilitation, and incapacitation “are clearly pragmatic,” nevertheless: “[e]vidence does not support the notion

justice advocates could burrow themselves within the larger debates about sentencing. Despite vast differences, law reformers, judges, and scholars began to acknowledge parallels between "informal justice" approaches that stressed communitarianism and interdependency,⁶⁹ and Aboriginal methods for dealing with harm to the community.

Specifically, researchers pointed to the potential of restorative justice to bridge the gap between Aboriginal and Euro-Canadian approaches to sentencing.⁷⁰ Aboriginal and restorative justice approaches were seen as overlapping in their goal to heal "the relationships that have been jeopardized by the wrongdoer's behavior."⁷¹ Given that North America, Europe, Australia, and New Zealand had already begun to implement restorative justice initiatives scholars, practitioners, and law reformers could

that variations in sanctions . . . affect the deterrent value of sentences. In other words, deterrence cannot be used, with empirical justification, to guide the imposition of sentences. There are no comprehensive data that support the idea that courts can . . . impose sanctions that have a reasonable likelihood of rehabilitating offenders . . . [And, the] extensive literature on incapacitation suggests that as a crime-control strategy the costs of imprisonment far outweigh the benefits achieved in reducing crime."); STANDING COMMITTEE ON JUSTICE & SOLICITOR GENERAL, TAKING RESPONSIBILITY: REPORT OF THE STANDING COMMITTEE ON JUSTICE AND SOLICITOR GENERAL ON ITS REVIEW OF SENTENCING, CONDITIONAL RELEASE AND RELATED ASPECTS OF CORRECTIONS (1988); see also Julian V. Roberts, *Sentencing in Canada: The Context for Reform*, 32 CANADIAN J. CRIMINOLOGY & CRIM. JUST. 381 (1990) (summarizing federal government initiatives, as well as the work of the Law Reform Commission of Canada, to produce proposals for sentencing reform focused on the reduction of imprisonment); Anthony N. Doob & Voula Marinou, *Reconceptualizing Punishment: Understanding the Limitations on the Use of Intermediate Sanctions*, 2 U. CHI. L. SCH. ROUNDTABLE 413, 417-21 (1993) (tracing the movement to support non-prison forms of punishment by reviewing the history of federal government initiatives to reform sentencing in Canada; and specifically noting statements by the Canadian Sentencing Commission chair, "a former Royal Canadian Mounted Police officer known for his far-right views on criminal justice matters, [which] stunned many observers by explicitly rejecting . . . the view that increased imprisonment would reduce levels of crime in Canadian society").

⁶⁹ Carol LaPrairie, *Aboriginal Crime and Justice: Explaining the Present, Exploring the Future*, 34 CAN. J. CRIMINOLOGY & CRIM. JUST. 281, 282 (1992).

⁷⁰ See, e.g., LAW COMM'N. OF CAN. & DENNIS COOLEY, FROM RESTORATIVE JUSTICE TO TRANSFORMATIVE JUSTICE DISCUSSION PAPER (1999) (stating that a restorative justice 'movement' began in the early 1970s based on work done with two young offenders arrested for vandalism in Kitchener, Ontario. Within the criminal justice system, restorative justice frequently consisted of victim-offender reconciliation and family group conferences. Family conferencing is an excellent example of why restorative justice and Aboriginal approaches to justice should not be conflated. Family group conferencing relies on the family's ability to evoke shame and show disapproval, which contradicts certain Aboriginal culture and justice practices); Kwochka, *supra* note 49, at 156 (arguing that recommendations to include Aboriginal involvement in the design and delivery of justice services "having more recognition of Aboriginal culture and law" are most promising "because they fit with a new and vibrant philosophy of criminal justice . . . [which] involves a fundamentally different approach to the criminal justice system that can be loosely characterized under the heading of 'restorative justice.'"); Quigley, *supra* note 52, at 144 ("Restorative justice is a throwback to the ways of dealing with wrongdoing in many indigenous societies."); Lilles, *supra* note 20.

⁷¹ Quigley, *supra* note 52, at 144.

appeal to “culturally appropriate” programs within already existing structures.⁷² Eventually, perceptions about Aboriginal approaches to crime converged with the idea of restorative justice.⁷³ For example, in a case decided by the Supreme Court of Canada in February 2000, Justice Iacobucci, on behalf of the Court, wrote: “most traditional [A]boriginal conceptions of sentencing hold restorative justice to be the primary objective,” and their “approaches place a primary emphasis on the goal of restorative justice.”⁷⁴

In 1996, Canadian lawmakers codified a broader movement away from deterrence and incapacitation in new sentencing provisions of the Canadian Criminal Code.⁷⁵ Thus, transplanted Aboriginal methods received legislative support and increased exposure. Based on the recommendations of a Federal Standing Committee on sentencing, the federal government enacted sweeping changes to the Criminal Code, including new provisions expressly articulating the purposes and principles of sentencing. Still in force, Section 718 outlines the purposes of sentencing for all offenders, including restorative and reparative justice goals.⁷⁶ In addition to denunciation, deterrence, and other traditional sentencing objectives, judges can also craft sanctions “to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.”⁷⁷ Section 718.2 introduces “other sentencing principles,” which requires judges to take into account the goals of predictability and ensures that the offender’s liberties are not deprived if less restrictive measures are appropriate.⁷⁸ More pointedly, Section 718.2(e)

⁷² MINISTRY OF SOLICITOR GENERAL, OTTAWA (ONTARIO), *supra* note 16; *see also* LAW REFORM COMMISSION OF CANADA, REPORT ON ABORIGINAL PEOPLES AND CRIMINAL JUSTICE EQUALITY, RESPECT, AND THE SEARCH FOR JUSTICE AS REQUESTED BY THE MINISTER OF JUSTICE UNDER SUBSECTION 12(2) OF THE LAW REFORM COMMISSION ACT (1991) (stating that with “very little adjustment,” restorative justice programs in place in Correctional Services would be able to “incorporate customary law, thus increasing their acceptability to the affected population”). *But see* Jennifer J. Llewellyn, *Dealing with the Legacy of Native Residential School Abuse in Canada: Litigation, ADR, and Restorative Justice*, 52 U. TORONTO L. J. 253 (2002) (presenting an opposing view).

⁷³ Llewellyn, *supra* note 72; *see*, Lilles, *supra* note 20 (explaining the process of ‘circle sentencing’ as an example of a restorative justice initiative).

⁷⁴ *R. v. Wells*, [2000] 1 S.C.R. 207, paras. 37–38 (Can.).

⁷⁵ Criminal Code, R.S.C. 1985, c C-46, s. 718(e)–(f). In addition to the principles of deterrence and denunciation, the criminal code states that “just sanctions” include the objectives of providing reparations, and promoting a sense of responsibility in offenders and acknowledging harm done to victims. The new sentencing provisions also introduced Alternative Measures (s. 717) and the Conditional Sentence of Imprisonment (s. 742) as options for sentencing offenders. *See discussion of conditional sentencing infra* note 80.

⁷⁶ Criminal Code, R.S.C. 1985, c C-46, s. 718 (a)–(f) (stating that the objectives of sanctions include: (a) denunciation, (b) deterrence, (c) removal, (d) rehabilitation, (e) reparations, and (f) promoting a sense of responsibility in offenders).

⁷⁷ *Id.* s. 718(f).

⁷⁸ *Id.* s. 718.2(b), (d).

mandates that judges consider all alternatives to imprisonment and give "particular attention to the circumstances of Aboriginal offenders."⁷⁹

Some judges were already conducting sentencing circles prior to these amendments pursuant to their discretion. However, these amendments to the Criminal Code gave judges legislative authority to transplant Aboriginal practices into the criminal trial.⁸⁰ Courts held that the sentencing principles delineated in Section 718.2(e) instruct judges to consider those sentencing *procedures* that may be appropriate because of the offender's Aboriginal heritage. For example, in a case decided shortly after the new sentencing provisions came into effect, Alberta Provincial Court Justice Marshall interpreted 718.2(e) as providing the legal authority to conduct a sentencing circle. Regarding the language "with particular attention to the circumstances of Aboriginal offenders," Justice Marshall wrote:

This suggests to me that additional tools that are unique to [A]boriginal people such as sentencing circles, traditional healing methods, respect for the advice of elders, etc., should be utilized where reasonably possible and that special recognition should be given to the native traditional way of life, and the effects that the removal from that community, and way of life, would have upon an [A]boriginal offender. Such an approach, it is hoped, would make the justice system more just, meaningful and acceptable to the aboriginal people.⁸¹

Considering the circumstances of Aboriginal offenders goes beyond merely inquiring into the offender's socio-economic circumstances. It also requires a different approach and a willingness to address crime by utilizing those additional tools, which include sentencing circles, that are available to Aboriginal offenders as members of that community.⁸²

⁷⁹ *Id.* s. 718.2 ("A court that imposes a sentence shall also take into consideration the following principles . . . (e) all available sanctions, other than imprisonment, that are reasonable in the circumstances . . . should be considered for all offenders, with particular attention to the circumstances . . . of Aboriginal offenders.").

⁸⁰ In addition to directing judges to consider express statements of the purposes and principles of sentencing, the amendments to the Criminal Code introduced the conditional sentence of imprisonment as a sentencing option. See Criminal Code, R.S.C. 1985, c C-46, s. 742.1 (explaining that if the offense is not subject to a mandatory minimum sentence and the final sentence is for a period of less than two years, the judge can order a term of imprisonment to be served in the community rather than in a correctional facility). Conditional sentences greatly impact the use of sentencing circles in criminal trial by providing a framework and a form of sentence for the types of recommendations that sentencing circles often craft. See *infra* Part III.B.

⁸¹ *R. v. R. (H.)* (1997), 205 A.R. 226, para. 53 (Can. Alta. P.C.).

