

A CIRCLE TAKES NO SIDES

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Comprehensive Law Class, Fall 2013
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I. INTRODUCTION

You have noticed that everything an Indian does is in a circle, and that is because the Power of the World always works in circles, and everything tries to be round Everything the power of the world does is done in a circle Birds make their nests in circles, for theirs is the same religion as ours Even the seasons form a great circle in their changing and always come back again to where they were.

---- Black Elk, Holy Man of the Oglala Sioux²

When I first started the program, I was confused, worried, frustrated I didn't know what to expect. As I continued with the Circle, I started to make changes in my life I learned that the world didn't have to come to an end because of the [violent] incident, and how good things can come from the bad.

---- Applicant, Circles of Peace, Nogales, Arizona³

I have been in restorative justice long enough to know that the process works. . . . No matter what you say we are going to respect what you say. Doesn't matter what your background is. Doesn't matter who you are. We are equal in this circle. That's a powerful concept that is foreign to the Western [community], but is natural to a lot of minority or immigrant, or native communities. . . . I'm from the system.

---- Sia Lo, Head of Criminal Division, St. Paul.⁴

Alice entered the room with trepidation. Around her were fifteen eager faces, all of which appeared to be anxiously awaiting her arrival. The faces belonged to the circle keeper, the victim, supporters of the victim, supporters of the defendant, a police officer, the school principal, teachers, and students. An elderly woman, the circle keeper, beckoned everyone to take a seat. The seats were arranged in a circle. Gingerly, Alice took a seat, and the rest of the crowd followed. "Welcome everybody!" the elderly woman said with a kind but authoritative voice.

²Danelle J. Daugherty, *Children Are Sacred: Looking Beyond Best Interests of the Child to Establish Effective Tribal-State Cooperative Child Support Advocacy Agreements in South Dakota*, 47 S.D. L. REV. 282 (2002).

³Linda G. Mills, Mary H. Maley, & Yael Shy, *Circulos De Paz and the Promise of Peace: Restorative Justice Meets Intimate Violence*, 33 N.Y.U. REV. L. & SOC. CHANGE 127 (2009).

⁴James Coben & Penelope Harley, *Intentional Conversations About Restorative Justice, Mediation and the Practice of Law*, 25 HAMLINE J. PUB. L. & POL'Y 235, 275 (2004).

“We are gathered here today to discuss the consequences of Alice’s behavior and to agree upon a solution.” The elderly woman was holding a talking stick, a symbolic sacred object that could just have easily been a feather.⁵ After a preliminary introduction, the stick was passed around the circle. People took turns speaking when the stick was passed to them, including Alice. This process emphasized respect, and the importance of speaking from the heart.⁶ The tone started out serious yet productive. An hour and a half later everyone had shared their opinions, feelings, or both. The circle decided by consensus that Alice would enter counseling sessions for the bullying offense, as well as volunteer on the anti-bullying committee at school. Circle justice had been dealt, and all left feeling as though they had accomplished their goals.

Typically, when people think of justice, they envision the adversarial system that deals primarily with two parties, each of whom hold strongly opposing views. At the end of the legal battle there is a winner and a loser. While this form of justice with clear-cut black and white lines may work in certain circumstances for certain cases, a large part of the world is not black and white, but rather made up of thousands of differing shades of gray. In these instances, therapeutic jurisprudence, restorative justice, and more specifically, circle justice may play a larger role, thereby allowing many winners and near to no losers.

This paper is entitled “A Circle Takes No Sides” because of precisely this reason, that circle justice takes no sides; neither physically, because geometrically the circle has none, nor metaphorically, because all persons involved should end up winning in some way as a result of the gathering. The first portion of this paper discusses, quite briefly by way of providing background to the reader, the origins of circle justice as seen through a therapeutic lens. The

⁵Gretchen Ulrich, *Widening the Circle: Adapting Traditional Indian Dispute Resolution Methods to Implement Alternative Dispute Resolution and Restorative Justice in Modern Communities*, 20 *HAMLIN J. PUB. L. & POL’Y* 419, 432-34 (1999).

⁶Mary E. Reimund, *The Law and Restorative Justice: Friend or Foe? A Systemic Look at the Legal Issues in Restorative Justice*, 53 *DRAKE L. REV.* 667, 677-80 (2005).

majority of the paper then compares the numerous uses of circlejustice mainly around North America primarily as a way of inspiring its further benefits while also, quite fairly, detailing any shortcomings.

In brief, and also by way of explaining the general road map of this paper, circle justice has been used in Australia, Canada, and the United States in the context of: (1) domestic violence and batterer intervention programs; (2) programs aimed at keeping kids in schools; (3) anti-bullying programs in schools; (4) healing fractured communities when hate crimes have run rampant; (5) offender conferences in criminal cases; (6) recidivism in juveniles; and (7) welfare-to-work programs. Each of these areas will be discussed in a separate chapter. At the conclusion of the paper, it is the hope and intent of the author to have not only educated the reader on circle justice, but more importantly inspired the reader to seek out ways to use circle justice within his or her realm of law and ultimately to heal clients in a more holistic way than cold hard black letter law alone could ever do.

A. Defining Terms

Circle justice is synonymous with sentencing circles, peacemaking circles, healing circles, talking circles, and even community circles.⁷ Sentencing circles are sentencing hearings conducted in a circle format, based upon the Aboriginal tradition of the healing circle.⁸ Traditional healing circles address disputes among community members with an eye to restoring harmony within the community.⁹ In this paper, the simple term, circle, is used for clarity.

Therapeutic jurisprudence is mainly a lens for focusing on having empathy for human survivors of legal conflicts by taking a “holistic grasp of the human consequences, in loss, pain,

⁷*Id.*

⁸Rashmi Goel, *No Women at the Center: The Use of the Canadian Sentencing Circle in Domestic Violence Cases*, 15 WIS. WOMEN'S L.J. 293, 294-96 (2000).

⁹*Id.*

emotion and relationships, of the legal encounter.”¹⁰ In other words, the many shades of gray mentioned previously. Restorative justice involves more concrete commitments to just “processes and values.”¹¹ In restorative justice, the community, victim, and offender, in a collaborative process, participate in some form of conferencing usually designed to substitute for criminal sentencing.¹² The conference may be as simple as post-sentencing victim-offender mediation or as complicated as sentencing that is done in a community, circle conference with all parties present, much like in the fictitious opening paragraph above.

Howard Zehr, a pioneer of the American restorative justice movement, defined restorative justice as processes “to involve, to the extent possible, those who have a stake in a specific offense to collectively identify and address harms, needs, and obligations, in order to heal and put things as right as possible.”¹³ According to Zehr, the questions asked in any restorative process are: (1) “Who has been hurt?” (2) “What are their needs?” and (3) “Whose obligations are these?”¹⁴ By way of contrast, the questions asked in any criminal justice system are: (1) “What laws have been broken?” (2) “Who did it?” and (3) “What do they deserve?”¹⁵

Donna Coker, a scholar of indigenous peacemaking circles within the Navajo Nation who has worked with domestic violence victims, advocates for a model of “transformative justice” rather than restoration.¹⁶ Coker argues that the term “restorative” implies that once the program is over, power relations between a conflicted couple are likely to be “restored” to the status quo

¹⁰JOHN BRAITHWAITE, RESTORATIVE JUSTICE AND THERAPEUTIC JURISPRUDENCE, AUSTRALIAN NATIONAL UNIVERSITY (2002).

¹¹*Id.*

¹²SUSAN SWAIM DAICOFF, COMPREHENSIVE LAW PRACTICE, CAROLINA ACADEMIC PRESS (2011).