⁸² The Supreme Court of Canada had the opportunity to consider Section 718.2 (e) in *Gladue*, 1 S.C.R., and then shortly thereafter in *Wells*, 1 S.C.R. In *Gladue*, the Court noted the emergence

During roughly the same period sentencing circles were being transplanted into the criminal trial, the Aboriginal Justice Initiative (1991–1996), and its successor, the Aboriginal Justice Strategy (1996–present), provided a bureaucratic structure for Aboriginal justice programs.⁸³ The federal government—in cooperation with Indian and Northern Affairs Canada, the Privy Council Office, the former Office of the Solicitor General (now Public Safety Canada), and the Royal Canadian Mounted Police—developed initiatives to foster programs that could “be the foundation of long term administration of justice improvements within the framework of the Canadian law for Aboriginal people.”⁸⁴ In partnership with provincial and territorial governments, the federal government funded “community-based justice programs” on a cost sharing basis, which included sentencing circles, training, and development related to justice programs.⁸⁵

of “innovative sentencing practices, such as healing and sentencing circles, and aboriginal community council projects, which are available especially to [A]boriginal offenders.” 1 S.C.R. ¶ 74. While it declined to discuss sentencing circles in detail, the Court did write that “[t]he background considerations regarding the distinct situation of [A]boriginal peoples in Canada” included “[t]he types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular aboriginal heritage or connection.” *Id.* ¶ 66.

⁸³ DEPT. OF JUSTICE CAN., ABORIGINAL JUSTICE STRATEGY EVALUATION FINAL REPORT (2011) [hereinafter ABORIGINAL JUSTICE STRATEGY EVALUATION 2011]; DON CLAIRMONT & JANE McMILLAN, DIRECTIONS IN MIKMAQ JUSTICE: AN EVALUATION OF THE MIKMAQ JUSTICE INSTITUTE AND ITS AFTERMATH 12–13 (2001) (describing the Aboriginal Justice Directorate’s (“AJD”) emphasis on restorative justice and community justice committees: “The major emphasis of the [Aboriginal Justice Learning] Network [an initiative of the AJD] has been on restorative justice, linking aboriginal traditions and preferences (e.g., circle sentencing) with new developments such as family group conferencing.”).

⁸⁴ ABORIGINAL JUSTICE STRATEGY EVALUATION 2000, *supra* note 52, at i.

⁸⁵ ABORIGINAL JUSTICE STRATEGY EVALUATION 2011, *supra* note 83, at 5. The government also funded program development for communities that did not have Aboriginal Justice Strategy funded programs. *Id.* Since 1996, the Aboriginal Justice Strategy has been renewed twice for five year mandates. *Id.* at 5. In 2006–07, the fund supported approximately 100 programs. *Id.* at 5. By 2011–12, it funded 214 community programs. *Id.* In fiscal year 2013–2014, the federal government spent \$11 million funding the Aboriginal Justice Strategy, with a total commitment to provide \$22.2 million over two years. *Aboriginal Justice Strategy*, CANADA’S ECON. ACTION PLAN, <http://actionplan.gc.ca/en/initiative/aboriginal-justice-strategy> (last visited Dec. 16, 2015). Aboriginal Justice Strategy funded “Community Justice Committees” that often arrange sentencing circles; they may specify procedures to be followed prior to, and at the sentencing circle, make decisions about who participates in the circle, and may also identify a local community leader to act as keeper of the circle. *See generally* ABORIGINAL JUSTICE STRATEGY EVALUATION 2000, *supra* note 52, app. A. For example, the Yukon Tribal Council Community Based Justice Initiative developed protocols and guidelines for sentencing circles, and the Elders Panel of the Waywayseecappe Aboriginal Justice Program sits with the provincial court and offers recommendations on sentencing. *Id.* at 81, 92. *See also* R. v. Johns (J.C.), [1995] B.C.W.L.D. 299, para. 9 (Can. Y.K.C.A.) (describing the application process to the Kwanlin Dun Community Justice Committee for a sentencing circle, and the process to set up a rehabilitation program before the sentencing circle is held); R. v. Craft, [2006] Y.K.T.C. 19, paras. 30–31 (Can.); R. v. Van Bibber, [2010] Y.K.T.C. 49, para. 31 (Can.) (noting the role of the Northern Tutchone Council, also funded by the Department of Justice through the Aboriginal Courtwork Program,

III. SENTENCING CIRCLE OUTCOMES

A. *Sentencing Circles in the Criminal Trial*

Following standard comparative law and legal transplant methodology,⁸⁶ this Part examines the effects of importing Aboriginal healing circles into the sentencing phase of the criminal trial. This section presents data compiled from a review of all adult criminal trials and appeals dealing with sentencing circles to see how the reforms operate in action and to what extent the system is receptive to the new legal transplant.⁸⁷

Before presenting this data, this Article introduces the issues and concerns via a difficult, but emblematic, case. The facts are as follows. Sometime between midnight and 5:00 AM, a father lost his two daughters in the field by his house.⁸⁸ He was attempting to cross the field to get to his brother-in-law's house to find help for his youngest daughter who he thought was hurt.⁸⁹ "Both girls died of hypothermia."⁹⁰ The father "pled guilty to criminal negligence" causing death.⁹¹ At trial, he asked for a sentencing circle to be held.⁹² The court granted the request, held the sentencing circle, and then delivered the sentence, which included a three-year prison term in a federal penitentiary.⁹³

The level of controversy and vitriol around the judge's decision to hold the sentencing circle was robust. One reporter likened a sentencing circle to "a group hug for both victims and offenders."⁹⁴ Another intimated that given the chance, the sentencing circle's recommendation to the defendant would be to "go stand outside in a snowbank until you're a Popsicle."⁹⁵ Against these

in conducting the sentencing circle); *see also*, STUART, *supra* note 19, at 33; Clairmont, *supra* note 16, at 131–146 (discussing the Indian Brook justice initiative in Nova Scotia in comparison to Aboriginal justice programs in Northern Ontario and Metropolitan Toronto).

⁸⁶ Lasser, *supra* note 33; Michele Graziadei, *The Functionalist Heritage*, in *COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS* 100 (Pierre Legrand & Roderick Munday eds., 2003); Langer, *supra* note 8.

⁸⁷ Berkowitz et al., *supra* note 6.

⁸⁸ *R. v. Pauchay* (2009), 328 Sask. R. 173, paras. 14–18 (Can. Sask. P.C.).

⁸⁹ *Id.* ¶ 18.

⁹⁰ *Id.* ¶ 17.

⁹¹ *Id.* ¶ 1.

⁹² *Id.*

⁹³ *R. v. Pauchay* (2009), 333 Sask. R. 167, paras. 1, 69 (Can. Sask. P.C.) [hereinafter *R. v. Pauchay (II)*].

⁹⁴ Kevin Libin, *Sentencing Circles for Aboriginals: Good Justice?*, NAT'L POST (Feb. 27, 2009, 8:01 PM), <http://www.nationalpost.com/news/story.html?id=1337495>.

⁹⁵ Colby Cosh, *Squaring the Circle on Justice*, NAT'L POST (Nov. 7, 2008), <http://www.nationalpost.com/opinion/story.html?id=4252cc77-d93f-4749-a757-fd54fe8fd229>.

protestations stands the amount of time and effort the community expended. Twenty-three people participated in an inner circle including: the victims' mother, two members of the community who sat as surrogates for the victims, the defendant's parents, senior elders from Sturgeon Lake First Nation and the Yellow Quill First Nation, interpreters, the judge, and other justice representatives.⁹⁶ Another fifty to sixty people observed.⁹⁷ The circle met for five hours. In advance of the sentencing circle, member of the reserve spent additional time in healing circles held by the defendant's family.⁹⁸ In addition, a mental health specialist conducted interviews to prepare an intervention strategy.⁹⁹

The participants made various recommendations. For example, the mental health specialist recommended intervention strategies, such as workshops to teach parenting and life skills, mentoring programs for youths, and a helpline for children.¹⁰⁰ A community elder recommended that defendant serve the elders, acting as a cultural helper and assisting with ceremonial duties, such as setting up rocks for sweat lodges and filling and lighting pipes before ceremonies.¹⁰¹ The defendant would be required to abstain from alcohol and drugs while in that role and would receive guidance from the elders.¹⁰² The role would be for life and serve as "a reminder that the Creator had not left him."¹⁰³

When he announced the decision, the judge thanked the participants, noting that the sentencing circle had given him "valuable insight" into the community's views of the problems it faces.¹⁰⁴ The judge, however, noted that he did not have the authority to order something that would amount to probation for more than three years.¹⁰⁵ His decision was that a proper balancing of the sentencing principles required incarceration for three

⁹⁶ *R. v. Pauchay (II)*, *supra* note 93, para. 47.

⁹⁷ Goldbach et al., *supra* note 8, at 56.

⁹⁸ *Id.*

⁹⁹ *Id.* at 59; *R. v. Pauchay (II)*, *supra* note 93, para. 48.

¹⁰⁰ Goldbach et al., *supra* note 8, at 59; *R. v. Pauchay (II)*, *supra* note 93, para. 48 (providing a statement by the court regarding the recommendations made by the mental health specialist: "Dr. Raj Hathiramani, the mental health therapist at Yellow Quill First Nation, provided a comprehensive community healing plan that contained twelve specific recommendations, some that were designed to address community issues well beyond the scope of the Sentencing Circle"). For a discussion on judicial recitation of sentencing circle recommendations see *infra* Part IV.

¹⁰¹ *R. v. Pauchay (II)*, *supra* note 93, para. 51.

¹⁰² Goldbach et al., *supra* note 8, at 57.

¹⁰³ *R. v. Pauchay (II)*, *supra* note 93, para. 51.

¹⁰⁴ *Id.* ¶ 53.

¹⁰⁵ *Id.* ¶ 69.

years.¹⁰⁶ He wrote that it would be up to Mr. Pauchay, following his incarceration, to decide whether he wanted the support of the Yellow Quill First Nation.¹⁰⁷

It seemed everyone did everything right; an alternative, culturally appropriate process was used and the judge engaged in the proper legal analysis. Yet, because so many people spent so much time to work on recommendations—only to have the judge say “thank you”—one can easily find themselves frustrated and perturbed when reading the case. Again juries are generally not involved in sentencing in Canada, but once we do involve the community and ask them to participate, is there any duty on the judge to adopt any part of the sentencing recommendations or to consider them in a particular way?

B. Requests for Sentencing Circles

Taking a macro view, what follows is a review of the treatment of sentencing circles in all cases where judges considered them during the course of an adult criminal trial under the Canadian Criminal Code.¹⁰⁸ A search for the phrase “sentencing circle” and “circle sentencing” generated 103 distinct hits.¹⁰⁹ These 103 hits included motions, final declarations or dispositions on sentencing, appellate level decisions of cases relating to sentencing circles, as well as cases that referred to the sentencing circle process, but where sentencing circles were not actually conducted in the trial.