¹³Linda G. Mills, Mary Helen Maley, Yael Shy, *Circulos De Paz and the Promise of Peace: Restorative Justice Meets Intimate Violence*, 33 N.Y.U. REV. L. & SOC. CHANGE 127, 129-30 (2009).

¹⁴*Id.*

¹⁵*Id.*

¹⁶*Id.*

that is characterized by the victim's powerlessness and lack of safety.¹⁷ Coker's alternative is that a transformative model still gathers the victim and offender together with their respective supporters; however, its focus is on the "ways in which racism and economic subordination as well as childhood experiences of abuse relate to a man's use of violence in his intimate relationships with women while stressing personal responsibility for the decision to use violence."¹⁸ In Coker's view, this alternative model enables men and women to examine their violent dynamic more closely and to re-conceptualize how they perform their gender roles.

II. ORIGINS OF CIRCLE JUSTICE

A. Historical Examples

The circle is derived from Hollow Water First Nation Community Holistic Circle Healing (CHCH) Process, a small community in Manitoba, Canada, where it has been successfully used since 1986 to deal with criminal family charges, including intergenerational family violence and sexual abuse.¹⁹ Professor Joe Couture and his colleagues, in cooperation with the Canadian Solicitor General, evaluated this CHCH process, measured intangible benefits to the community, and made direct cost comparisons with traditional policing, court, institutional, probation, and victims' services.²⁰ These researchers examined financial records and conducted interviews with community members, CHCH staff, social resource people, and justice system participants to identify the benefits of that community healing process. They found that the CHCH program costs were less than one-third of those associated with the traditional criminal justice system and that, as a result of the program, the community showed significant improvements on health and wellness scales, indicating healthier children, better parenting skills, individual empowerment,

¹⁷*Id.*

¹⁸*Id.*

¹⁹*Id.*

²⁰*Id.*

greater community responsibility toward domestic abuse issues, an increased sense of safety, and a decrease in overall violence.²¹ Another study of the impact of healing circles on the Hollow Water First Nation community, by Mark Umbreit and Marilyn Peterson Armour, showed that Hollow Water has had a recidivism rate of approximately two percent over a ten-year period.²²

Another successful use of the circle has taken place within the Mi'kmaq Nation, in Eskasoni, Nova Scotia.²³ There, the deputy sheriff, court workers and translators who service the court are all Mi'kmaq. They are trained and employed by the Mi'kmaq Legal Support Network, a program that assists offenders as they encounter the mainstream system, offers a customary law program consisting of justice circles designed to craft community service orders and to help manage disputes that are diverted from the court.²⁴

B. Modern Usage

The circles used today in the United States find their origins in these North American aboriginal peoples' circles mentioned above.²⁵ In 1995, the United States adopted a pilot program using the circle in Minnesota.²⁶ The Mille Lacs Band of Ojibwe, together with the Mille Lacs County District Court, developed the first circle in 1996 for non-violent adult misdemeanor offenders.²⁷ In 1998, after years of discussion and learning more about the traditional ways of dispute resolution among the Tlingit people in Alaska, the Organized Village of Kake decided to

²¹*Id.*

²²Mark S. Umbreit & Marilyn Peterson Armour, *Restorative Justice and Dialogue: Impact, Opportunities, and Challenges in the Global Community*, 36 WASH. U. J.L. & POL'Y 65, 71-72 (2011).

²³L. Jane McMillan, *Colonial Traditions, Co-Optations, and Mi'kmaq Legal Consciousness*, 36 LAW & SOC. INQUIRY 171, 185-87 (2011).

²⁴*Id.*

²⁵Brian Sapir, *Healing A Fractured Community: The Use of Community Sentencing Circles in Response to Hate Crimes*, 9 CARDOZO J. CONFLICT RESOL. 207, 215-21 (2007).

²⁶*Id.*

²⁷Aaron F. Arnold et. al., *State and Tribal Courts: Strategies for Bridging the Divide*, 47 GONZ. L. REV. 801, 830-31 (2011).

create their own traditional dispute resolution system, called the Healing Heart Council, which ultimately utilized the process of circlepeacemaking.²⁸ The Juvenile Justice Center in Anchorage is now successfully using the circle with juvenile offenders.²⁹

In 1998, the Minnesota legislature adopted the circle to provide an alternative adjudication process to the state court system.³⁰ Minnesota's restorative justice statute, which includes the circle, even withstood a challenge before the Minnesota Supreme Court in *State v. Pearson*.³¹ Since 1998, the Washington County circle has handled misdemeanor cases. One of the oldest operating circles is the South Saint Paul Restorative Justice Council. Three Minnesota school districts have used a three-year prevention grant to train staff in the circle process and implement the circle in schools as an alternative response to discipline problems.³²

Canadian Judge Barry Stuart, an experienced mediator, pioneered circle sentencing in the Yukon Territory, Canada.³³ The circle had been used since the 1980s in other Canadian communities, such as Saskatchewan, Manitoba, and Quebec.³⁴ In New Zealand, the Maori traditions were the basis for their circles.³⁵

The Grand Traverse Band of Ottawa and Chippewa Indians, a federally recognized tribe near Grand Rapids, Michigan started the Grand Traverse Band's Peacemaking Court, known as

²⁸Ryan Seelau, *The Kids Aren't Alright: An Argument to Use the Nation Building Model in the Development of Native Juvenile Justice Systems to Combat the Effects of Failed Assimilative Policies*, 17 BERKELEY J. CRIM. L. 97, 136-48 (2012).

²⁹*Id.*

³⁰Aaron F. Arnold et. al., *State and Tribal Courts: Strategies for Bridging the Divide*, 47 GONZ. L. REV. 801, 830-31 (2011).

³¹Mary Ellen Reimund, *The Law and Restorative Justice: Friend or Foe? A Systemic Look at the Legal Issues in Restorative Justice*, 53 DRAKE L. REV. 667, 677-80 (2005).

³²Mark S. Umbreit, Betty Vos, Robert B. Coates, Elizabeth Lightfoot, *Restorative Justice in the Twenty-First Century: A Social Movement Full of Opportunities and Pitfalls*, 89 MARQ. L. REV. 251, 276-77 (2005).

³³*Id.*

³⁴*Restorative and Community Justice in the United States*, 27 CRIME & JUST. 235, 280-82 (2000).

³⁵James Coben & Penelope Harley, *Intentional Conversations About Restorative Justice, Mediation and the Practice of Law*, 25 HAMLINE J. PUB. L. & POL'Y 235, 243-44 (2004).

Mnaweejeendiwin, which translated means, “walking together in a good way.”³⁶ The Mnaweejeendiwin involves no judges, lawyers, social workers, or dockets because it is based on a traditional practice involving a peacemaker who ensures everyone has an opportunity to say what they want to say and focuses the group on restoring harmony to the community.³⁷ A case gets to the Mnaweejeendiwin by referral from a tribal social worker, law enforcement officer, prosecutor, or judge. The Mississippi Band of Choctaw, another federally recognized tribe, near Birmingham, Alabama, created a Peacemaker Court and a Teen Court based on the circle.³⁸ The Navajo Nation, the largest federally recognized tribe in the United States also has similar circles.³⁹

Canada continues to pioneer circles involving re-entry into society. Circles of Support and Accountability (COSA) were first developed in Ontario more than fifteen years ago as an “alternate means of social support to high-risk sexual offenders released at the end of their sentence without any community supervision.”⁴⁰ The initial pilot project has been replicated throughout Canada and many locations in the United States. Umbreit and Armour, who studied this process, found that, compared to a matched sample of offenders not in COSA, offenders in COSA had an 83 percent reduction in sexual recidivism, a 73 percent reduction in all kinds of violent recidivism, and an overall combined reduction in recidivism of 71 percent.⁴¹

³⁶Ryan Seelau, *The Kids Aren't Alright: An Argument to Use the Nation Building Model in the Development of Native Juvenile Justice Systems to Combat the Effects of Failed Assimilative Policies*, 17 BERKELEY J. CRIM. L. 97, 136-48 (2012).