The cases were initially divided according to whether they related to requests for sentencing circles, trials where sentencing circles were held, or cases where the parties appealed. Appeals could consist of reviews of decisions of whether to hold a sentencing circle, or reviews of the sentence

¹⁰⁶ *Id.*

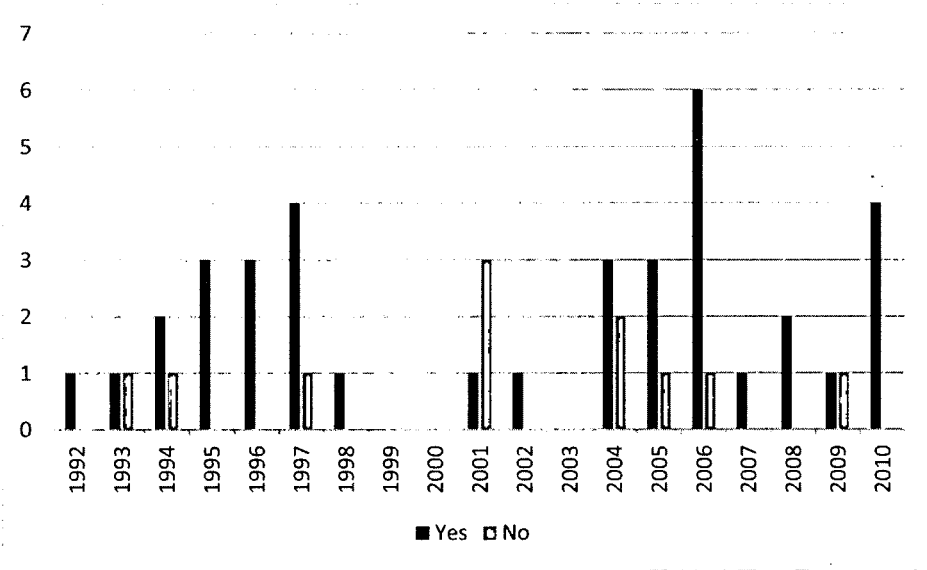
¹⁰⁷ *Id.*

¹⁰⁸ This will capture all published criminal trial decisions in Canada. Through online databases, such as LexisNexis, Quicklaw, and the Canadian Legal Information Institute (“CanLII”), Canadian courts publish all judgments on criminal code matters, including appellate decisions and decisions of lower and higher court judges who are provincially and federally appointed, respectively. What this does not include are cases that are diverted from the criminal justice system, and young offenders who may go through the sentencing circle process, but whose decisions remain unpublished. Therefore, there will be an amount of activity that is not covered by this review. However, in so far as the reforms were meant to provide Aboriginal communities with authority over the design and delivery of justice services, implementation and outcomes within the adult criminal trials provide highly relevant information.

¹⁰⁹ The initial search did not yield *R. v. Moses*, [1992] B.C.W.L.D. 1293 (Can. Y.K.T.C.). The judge in that case, Territorial Court Judge Stuart, only used the terms “circle process” or “circle discussions.” *Moses*, [1992] 71 C.C.C., paras. 81, 86, 100, 103, 110, 113, 169. The data presented in this Article includes *R. v. Moses* because it is widely acknowledged as the first case where this process was used. The data includes the first case and reflects the transition in judicial discourse towards referring to the process as “circle sentencing” or a “sentencing circle.”

itself when a sentencing circle was held. Of the cases that were reviewed, there were forty eight cases in which a request for a sentencing circle was made to a judge.¹¹⁰ Of the forty-eight cases in which a defendant made a request before a judge to hold a sentencing circle, judges allowed a circle to be held in thirty-seven cases.¹¹¹ The table below indicates the number of requests for sentencing circles per year.

Table 1: Did the judge allow a request for a sentencing circle? (1992-2010)



Viewed in the aggregate, the data seems to indicate that judges were favorable to allowing sentencing circles. However, the data looks different when focusing on reported decisions in which the judge actually considered the request as a motion on the merits. Of the sixteen cases where the request

¹¹⁰ These forty eight cases include decisions in which the judge documented the disposition on a formal application to the court in a distinct decision, as well as cases where a disposition was inferred from reported sentencing decisions or appellate level decisions. In some of the decisions, the court had already held a sentencing circle and the trial judge delivered the sentence. In those cases, either the Crown consented to the request for a sentencing circle or the judge held a hearing but did not write reasons regarding the request. See, e.g., *R. v. Kahypeasewat* (2006), 284 Sask. R. 55, paras. 62-66 (Can. Sask. P.C.) (court held a sentencing circle; judge only wrote reasons for the final decision on sentencing). The Crown consented to the holding of a sentencing circle in *R. v. Manyfingers (C.J.)* (1996), 191 A.R. 342 (Can. Alta. P.C.); *R. v. Paul (D.)* (1998), 203 N.B.R. 2d 243 (Can. N.B.P.C.); and *R. v. Brooks*, [2008] N.S.P.C. 58 (Can.). The data tabulating requests for sentencing circles is presented in Appendix A of this Article.

¹¹¹ For the full list of cases, see Appendix A.

was contested, or the judge considered it as a motion on the merits and wrote reasons for the decision, judges denied eleven of the requests for a sentencing circle.¹¹² In three cases, the judge held a hearing or discussed reasons for allowing a sentencing circle even though the Crown already consented.¹¹³

The table below shows no discernible trend in the number of requests allowed over the examined period, which suggest consistency in judicial attitudes towards conducting sentencing circles. Although, there was a considerable decline in requests for sentencing circles between 1998 and 2004, which may be the result of unfavorable decisions in early appeals of trials that implemented sentencing circles.¹¹⁴

In all jurisdictions, judges developed criteria to consider in determining whether a particular case was appropriate for a sentencing circle. In Saskatchewan, trial courts consider seven criteria, which were originally articulated by Provincial Judge Fafard in *R. v. Joseyounen*.¹¹⁵ British Columbia trial courts adopted these seven criteria,¹¹⁶ whereas the Newfoundland and Labrador Court of Appeal reviewed the criteria and adopted five of the seven factors for their courts.¹¹⁷ The relevant factors that judges consider when determining whether to allow a sentencing circle present similar themes, especially with regard to issues relating to the accused, the victim, and the community's participation. The table below amalgamates the criteria, which appear across all provinces, and identifies

¹¹² See Appendix A.

¹¹³ *R. v. Nicholas* (B.L.) (1996), 177 N.B.R. 2d 124 (Can. N.B.P.C.); *Paul (D.)*, 203 N.B.R. 2d 243; *Brooks*, [2008] N.S.P.C. 58, para. 2 (referring to principles set out in *R. v. J. (J.)* (2004), 244 Nfld. & P.E.I.R. 24 (Can. Nfld. & Lab. C.A.) on whether to allow a request for a sentencing circle, however, the Court indicates that the Crown's consent made it unnecessary to determine the issue of the request); see also *R. v. Stick (C.)* (2001), 202 Sask. R. 306, para. 10 (Can. Sask. Q.B.) (stating that, on appeal, the court determined that the trial court judge erred by reversing his prior decision to allow a sentencing circle without hearing submissions from the parties).

¹¹⁴ Luke McNamara, *Appellate Court Scrutiny of Circle Sentencing*, 27 MANITOBA L.J. 209, 225 (2000).

¹¹⁵ *R. v. Joseyounen*, [1995] 6 W.W.R. 438 (Can. Sask. P.C.). The Saskatchewan Court of Appeal approved Fafard's criteria in *R. v. Morin (I.)* (1995), 134 Sask. R. 120 (Can. Sask. C.A.), and then again in *R. v. Munson* (2001), 214 Sask. R. 26 (Can. Sask. Q.B.). The seven criteria are: (1) the accused must agree to be referred to the sentencing circle; (2) the accused must have deep roots in the community; (3) there are elders or respected non political community leaders willing to participate; (4) the victim is willing to participate and has been subjected to no coercion or pressure; (5) the victim has counseling made available and is accompanied by a support team if she has battered spouse syndrome; (6) disputed facts have been resolved in advance; and, (7) the Court is willing to depart from the usual range of sentencing.

¹¹⁶ *R. v. Pena (M. J.)* (1997), 148 D.L.R. 4th 372 (Can. B.C.S.C.).

¹¹⁷ *J. (J.)*, 244 Nfld. & P.E.I.R. 24; see also STUART, *supra* note 19.

which factors were considered when denying a request for a sentencing circle.¹¹⁸

Table 2: Which factors were considered in denying a request for a sentencing circle?

Factors to consider in allowing/denying request for sentencing circle	# of times referred to as reason for denying request	Province and Court, ¹¹⁹ Year of Decision
Accused does not appear to have accepted responsibility	2	BC SC, 1997 SK QB, 2001
Court is not willing to take a calculated risk	3	SK QB, 1993 SK PC, 2006 SK QB, 2009
Accused does not have deep roots in community	2	SK QB, 1993 BC SC, 1997
Community is not willing to participate	3	BC CA, 2001 SK QB, 2001 BC PC, 2004
Victim is not willing to participate	3	NF SC, 1994 SK CA, 2004 SK QB, 2009
Other ¹²⁰	3	BC SC, 1997 SK QB, 2001 SK QB, 2005

¹¹⁸ *Joseyounan*, [1995] 6 W.W.R. 438 (demonstrating Judge Fafard's criteria and factors were delineated by Judge Grotsky in *R. v. Cheeknew* (1993), 108 Sask. R. 114 (Can. Sask. Q.B.), but it does not include Fafard's factors regarding whether the facts were agreed upon and whether the accused agreed to be referred to a sentencing circle, as there were no cases that were denied for these reasons. A more appropriate or accurate way to deal with issues involving the accused is to query whether the accused sufficiently accepted responsibility for his or her actions before involving the victim and the community in a joint process).

¹¹⁹ Court of Appeal ("CA") and Superior Court ("SC") are higher-level courts with federally appointed judges, and Provincial Court ("PC"), is a lower level trial court with provincially appointed judges.

¹²⁰ Other reasons for denying a request for a sentencing circle included: concern that the discussion was going to be outside the normal scope of sentencing circles and about the charge rather than about the accused, see *R. v. Stick (C.)* (2001), 202 Sask. R. 306 (Can. Sask. Q.B.); concern that it was not appropriate to sever sentencing processes, see *Pena (M.J.)*, 148 D.L.R. 4th 372; and, concern that the victims were numerous and the community was divided in support or anger of the multiple accused, see *R. v. Gopher* (2005), 270 Sask. R. 175 (Can. Sask. Q.B.).