³⁷*Id.*

³⁸*Id.*

³⁹*Id.*

⁴⁰*Id.*

⁴¹Mark S. Umbreit & Marilyn Peterson Armour, *Restorative Justice and Dialogue: Impact, Opportunities, and Challenges in the Global Community*, 36 WASH. U. J.L. & POL'Y 65, 71-72 (2011).

C. Circle Function

Functionally, the circle is used to help families and communities take responsibility, by consensus, to mend broken relations and create new lives, as well as to give criminal justice professionals a chance to work with victims and offenders in more healing ways.⁴² The purpose is to bring about forgiveness and healing for everyone involved, but more specifically, to address the underlying cause of the offender's behavior, and then to try to figure out a way to restore community life.⁴³ The circle usually happens in four stages: (1) determination of suitability; (2) preparation; (3) the peacemaking circle meeting; and (4) follow-up and maintenance of accountability.⁴⁴

The circle is typically organized in one of two ways. Either judges may refer cases to circle sentencing and agreements reached then become sentencing recommendations, or the judge, prosecutor, and defense attorney may participate in the circle and agreement reached becomes the final sentence.⁴⁵ In both cases, the community, comprised of volunteer citizens, makes the final decision of acceptance to the circle even though the details of the circle process vary by community.⁴⁶

Procedurally, the community may place meaningful objects in the center of the circle as a focal point to remind participants of shared values and common ground.⁴⁷ Circle participants may tell stories as they pass the talking piece, and participants are "encouraged to draw on [their] life experience[s] to add to the understanding of the problem and to generate possible

⁴²Mary Ellen Reimund, *The Law and Restorative Justice: Friend or Foe? A Systemic Look at the Legal Issues in Restorative Justice*, 53 *DRAKE L. REV.* 667, 677-80 (2005).

⁴³Ryan Seelau, *The Kids Aren't Alright: An Argument to Use the Nation Building Model in the Development of Native Juvenile Justice Systems to Combat the Effects of Failed Assimilative Policies*, 17 *BERKELEY J. CRIM. L.* 97, 136-48 (2012).

⁴⁴*Id.*

⁴⁵*Restorative and Community Justice in the United States*, 27 *CRIME & JUST.* 235, 280-82 (2000).

⁴⁶*Id.*

⁴⁷Janelle Smith, *Peacemaking Circles: The "Original" Dispute Resolution of Aboriginal People Emerges As the "New" Alternative Dispute Resolution Process*, 24 *HAMLIN J. PUB. L. & POL'Y* 329, 351 (2003).

solutions.⁴⁸ Storytelling helps participants learn more about each other and ultimately reach an appropriate resolution of the problem; whereas personal narratives allow participants to see the speaker in another light because they are allowed to define themselves and uncover commonalities between people, opening the possibility for connections between participants.⁴⁹ The hearing of stories reduces social distance and stereotypes about other people because people are able to touch each other's lives, and the experiences that they share may provide insight for reaching a solution to the problem.⁵⁰

Circles may be used for a variety of purposes, including: (1) sentencing in criminal cases; (2) healing in preparation for sentencing; (3) reintegration to help juveniles and adults returning to the community from correctional facilities; (4) to resolve workplace conflicts; and (5) to facilitate community dialogue.⁵¹ The physical structure of the circle encourages participation because everyone sits facing each other, and tables are generally dispensed with, leaving only a circle of simple chairs.⁵² Without the barriers of podiums or witness boxes, participants face each other as community members and persons, not titles and positions.⁵³

Canadian Circle Justice Coordinator Mary Crnkovich stated:

The theory behind the circle is that everyone in the circle is of equal status. The circle is intended to promote equal access and equal exposure with everyone facing each other. Within the circle, the judge's opinion is no more important than that of an elder or a family member.⁵⁴

⁴⁸*Id.*

⁴⁹*Id.*

⁵⁰*Id.*

⁵¹Nicole Concordia, *Preserving Liberty in the American Justice System Through Circle Processes*, 5 U. ST. THOMAS J.L. & PUB. POL'Y 67, 80-83 (2011).