Judges across each province apply tests or criteria to determine whether a sentencing circle is appropriate in a particular case.¹²¹ The list of factors for the tests or criteria were developed and modified as individual judges referred to similar judicial action in other provinces.¹²² It should also be noted that in the Newfoundland and Labrador case referred to above,¹²³ the Court of Appeal went out of its way to identify that the trial judge's mistake was not the decision to allow a sentencing circle, rather, the judge failed to consider whether the relevant criteria was met.¹²⁴ The appellate court concluded that the trial judge erred:

not because he used a sentencing circle. (That may or may not have been an appropriate decision in the exercise of his discretion.) He did so, rather, because there were relevant factors that he should have considered, but that he did not (or, at least, there is no record of his ever having considered them).¹²⁵

C. Sentencing Circle Recommendations

Once the trial judge allows a sentencing circle, the court will adjourn for a period of time to allow for necessary preparations.¹²⁶ Participants who

¹²¹ Judges in Yukon, Ontario, and Alberta considered similar criteria to those laid out by judges from Saskatchewan, British Columbia, Newfoundland and Labrador. *See supra* notes 114–120; *see, e.g.*, *R. v. Manyfingers* (C.J.) (1996), 191 A.R. 342, paras. 125–27 (Can. Alta. P.C.) (reviewing the Saskatchewan and British Columbia tests and holding that “[n]o matter what procedure is followed, it must be based on high legal standards”); *R. v. L. (B.)* (2002), 266 W.A.C. 78, paras. 7, 39–53 (Can. Alta. C.A.) (finding that the trial judge erred by not dealing with disputed facts as to the extent of the defendant’s involvement in the crime prior to conducting the sentencing circle, and noting that (i) there were no members of the community present that were not related to the accused, and (ii) the victim’s wife, who was the victim of the crime, was not present because of her condition). Yukon courts have fewer published decisions at the request stage, but decisions on sentencing indicate that the court considered: the defendant’s voluntary participation; community support; participation of the victim; and the defendant’s acceptance of responsibility. *See R. v. Van Bibber*, [2010] Y.K.T.C. 49, para. 78 (Can.); *R. v. Craft*, [2006] Y.K.T.C. 19, para. 31 (Can.).

¹²² *See supra* notes 114–118.

¹²³ *See R. v. J. (J.)* (2004), 244 Nfld. & P.E.I.R. 24, para. 1 (Can. Nfld. & Lab. C.A.).

¹²⁴ Specifically, the court points to the following criteria “to be used in deciding whether or not a sentencing circle should be used: (1) Willingness and Suitability of the Convicted Person . . . (2) Willingness of the Victim (Freely Given) . . . (3) Willingness of the Community to Participate . . . [and] (4) Whether the Offence Required a Term of Imprisonment.” *Id.* ¶ 73. The court held that the judge failed to adequately consider three of those four criteria. *Id.*

¹²⁵ *Id.* ¶ 74.

¹²⁶ *See, e.g.*, *R. v. Morris*, [2004] B.C.W.L.D. 807, paras. 1, 25 (Can. B.C.C.A.) (reporting that the defendant pled guilty on July 22, 2003, and the sentencing circle was held on February 13, 2004); *R. v. Nicholas* (B.L.) (1996), 177 N.B.R. 2d 124, paras. 1–3 (Can. N.B.P.C.) (reporting that the defendant pled guilty on January 8, 1996, and the sentencing circle was held on March 25, 1996); *R. v. Pauchay* (2009), 328 Sask. R. 173 (Can. Sask. P.C.); *R. v. Pauchay* (2009), 333 Sask. R. 167

normally appear during the sentencing phase of the trial, including the defendant, defense counsel, the Crown, the police, social workers, and the judge, also participate in the sentencing circle.¹²⁷ Additionally, the victim and members of his or her family, as well as members of the defendant's family and other members of the community will also be present.¹²⁸ Talking about the crime and its impact is meant to be an educational experience, where the defendant learns about why and how his or her actions had a negative impact.¹²⁹ It is also an opportunity for participants to discuss larger socio-economic issues facing the community.¹³⁰ At the conclusion, the circle will present recommendations for sentencing to the judge.¹³¹ The court adjourns for final submissions, and then the judge delivers the sentence.

(Can. Sask. P.C.) (stating that the request for the sentencing circle was granted on January 7, 2009, the circle was held on February 13, 2009, and the Crown and defense counsel made final submissions on sentencing on March 4, 2009); *R. v. Kahypeasewat* (2006), 284 Sask R 55 (Can Sask. P.C.) ("The accused plead guilty to manslaughter on September 26, 2005. In May 2006, a sentencing circle was held."). Pre sentencing reports are also prepared in the interim. *But see R. v. Johns* (J.C.), [1995] B.C.W.L.D. 2996 (Can. Y.K.C.A.) (stating that preparations for the sentencing circle were done before the conviction phase and that "[b]y the time Mr. Johns attended court to plead guilty and to be sentenced, he had completed a 30 day residential alcohol treatment program in Cardston, Alberta and had been sober for eight months.").

¹²⁷ STUART, *supra* note 19, at 48–51 (discussing the role of court personnel before and during the sentencing circle); Lilles, *supra* note 20, at 81–82 (noting that at the beginning of the proceedings the charges are read, and Crown and defense counsel will make brief opening statements).

¹²⁸ See, e.g., *R. v. Craft*, [2006] Y K T C 19, para. 33 (Can.) (noting that the sentencing circle "was conducted on two separate days. Thirty people were present on the first day, February 6, 2006, including three of the victims in the car driven by Jodie MacMillan, her father and the parents of the third person, Ainslinn Cornett. A number of their close friends were also in the Circle supporting them. Twenty people were in the Circle on the second day, April 19, 2006, including the victims and/or their family members."); *R. v. Poker* (2006), 261 Nfld. & P.E.I.R., para. 54 (Can. Nfld. & Lab. T.D.) ("There were twenty participants in the circle which was under the direction of Mr. Apenam Pone as the Circle Keeper and a well-respected Innu man in his own right as counsellor for the Innu people of Sheshatshiu."); see also Lilles, *supra* note 20, at 81 (estimating that between fifteen and fifty people usually attend the sentencing circle); STUART, *supra* note 19, at 45 (discussing the importance of pre-circle preparation).

¹²⁹ Lilles, *supra* note 20, at 84; STUART, *supra* note 19, at 9, 86 ("All the circumstances of the offender, victim, and offence are examined to understand the underlying causes of the crime in order to appreciate what relationships must be healed and strengthened—and called upon in developing a healing plan.").

¹³⁰ See, e.g., *Craft*, [2006] Y.K.T.C. 19, para. 35 (stating that participants discussed "the frequency of drinking and driving in the Yukon and how people driving to and from work are at risk."); *R. v. Kahypeasewat*, 284 Sask. R., ¶ 62 (noting that the circle discussed "the dynamic of the offence"); Lilles, *supra* note 20, at 81 (stating that topics at a sentencing circle often include: "[t]he extent of similar crimes within the community; [t]he underlying cause of such crimes; [a] retrospective analysis of what life in the community had been before crime became so prevalent; [t]he impact of these sorts of crimes on victims generally, on families and community life . . .") (ellipses removed).

¹³¹ See, e.g., *R. v. J. (J.)* (2004), 244 Nfld. & P.E.I.R. 24, para. 2 (Can. Nfld. & Lab. C.A.) ("It was the recommendation of the Sentencing Circle that Mr. Poker be permitted to serve whatever is left of his sentence in the Community of Natuashish under the direction of the counsellors there . . . and with the help of the elders that they would offer whatever assistance they could to get Mr.

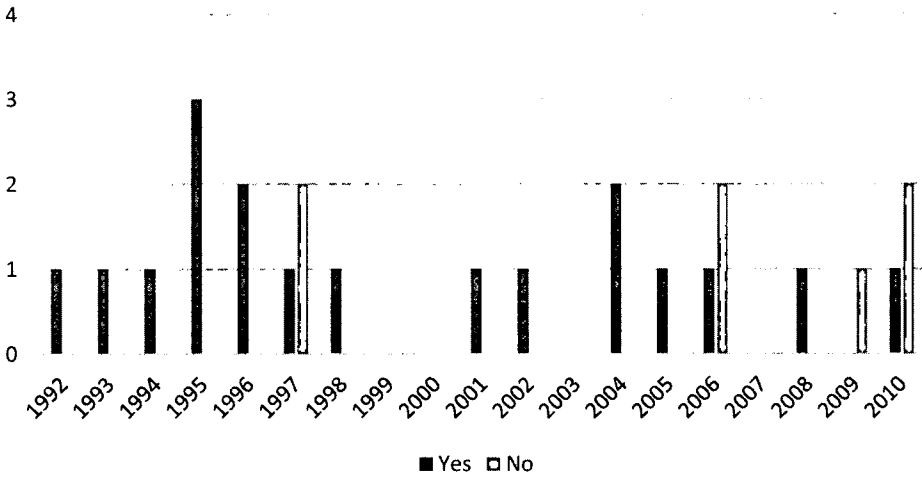
It is important to analyze how judges treat sentencing circle recommendations in the final sentencing decision. With respect to the cases discussed in this Article, judges accepted the recommendations of sentencing circles in eighteen of the thirty-seven reported cases.¹³² However, in seven of those cases, the Crown successfully reversed the sentence on appeal.¹³³ The table below shows the number of sentencing circle recommendations from 1992 to 2010. During this span, trial judges accepted recommendations in eighteen cases and explicitly rejected them in seven cases.

Poker back on track again.”); *R. v. Taylor* (1995), 132 Sask. R. 221, para. 1 (Can. Sask. Q.B.) (noting that the “consensus” of the community participants “was that Taylor should be banished to an island for the period of one year and if he completes this period of banishment then he should be put on probation for three years with conditions that he attend a program on sexual abuse, anger management and alcoholism and that he would not have contact with the victim for a period of three years from the commencement of the probation); *R. v. Paul* (D.) (1998), 203 N.B.R. 2d 243, para. 15 (Can. N.B.P.C.) (noting that the court delivered the sentence, after considering “all relevant principles and the concerns and recommendations of the circle,” which included banishment); *R. v. Elliot*, [2006] A.B.P.C. 372, para. 34 (Can. Alta. P.C.) (noting that the sentencing circle recommendations “were presented to the court to assist the court in sentencing.”). *But see* *R. v. Morris*, [2004] B.C.W.L.D. 807, paras. 25, 75–76 (Can. B.C.C.A) (noting that because of the victim’s concerns, “the circle proceeded more as a broad discussion of themes than for the specific purpose of formulating recommendations for sentencing . . .” But, the court later notes that the trial judge’s conditions for probation, namely “hosting a potlatch; organizing a Man’s Talking and Sharing Circle; and completing the community service hours . . . parallel the recommendations which emerged from the talking circle held on 13 February 2004”); *Kahypeasewat*, 284 Sask. R. 55, para. 62 (stating that participants at the sentencing circle “were given an opportunity to provide input into sentencing options”).

¹³² See *infra* Appendix B for cases where sentencing circles were held, by case, year, and court.

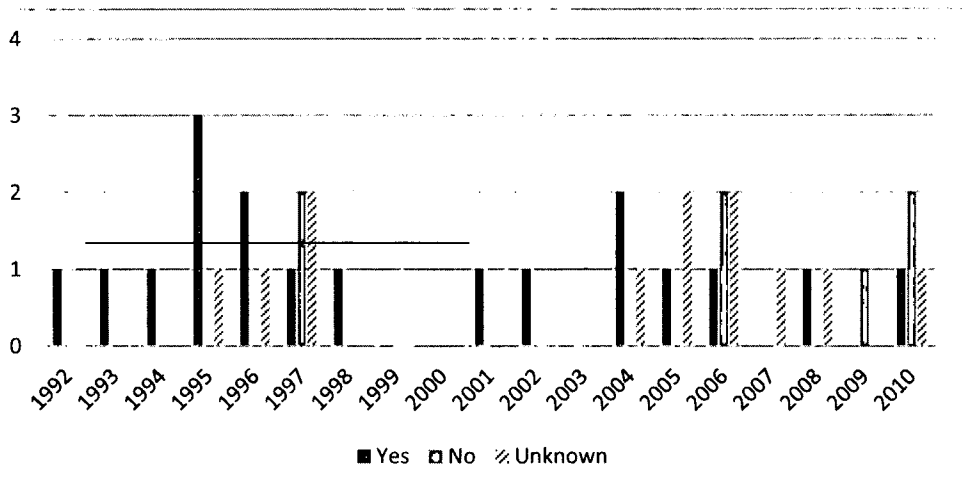
¹³³ In total, the Crown appealed over one third of the cases—seventeen out of forty-seven—in which sentencing circles were requested or held. Defense council appealed only one out of eighteen circle sentences. Moreover, the Crown succeeded in thirteen of its seventeen appeals.

Table 3: Did the Judge Accept the Sentencing Circle's Recommendations?



A troubling statistic remains that the status in twelve of the thirty-seven cases in which sentencing circles were held and recommendations given are unknown. In these twelve decisions, the trial judge neither specified the nature of the recommendations made by the sentencing circle participants, nor whether the recommendations were followed. In some cases, the judge did impose a conditional sentence, which may indicate that the judge accepted the circle's recommendations,¹³⁴ although such acceptance is impossible to confirm. The chart below revises the data in Table 3 to include decisions that do not discuss the specific recommendations made by sentencing circle participants.

Table 4: Did the Judge Accept the Sentencing Circle's Recommendations [Revised]?



Canadian criminal procedure does not require judges to disclose the details of pre-sentencing information in their sentencing decisions.¹³⁵ Consequently, in the twelve cases where the trial judge did not note the details of the recommendations, the judge may have treated sentencing circle recommendations in the same manner as other pre-sentencing information.¹³⁶ On the other hand, there were several instances where judges treated sentencing circle recommendations quite differently from pre-sentencing reports or information.¹³⁷ For example, in *R. v. Labelle (B.)*, the judge dealt with the sentencing circle recommendations as if they were part of a negotiated agreement that would become valid once endorsed by the court.¹³⁸

IV. DISCUSSION

A. Debates in Comparative Law

In Part III we saw that there was a transplant effect, especially at the final sentencing stage, where judges were unsure what to do with sentencing circle recommendations.¹³⁹ Why does this matter? How is this case different from any other legal problem where there is a transplant effect? This Article proposes that there is a difference when the transplant is undertaken not only because it represents best practices, but also because those best practices represent cultural and humanistic goals. Furthermore, this Article argues that there are increased risks when normative and cultural expressions are instrumentalized. This occurs when the *expressive* genre of law, which attempts to reflect the world, is used as an *instrument*,¹⁴⁰ and, when this happens, its implementation, outcomes, and transplant effects must be examined.

To examine the instrumental value of sentencing circles within the Aboriginal culture it is important to evaluate scholarship in comparative law. Wigmore, a legal scholar in the area, defines comparative law as “the tracing

¹³⁵ Canada Criminal Code, R.S.C. 1985, c C-46 ss 721–726.2 (Can.).

¹³⁶ In fact, in some decisions, the judge expressly likened the circle's recommendations to information or reports, which are submitted to the court at, or prior, to sentencing. See, e.g., *R. v. Naappaluk* (1993), 25 C.R. 4th 220 (Can. C.Q.); *R. v. Brooks* (2008), 331 N.B.R. 2d 268, paras. 9–11 (N.B.C.A.); *R. v. Craft*, [2006] Y.K.T.C. 19, para. 13 (Can.) (noting in an opinion written by Judge Heino Lilles regarding the sentencing circle as comparable to a victim impact statement).

¹³⁷ In the same case where he compared the sentencing circle process to a victim impact statement, Judge Lilles' remarks seemed to imply that the sentencing circle was actually deliberating on an appropriate sentence. See *Craft*, [2006] Y.K.T.C. 19, para. 61. That decision reads more like a judicial review than a distinct sentencing process.

¹³⁸ *R. v. L. (B.)* (2002), 266 W.A.C. 78, (Can. Alta. C.A.).

¹³⁹ Berkowitz et al., *supra* note 6, at 175–76.

¹⁴⁰ *Taking on the Technicalities*, *supra* note 12, at 1027–28.

of an identical or similar idea or institution through all or many [legal] systems, with a view to discovering its differences and likenesses in various systems, the reasons for those variations, and the nature and limits of the inherent and invariable idea”¹⁴¹ However, Wigmore does not ask to what objective are comparisons made—to acquire a body of knowledge or map legal traditions?¹⁴² What exactly do we compare when we engage in an exercise of comparative law?¹⁴³

Comparative law scholars compare legal systems that face the same, universal problems.¹⁴⁴ Konrad Zweigert and Hein Kötz wrote that the purpose of comparative investigations is always functional and instrumental,¹⁴⁵ while particular legal institutions and different laws are meant to solve social problems that are similar among these institution.¹⁴⁶ Thus, comparative law allows scholars to discover the best practices, of both legal rules and institutions, which one legal system can transplant to another.¹⁴⁷ Comparative law scholars also consider functionality when deciding which laws to compare because, “incomparables” cannot productively be contrasted while “those which fulfill the same function” can be.¹⁴⁸

According to these “social purpose functionalists,”¹⁴⁹ functionally equivalent legal institutions are transported between legal systems for their improvement. The view that imported legal institutions address social, economic, or political goals is solidly entrenched in a broader history of thinking that views law as a tool and society as a site that needs fixing.¹⁵⁰

¹⁴¹ John H. Wigmore, *Comparative Law: Jottings on Comparative Legal Ideas and Institutions*, 6 TUL. L. REV. 48, 51 (1932).

¹⁴² Mathias Reimann, *The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century*, 50 AM. J. COMP. L. 671, 673–77 (2002).

¹⁴³ *Id.* at 686.

¹⁴⁴ Ralf Michaels, *The Functional Method of Comparative Law*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW 339, 356–58 (Mathias Reimann & Reinhard Zimmermann eds., 2006) (referring to the idea that “similar functional needs can be fulfilled by different institutions,” and noting that “the recognition of functional equivalents gave a boost to the possibilities for comparative law,” which the author refers to as “Equivalence Functionalism”).

¹⁴⁵ ZWEIGERT & KÖETZ, *supra* note 9, at 34.

¹⁴⁶ Nils Jansen, *Comparative Law and Comparative Knowledge*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW 305, 323–338 (Mathias Reimann & Reinhard Zimmermann eds., 2006).

¹⁴⁷ Hill, *supra* note 5, at 109.

¹⁴⁸ ZWEIGERT & KÖETZ, *supra* note 9.

¹⁴⁹ Fernanda G. Nicola, *Family Law Exceptionalism in Comparative Law*, 58 AM. J. COMP. L. 777, 794 (2010).

¹⁵⁰ RUDOLF VON IHERING, *LAW AS A MEANS TO AN END* (Isaac Husic trans., 1914); BRIAN Z. TAMANAHA, *A GENERAL JURISPRUDENCE OF LAW AND SOCIETY* (2001); SUMMERS, *supra* note 12. Legal scholars in the late 19th and early 20th Centuries who criticized the formalist approach to

“Legal instrumentalism”—the idea of law as a tool or a means to an end—is currently at the center of American legal thinking.¹⁵¹ In many ways, law’s instrumentality is also what makes it interesting as an object of study.¹⁵² Those who derogate from the law as a tool axiom appear to challenge a whole ontology of law.¹⁵³

The “culturalists” could be said to constitute a second group of comparativists.¹⁵⁴ These scholars hold to the Savigny/Montesqui idea of *l’Esprit de loi*¹⁵⁵—that positive law is the spirit of the people.¹⁵⁶ In this group, scholars are less sanguine about the possibilities of transplanting whole legal rules or institutions. These scholars believe that law is part of a cognition or culture¹⁵⁷ that societies accept¹⁵⁸ or translate.¹⁵⁹ Thus, societies cannot transport best practices.¹⁶⁰ Scholarship among this group ranges in a

judicial decision making argued in favor of a pragmatic and sociological judicial process; law is a technology that lawmakers as sociological engineers—employ to achieve their goals. See Malcolm M. Feeley, *Three Voices of Socio-Legal Studies*, 35 *ISR. L. REV.* 175 (2001). Scholars may disagree about which goals to pursue or which ways to pursue them, but they can generally agree that law is a means to an end. See generally BRIAN Z. TAMANAHA, *THE PERILS OF PERVASIVE LEGAL INSTRUMENTALISM* (2006).

¹⁵¹ TAMANAHA, *supra* note 150; SUMMERS, *supra* note 12, at 179.

¹⁵³ *Law as Object*, *supra* note 13, *The Materiality of What?*, *supra* note 31.

¹⁵³ It may be for this reason that there is not as much a conversation about legal instrumentalism as there are rumblings of dissatisfaction and disorientation in the form of isolated self reflections about the failure of particular projects. See Kevin E. Davis & Michael J. Trebilcock, *The Relationship Between Law and Development: Optimists Versus Skeptics*, 56 *AM. J. COMP. L.* 895 (2008); David M. Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 4 *WIG. L. REV.* 1062 (1974); Merryman, *supra* note 1; Robert Dingwall, *A Stranger at the Table: Reflections on Law, Society, and the Higgs Boson*, 36 *LAW & SOC’Y REV.* 29 (2002). For complaints about discrepancies between law on the books and law in action, see Feeley, *supra* note 150.

¹⁵⁴ *Taking on the Technicalities*, *supra* note 12, at 106; Roger Cotterrell, *Comparative Law and Legal Culture*, in *THE OXFORD HANDBOOK OF COMPARATIVE LAW* 709, 710–11 (Mathias Reimann & Reinhard Zimmermann eds., 2006).

¹⁵⁵ Duncan Kennedy, *Savigny’s Family/Patrimony Distinction and its Place in the Global Genealogy of Classical Legal Thought*, 58 *AM. J. COMP. L.* 811, 811 (2010); Nicola, *supra* note 149.

¹⁵⁶ Wigmore, *supra* note 141, at 51 (“. . . a legal institution can be fully comprehended only in the light of the social, economic, religious, political, racial, and climatic circumstances which surround it.”).

¹⁵⁷ Louis F. del Duca & Alain A. Levasseur, *Impact of Legal Culture and Legal Transplants on the Evolution of the U.S. Legal System*, 58 *AM. J. COMP. L.* 1 (2010).

¹⁵⁸ Langer, *supra* note 8; see also Cianmaria Ajani, *By Chance and Precept: Legal Transplants in Russia and Eastern Europe*, 43 *AM. J. COMP. L.* 93 (1995).

¹⁵⁹ Berkowitz et al., *supra* note 6; see also JAMES A. GARDNER, *LEGAL IMPERIALISM: AMERICAN LAWYERS AND FOREIGN AID IN LATIN AMERICA* 8–9 (1980) (discussing the unsuccessful attempts to transplant and develop U.S. legal frameworks in developing countries due to a lack of understanding “local language, law, polity, economy, or culture”).

¹⁶⁰ Pistor, *supra* note 5.

spectrum from *weak* cultural theorists, who believe that legal institutions transfer between legal families,¹⁶¹ to *strong* theorists, like Legrand who argue that because national or local culture determines the nature and specifics of legal institutions, it never make senses to talk about legal transplants.¹⁶² In comparative law and scholarship on legal transplants, this could be referred to as the “does culture matter”¹⁶³ debate.

B. Objectification of Legal Knowledge

The commissions and task forces that investigated Aboriginal confrontation within the criminal justice system were clearly situated on the *culture* side of this debate. Aboriginal justice advocates saw conceptions of justice as “integrally related to that society’s world views and life philosophies.”¹⁶⁴ Reports noted vast differences between Euro-Canadian and Aboriginal approaches to righting legal wrongs—Aboriginal approaches sought restoration and healing, whereas Euro-Canadian criminal justice sought deterrence and punishment.¹⁶⁵ This conflict between two sets of justice values produced feelings of alienation and contributed to over-incarceration of Aboriginal offenders.¹⁶⁶ Culture mattered.

On the other hand, the exercise in comparative law—comparing Euro-Canadian and Aboriginal approaches to justice—was instrumental. Researchers sought to show how traditional Aboriginal healing circles and the sentencing phase of the criminal trial were functionally similar, addressing the same social problem: crime in the community. Comparing Euro-Canadian and Aboriginal approaches had a purpose. It was an effort to look at “foreign” law to assist with a criminal law “domestic” reform project.¹⁶⁷ Aboriginals’ feelings of alienation and negative experiences originated in the incompatibility between two justice systems and worldviews,¹⁶⁸ but ultimately the source of the problem—that law and culture

¹⁶¹ See generally THE COMMON CORE OF EUROPEAN PRIVATE LAW, *supra* note 6.

¹⁶² See Legrand, *supra* note 34, at 122; see also Pierre Legrand, *European Legal Systems Are Not Converging*, 45 INT’L & COMP. L. Q. 52, 81 (1996).

¹⁶³ See generally Amartya Sen, *How Does Culture Matter?*, in CULTURE AND PUBLIC ACTION 37–58 (Vijayendra Rao & Michael Walton eds., 2004).

¹⁶⁴ HAMILTON & SINCLAIR, *supra* note 52, at 59. Individual scholars were coming to similar conclusions. See, e.g., ROSS, *supra* note 44; FRIDERES & GADACZ, *supra* note 44; DIVERSITY AND JUSTICE IN CANADA (Douglas E. King & John Winterdyk eds., 1999); ROSS GORDON GREEN, JUSTICE IN ABORIGINAL COMMUNITIES: SENTENCING ALTERNATIVES (1998).

¹⁶⁵ See DUMONT, *supra* note 50; Mandamin, *supra* note 58; see also ROYAL COMMISSION ON ABORIGINAL PEOPLES, 1 REPORT OF THE ROYAL COMMISSION ON ABORIGINAL PEOPLES: LOOKING FORWARD LOOKING BACK 218 (1996); ROSS, *supra* note 44; FRIDERES & GADACZ, *supra* note 44.

¹⁶⁶ See DUMONT, *supra* note 50, at 30–32; Giokas, *supra* note 16, at 187.

¹⁶⁷ See Dubber, *supra* note 28, at 435–36.

¹⁶⁸ See Goldbach et al., *supra* note 8, at 19.

were intertwined—could also provide the solution. Those conceptions of justice, integrally interwoven with worldviews, could be used as a tool to address over-incarceration and the negative experience of Aboriginal offenders. Aboriginal justice so clearly provided a solution, that in 1996 Robert Depew wrote, “[p]erhaps more than any other expanding alternatives-to-the-State movement in Canada, ‘popular justice’ for [A]boriginal communities has been embraced by its advocates as a solution to a range of unique justice problems faced by [A]boriginal communities.”¹⁶⁹

Ralf Michaels argues that scholars often over-estimate the possibility that legal systems will converge by ignoring entrenched legal paradigms, for example, in determining jurisdiction for private law matters.¹⁷⁰ A similar problem exists here, as law reformers sought to harmonize alternative dispute resolution methods with Aboriginal justice approaches. Those scholars and practitioners, who advocated adapting Aboriginal methods for dealing with harm to the community, were optimistic¹⁷¹ about the possibilities of transplantation when the “origin” and “host” legal systems had contrasting and entrenched legal paradigms.¹⁷²

This case study, however, represents more than merely an example of harmonizing systems with entrenched legal paradigms or transplanting legal institutions into unreceptive legal systems.¹⁷³ In addition, these transplanted sentencing circles are an example of instrumentalizing the expressive. Scholars, practitioners, and reformers articulated the legal expression of Aboriginal culture. They conveyed the meaning of Aboriginal justice as a way to identify that group and its particular concerns,¹⁷⁴ and then turned that meaning back on itself in order to serve a useful function.

Sentencing circles represent both kinds of objectification of legal knowledge: they are a reflection of Aboriginal culture, and they are a “thing in the world”¹⁷⁵—a process that takes place at the sentencing phase of the criminal trial. Here, though, the two genres of legal acts¹⁷⁶—the expressive and instrumental genres—are integrated and conflated. The fact that sentencing circles could serve as an identifier of Aboriginal culture and stand

¹⁶⁹ Robert C. Depew, *Popular Justice and Aboriginal Communities: Some Preliminary Considerations*, 36 J. LEGAL PLURALISM & UNOFFICIAL L. 21, 22 (1996).

¹⁷⁰ Ralf Michaels, *Two Paradigms of Jurisdiction*, 27 MICH. J. INT’L L. 1003, 1047–48 (2006).

¹⁷¹ See Merryman, *supra* note 1; Davis & Trebilcock, *supra* note 154.

¹⁷² Goldbach et al., *supra* note 8.

¹⁷³ See Berkowitz et al., *supra* note 6.

¹⁷⁴ *Law as Object*, *supra* note 13, at 192.

¹⁷⁵ *Id.* at 190.

¹⁷⁶ See generally *id.*

in for traditional healing circles in the Euro-Canadian trial was instrumental to the reformers' goals.

Of course, overlap and intermingling of the instrumental and the expressive in lawmaking is not unique to this Canadian case study. This arises when law and development literature points to rule of law or democratic freedom as the key to progress,¹⁷⁷ when state department programs link gender equality indicators with national security,¹⁷⁸ or when scholars point to constitutionalism as an organizing concept or archetype in legal thought.¹⁷⁹ Canada's reform of criminal sentencing procedures, however, stands as a particularly poignant example of this movement toward cultural and normative goals. It also brings to light the hazards associated with material "things in the world" and the difficulties in mixing the material with the symbolic.¹⁸⁰ Reformers had some expectations about the transcendent aspects of sentencing circles, but sentencing circles are also concretely present. Sentencing circles are procedures in which real people—defendants, victims, and community members—participate.

C. Introducing Legal Techniques

¹⁷⁷ See, e.g., Santos, *supra* note 36; Amartya Sen, *Elements of a Theory of Human Rights*, 32 PHIL. & PUB. AFF. 315, 315–18 (2004); Kerry Rittich, *The Future of Law and Development: Second Generation Reforms and the Incorporation of the Social*, 26 MICH. J. INT'L L. 199, 202–03 (2004) ("at least at the rhetorical level, social issues have now been accepted both as ends of development in and of themselves and as important factors to the achievement of general economic growth. As a result, issues ranging from human rights to gender equality no longer stand outside the development agenda, nor is their importance to economic development still seriously debated."); Daniel M. Brinks et al., *Social Rights Constitutionalism: Negotiating the Tension Between the Universal and the Particular*, 11 ANN. REV. L. & SOC. SCI. 289, 290–91 (2015) (examining "the increasing inclusion of social and economic rights language in constitutions" and noting "the remarkable diffusion of social rights into constitutions around the world over the past fifty or sixty years"). See also discussion *supra* note 15 (examining the overlap in instrumental and normative goals).

¹⁷⁸ See, e.g., Annelise Riles, *Smart Power: Feminism and Instrumentalism in US Foreign Policy* (2013) (unpublished paper presented at the Public International Law Workshop, London School of Economics) (on file with the author).

¹⁷⁹ See, e.g., David Kennedy, *The Mystery of Global Governance*, in *RULING THE WORLD?: CONSTITUTIONALISM, INTERNATIONAL LAW, AND GLOBAL GOVERNANCE* 37, 37–38 (Jeffrey L. Dunoff & Joel P. Trachtman eds., 2009) ("In the past few years, many have experimented with the metaphor of a constitution to describe the legal order beyond the nation-state Others have seen a constitutional moment in the emergence of human rights as a global vernacular for the legitimacy of power Comparative constitutional law is front and center in their accounts of how we are governed at the global level."). Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850–2000*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL* 19–73 (David M. Trubek & Alvaro Santos eds., 2006); Rodríguez Caravito, *supra* note 36.

¹⁸⁰ See generally WEBB KEANE, *SIGNS OF RECOGNITION: POWERS AND HAZARDS OF REPRESENTATION IN AN INDONESIAN SOCIETY* 23–28 (1997) (by means of an ethnography of ritual speech in Anakalang, discussing the "social force of signs" and their potential for failure because symbols are at once both representations and material things).

When reviewing the judicial decisions it became evident that—unlike the instances of judges responding to sentencing circle requests with a list of factors to consider—judges did not develop common law directive tools to assist in processing sentencing circle recommendations. When a sentencing circle was requested, judges limited their discretion by creating tests and identifying criteria that had to be considered. By comparison, at the final stage of crafting the sentence, judges treated the sentencing circle recommendations inconsistently and without disciplined legal techniques.

Several judges did not give an account of the sentencing circle recommendations for the record.¹⁸¹ Sometimes judges compared the recommendations to pre sentence reports or victim impact statements, and at other times judges seemed to approach the recommendations as if they were a negotiated settlement. There were no tests, factors, or technical practices that judges implemented to decide whether or not to include sentencing circle recommendations into the final sentence. At this second stage—after the sentencing circle has been conducted—judges were left without legal techniques and technologies to assist in processing the information, in weighing and balancing considerations, or in dealing with legal conflicts.

At first glance, this absence of legal devices may not seem problematic. One could argue that conducting a sentencing circle allows the judge to get more information about the accused and the community's ability to help monitor conditions. Nevertheless, the final sentencing rests with the judge. While section 35(1) of the Constitution Act of 1982 recognizes Aboriginal rights and practices,¹⁸² these are not unlimited rights and must be compatible with Canadian sovereign authority.¹⁸³ In other words, Canadian sovereign authority has a monopoly on sentencing and incarceration, such that the potential right to a pre-existing practice to conduct healing circles is not unfettered.

This technical legal argument is not overly persuasive in light of a technical counterargument. If the sentencing circle is merely an information gathering exercise, there is no reason to require a test to decide whether a sentencing circle can be held. If there are criteria to determine whether to allow the request for a sentencing circle, the sentencing circle is *ab initio*—distinct from other pre sentencing practices without tests.

¹⁸¹ See discussion *supra* note 81.

¹⁸² The Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.).

¹⁸³ See *Mitchell v. Minister of Nat'l Revenue*, [2001] 1 S.C.R. 911 (Can.) (explaining that the Supreme Court of Canada has indicated that even if an Aboriginal community had a tradition of military force as part of its distinctive culture, there is no concurrent right to deploy an army and that only the Canadian sovereign authority may maintain a military and use force within its own territory).

Sentencing circle recommendations may appear functionally similar to pre-sentencing reports or victim impact statements. However, focusing on the instrumental *form*—“the particular devices, practices, or orientations”—¹⁸⁴ makes the differences apparent. The practices required to compose pre-sentencing reports, victim impact statements, and sentencing circle recommendations differ.¹⁸⁵ A pre-sentence report is put together by a probation officer in the course of his or her employment, usually in the form of a document with questions.¹⁸⁶ On the other hand, sentencing circle recommendations come about through unscripted, guided discussion by varied numbers of volunteers participating and observing. The process can be lengthy and intrusive to the lives of the victims, the accused, and the community.

The level and extent of community participation in sentencing circles brings to mind jury or lay judge involvement in the legal system.¹⁸⁷ Scholars have noted the similarities between jury participation and democracy.¹⁸⁸ The link between political and judicial participation also figures prominently into

¹⁸⁴ *Law as Object*, *supra* note 13, at 201; *see also* Pottage, *supra* note 31 (exploring Roman Law as a way to examine law as a specific set of tools and technical devices for making relations); *see also* COLLATERAL KNOWLEDGE, *supra* note 43, at 232 (arguing that legal theorists, social scientists, and policy makers need to pay more attention to legal form and legal technique in addition to the content of law and legal regulation).

¹⁸⁵ *See generally* BRUNO LATOUR & STEVE WOOLGAR, *LABORATORY LIFE: THE CONSTRUCTION OF SCIENTIFIC FACTS* 45–69 (1986) (describing the practices of laboratory scientists which “inscribe” material substances into diagrammatic form, focusing on the particular and varied activities which produce journal articles).

¹⁸⁶ Kelly Hannah-Moffat & Paula Maurutto, *Re-Contextualizing Pre-Sentence Reports: Risk and Race*, 12 PUNISHMENT & SOC’Y 262, 263, 267 (2010) (noting the number of jurisdictions in Canada and the United States that are using “standardized actuarial risk assessment instruments,” reports that focus on “objective’ criteria (i.e. type of offence, prior criminal history, age and gender and sentence length) and factors that are empirically shown to be statistically correlated with recidivism,” which can be quickly scored).

¹⁸⁷ *See, e.g.*, Goldbach & Hans, *supra* note 26 (explaining that the provisions that make sentencing circles permissible for Aboriginal offenders address the circumstances of that population, and include the history of indigenous confrontation with colonization and its current effects and manifestations. It is therefore difficult to conceive of a situation where a non-aboriginal community would conduct a sentencing circle); *see* R. v. Gladue, [1999] 1 S.C.R. 688, para. 58 (Can.); R. v. Paker (2006), 261 Nfld. & P.E.I.R. 1 (Can. Nfld. & Lab. T.D.) (showing that despite not taking sentencing circles out of the conversation about lay participation in criminal law, historically and presently, many jurisdictions have and do restrict the selection of juries or lay judges on the basis of socio-economic, occupational, educational or other demographic factors); *see* S. Kutnjak Ivkovi, *Exploring Lay Participation in Legal Decision-Making: Lessons from Mixed Tribunals*, 40 CORNELL INT’L L. J. 429 (2007) (examining lay judges and the mixed tribunal system in Croatia); UNDERSTANDING WORLD JURY SYSTEMS THROUGH SOCIAL PSYCHOLOGICAL RESEARCH (Martin F. Kaplan & Ana M. Martín eds., 2006) (exploring lay participation and mixed tribunals in Italy, Poland, Germany, and Japan).

¹⁸⁸ JOHN GASTIL ET AL., *THE JURY AND DEMOCRACY: HOW JURY DELIBERATION PROMOTES CIVIC ENGAGEMENT AND POLITICAL PARTICIPATION* (2010); Valerie Hans, *Introduction: Citizens as Legal Decision Makers: An International Perspective*, 40 CORNELL INT’L L.J. 303 (2007).

the Canadian reforms.¹⁸⁹ While the government eventually disaggregated the political goals from the goal to increase Aboriginal participation in justice design and delivery, the notion of “citizen-in-justice” has always been integrated into the Aboriginal Justice Strategy mandate.¹⁹⁰ The Aboriginal Justice Initiative and its successor, the Aboriginal Justice Strategy, could not be legitimate if Aboriginal communities did not have the right to administer justice. At the very least, the federal government has indicated its intention to delegate authority to federally-funded Community Justice Committees in a way that should make outright dismissal of sentencing circle recommendations inappropriate.¹⁹¹

Moreover, the 1996 amendments to the sentencing provisions in the Criminal Code were clearly meant to address a lack of expertise that sentencing scholars had previously identified. Judges were generalists without consistent application of the purposes of sentencing or principles governing legal sanctions.¹⁹² In sentencing circles, in particular, cultural and personal expertise shifts to the community. Unlike juries and lay judges, “lay” participants in sentencing circles occupy the role of experts through their knowledge of culturally appropriate procedures and often through a familiarity with the accused.¹⁹³ As already noted, in many communities this expertise is constituted, institutionalized, and bureaucratized through government-funded Aboriginal Justice Committees.

V. CONCLUSION

Three developments reformed sentencing for Aboriginal offenders in the criminal trial, including the ad hoc way in which judges began conducting sentencing circles, the 1996 Criminal Code amendments that directed judges to consider the circumstances of Aboriginal offenders, and the establishment of the Aboriginal Justice Strategy. The examination of reported decisions reveals that transplanting Aboriginal sentencing circles into the criminal trial was neither an outright success nor failure. A “transplant effect”¹⁹⁴ occurred with judges seemingly unsure of how to integrate sentencing circle recommendations or what was being asked of them during the final

¹⁸⁹ LaPrairie, *supra* note 69; see also BRIDGING THE CULTURAL DIVIDE, *supra* note 16. Initially, the rationale for funding the Aboriginal Justice Initiative was to support participation in justice administration in order to prepare communities for treaty negotiations and some measure of political administration. *Id.*

¹⁹⁰ ABORIGINAL JUSTICE STRATEGY EVALUATION 2011, *supra* note 83.

¹⁹¹ See discussion *supra* note 81.

¹⁹² CANADIAN SENTENCING COMMISSION, *supra* note 68.

¹⁹³ This also parallels historical accounts of juries in England who would testify to their personal knowledge of local disputes.

¹⁹⁴ Berkowitz et al., *supra* note 6, at 167.

sentencing stage. The data reveals a stark contrast between legal criteria developed at the request stage and the absence of technical legal knowledge practices at the recommendation and sentencing stage.

The history of sentencing reform in Part II describes how law reform projects constituted cultured procedures, which then became instruments reformers could use. In comparing justice principles, Aboriginal justice advocates identified an expression of Aboriginal culture as the solution to both humanistic experiential and sociological goals. I call this an *instrumentalizing of the expressive*, where an attempt to generate meaning was not only the end-goal, but also the tool—the “thing in the world”—to accomplish other goals that law reformers defined.¹⁹⁵ By way of conclusion, this Article suggests that, when transforming the expressive into a tool, a technical approach might be just the thing to reveal knowledge and enable normative goals.

Rather than excoriate the judges who were involved in these decisions, I want to appeal to the technical knowledge practices that legal intermediaries already use to mediate risk.¹⁹⁶ Unfortunately, in American legal thinking, the technical aspects of legal knowledge practices are conflated with legal formalism as to *how* law does its work, and as to the opposite of *what* law does. Those legal thinkers who reacted against formalism did so in part because of formalism’s capacity to obscure what was felt to be politically based decisions;¹⁹⁷ for example, decisions favoring corporations over labor. On the other hand, with respect to sentencing circles, it is legal formality that established sentencing circles as a legal procedure. Through the application of tests and precedent, sentencing circles have become accessible within the criminal trial. It is where form is absent, at the stage of processing the sentencing circle’s recommendations, that knowledge and politics are obscured.

In the case of sentencing circles, formalities may reveal reason. Instead of obscuring preferences, legal technicalities at the recommendation stage may force judges to be explicit about their preferences, such as between justice theories or between expert versus “lay” decision-making in sentencing offenders. Applying technical legal knowledge practices at this stage may also be the kind of formality that facilitates, rather than hinders, desired constitutive and corrective justice goals. In the very least, some kind of technical legal practice by judges at the recommendation stage would reinforce Aboriginal authority to administer justice, and confer respect on the community’s voice. The technical part of law, including reports, legislation, and logical legal reasoning delivered sentencing circles as a legal procedure

¹⁹⁵ *Law as Object*, *supra* note 13, at 9–11.

¹⁹⁶ VALVERDE, *supra* note 29, at 192.

¹⁹⁷ See generally SUMMERS, *supra* note 12.

in the criminal trial. Where technique was absent, knowledge became obstructed and social normative goals were put in jeopardy. Especially where an expression of culture is used as a tool, those engaged in law reform must challenge themselves to explore outcomes as evidence of unmet expectations.

Appendix A

Request for Sentencing Circles by Case, Year, and Court

	Hit # In Search	Case Name	Year	Court	Crown consent and/or request not reported	Request inferred from appellate level decision	Request Allowed
1	1	<i>R. v. Smarch</i>	2010	YKTC	x		Y
2	2	<i>R. v. Cooper</i>	2010	Ont. CA	x	x	Y
3	4	<i>R. v. Van Bibber</i>	2010	YKTC	x		Y
4	6	<i>R. v. Langan</i>	2010	SK PC	x		Y
5	11	<i>R. v. Favel</i>	2009	SK QB			N
6	14	<i>R. v. Pauchay</i>	2009	SK PC			Y
7	17	<i>R. v. Brooks</i>	2008	NS PC	x		Y
8	19	<i>R. v. Stimson</i>	2008	AB PC	x		Y
9	24	<i>R. v. MacKendrick</i>	2007	BC PC	x		Y
10	25	<i>R. v. Elliot</i>	2006	AB PC	x		Y
11	26	<i>R. v. Braun</i>	2006	BC PC	x		Y
12	27	<i>R. v. Poker</i>	2006	NL TD	x		Y
13	28	<i>R. v. Kahypeasewat</i>	2006	SK PC	x		Y
14	30	<i>R. v. James</i>	2006	YKTC	x		Y
15	31	<i>R. v. Kinistino</i>	2006	SK PC			N
16	32	<i>R. v. Craft</i>	2006	YKTC	x		Y
17	33	<i>R. v. Desnomie</i>	2005	SK CA	x	x	Y
18	34	<i>R. v. Cappo</i>	2005	SK CA	x	x	Y
19	36	<i>R. v. Anaquod</i>	2005	SK CA	x	x	Y
20	37	<i>R. v. Gopher</i>	2005	SK QB			N
21	39	<i>R. v. J. (J.)</i>	2004	NL CA	x	x	Y

22	41	<i>R. v. Frank</i>	2004	SK CA	x		N
23	44	<i>R. v. Mackinaw</i>	2004	BC PC	x		N
24	46	<i>R. v. Morris*</i>	2004	BC PC	x		Y
25	47	<i>R. v. Joyea</i>	2004	SK CA	x	x	Y
26	54	<i>R. v. L. (B.)</i>	2002	AB CA	x	x	Y
27	55	<i>R. v. Munson</i>	2001	SK QB			N
28	56	<i>R. v. Haines</i>	2001	BCCA	x	x	N
29	58	<i>R. v. K (N.T.)</i>	2001	SK CA	x	x	Y
30	59	<i>R. v. Stick (C.)**</i>	2001	SK QB			N
31	72	<i>R. v. Paul (D.)</i>	1998	NB PC	x		Y
32	79	<i>R. v. C. (H.K.)</i>	1997	SK CA			Y
33	81	<i>R. v. R. (H.)</i>	1997	AB PC	x		Y
34	83	<i>R. v. Pena (M.J.)</i>	1997	BC SC			N
35	84	<i>R. v. McKay (R.W.)</i>	1997	AB PC	x		Y
36	86	<i>R. v. McDonald (D.P.)</i>	1997	SK CA	x	x	Y
37	87	<i>R. v. Manyfingers (C.J.)</i>	1996	AB PC	x		Y
38	89	<i>R. v. Nicholas (B.L.)</i>	1996	NB PC			Y
39	90	<i>R. v. Severight (A.D.)</i>	1996	SK CA	x	x	Y
40	93	<i>R. v. Johns (J.C.)</i>	1995	YK CA	x	x	Y
41	95	<i>R. v. Taylor (W.B.)</i>	1995	SK QB	x		Y
42	96	<i>R. v. John (R.C.)</i>	1995	AB CA	x	x	Y
43	98	<i>R. v. Rope</i>	1994	SK QB			Y

* *R. v. Morris*: the decision refers to a "talking circle" and the judge and Crown were not present; however the judge treated the procedure like a sentencing circle and accepted the recommendations.

** *R. v. Stick*: the reported case is an order to set aside decision denying application for holding a sentencing circle, reviewing judge remanded case back to trial judge to hear submissions about whether or not to hold a sentencing circle.

44	99	<i>R. v. Johnson (G.)</i>	1994	YK CA	x	x	Y
45	101	<i>R. v. R. (S.)</i>	1994	NF SC			N
46	102	<i>R. v. Morin (I.)</i>	1993	SK QB	x		Y
47	103	<i>R. v. Cheekineew</i>	1993	SK QB			N
48		<i>R. v. Moses</i>	1992	YK TC	x		Y

Appendix B

Whether the Judge Followed the Sentencing Circle's Recommendations: Cases Where Sentencing Circles were Held, by Case, Year, and Court

	Hit # In Search	Case Name	Year	Court	Recommendation Followed
1	1	<i>R. v. Smarch</i>	2010	YKTC	U*
2	2	<i>R. v. Cooper</i>	2010	Ont. CA	N
3	4	<i>R. v. Van Bibber</i>	2010	YKTC	Y
4	6	<i>R. v. Langan</i>	2010	SK PC	N
5	12	<i>R. v. Pauchay (II)</i>	2009	SK PC	N
6	17	<i>R. v. Brooks</i>	2008	NS PC	Y
7	19	<i>R. v. Stimson</i>	2008	AB PC	U
8	24	<i>R. v. MacKendrick</i>	2007	BC PC	U
9	25	<i>R. v. Elliot</i>	2006	AB PC	N
10	27	<i>R. v. Poker</i>	2006	NL TD	N
11	28	<i>R. v. Kahypeasewat</i>	2006	SK PC	U
12	30	<i>R. v. James</i>	2006	YKTC	U
13	32	<i>R. v. Craft</i>	2006	YKTC	Y
14	33	<i>R. v. Desnomie</i>	2005	SK CA	U
15	34	<i>R. v. Cappo</i>	2005	SK CA	Y
16	36	<i>R. v. Anaquod</i>	2005	SK CA	U
17	39	<i>R. v. J. (J.)</i>	2004	NL CA	Y
18	46	<i>R. v. Morris**</i>	2004	BC PC	Y

* U –Unknown: No description of recommendations; there was no information in case about what, if any, recommendations were presented following the sentencing circle.

19	47	<i>R. v. Joyea</i>	2004	SK CA	U
20	54	<i>R. v. L. (B.)</i>	2002	AB CA	Y
21	58	<i>R. v. K (N.T.)</i>	2001	SK CA	Y
22	72	<i>R. v. Paul (D.)</i>	1998	NB PC	Y
23	75	<i>R. v. Taylor</i>	1997	SK CA	N
24	79	<i>R. v. C. (H.K.)</i>	1997	SK CA	U***
25	81	<i>R. v. R. (H.)****</i>	1997	AB PC	N
26	84	<i>R. v. McKay (R.W.)</i>	1997	AB PC	Y
27	86	<i>R. v. McDonald (D.P.)</i>	1997	SK CA	U
28	87	<i>R. v. Manyfingers (C.J.)</i>	1996	AB PC	Y
29	89	<i>R. v. Nicholas (B.L.)</i>	1996	NB PC	Y
30	90	<i>R. v. Severight (A.D.)</i>	1996	SK CA	U
31	93	<i>R. v. Johns (J.C.)</i>	1995	YK CA	U
32	95	<i>R. v. Taylor (W.B.)</i>	1995	SK QB	Y
33	96	<i>R. v. John (R.C.)</i>	1995	AB CA	Y
34	98	<i>R. v. Rope</i>	1994	SK QB	Y
35	99	<i>R. v. Johnson (G.)</i>	1994	YK CA	Y
36	102	<i>R. v. Morin (I.)</i>	1993	SK QB	Y
37		<i>R. v. Moses</i>	1992	YK TC	Y

** The judge left during the process.

*** The judge left during the process.

**** The Circle was conducted by Edmonton Native Youth Justice Committee ("ENYJC"), a group recognized by the Department of Justice. ENYJC normally holds circles to assist in recommendations to the Edmonton Youth Court. However, in this case the defendant was charged as an adult because he was twenty-one years old at the time of the offence.