⁵²Rashmi Goel, *No Women at the Center: The Use of the Canadian Sentencing Circle in Domestic Violence Cases*, 15 WIS. WOMEN'S L.J. 293, 294-96 (2000).

⁵³*Id.*

⁵⁴*Id.*

Procedurally, when a case is referred from the traditional justice system to a circle, the circle must make a recommendation that the judge can then translate into an order in state or federal court.⁵⁵ Thus, if a judge entered a circle's recommendation of banishment and an appellate court found the punishment to be unconstitutional, the decision could then be challenged in the Supreme Court or a state court of last resort.⁵⁶ One court in the United States has, at least partially, found that a tribal court could not impose a sentence under which "the defendant was penalized more harshly because she entered the alternative court than someone charged with an identical offense that did not enter the alternative court."⁵⁷ Another court has found that sentencing circles may not deviate from established sentencing guidelines absent categorical authorization from the prosecutor.⁵⁸ By 2004, in Canada and the United States, tribes had begun reclaiming judicial sovereignty through the proliferation of sentencing circles.⁵⁹ For example, in *Regina v. Lucas*, an indigenous sexual offender in the Yukon Territory was banished for a period of twelve months to a First Nation bush settlement called No-Gold by a quasi-sentencing circle.⁶⁰

D. Circle Growth

In the United States, while the use of circles has not been very widespread, and comprehensive studies have not yet been completed, it has received mostly positive preliminary responses.⁶¹ Thus, the use of the circle should be broadened to crimes of a more serious nature.

⁵⁵Nicole Concordia, *Preserving Liberty in the American Justice System Through Circle Processes*, 5 U. ST. THOMAS J.L. & PUB. POL'Y 67, 80-83 (2011).

⁵⁶*Id.*

⁵⁷*Id.*

⁵⁸*Id.*

⁵⁹Colin Miller, *Banishment from Within and Without: Analyzing Indigenous Sentencing Under International Human Rights Standards*, 80 N.D. L. REV. 253, 255-57 (2004).

⁶⁰*Id.*

⁶¹Brian Sapir, *Healing A Fractured Community: The Use of Community Sentencing Circles in Response to Hate Crimes*, 9 CARDOZO J. CONFLICT RESOL. 207, 208-09 (2007).

An Aboriginal police officer, a Mi'kmaq resident of Eskasoni, makes an excellent case for circle justice.⁶² He points out:

The court system does not generate healing; there is no reintegration process. That is why there are so many repeat offenders: there is no help being offered, no healing for themselves. The community is not involved. You do not have to face each other. The court puts on protection orders and they are all breached in a week or two.⁶³

This Mi'kmaq police officer is in favor of creating more circles as the strategy best suited to addressing the issue of responsibility because court-delivered remedies remove responsibility from the community and interrupt the opportunities for restoring the balance disrupted by the harm done.⁶⁴

The first circle recognized by the Canadian justice system was *Regina v. Moses* presided over by Judge Stuart of the Yukon Territorial Court.⁶⁵ Questions of when the circle is appropriate and under what circumstances brought early cases to the appellate courts.⁶⁶ While it would be premature to say matters have been settled, some general guidelines have emerged.⁶⁷ Circle jurisprudence furnishes the following indicia for when a sentencing circle is **not** appropriate: (1) for purely punitive sanctions or where a term of incarceration in excess of two years is realistic; (2) where there have been frequent repeat offenses or the offence is indictable; (3) where the attitude of the offender prohibits his or her involvement; (4) where there are no community sentencing options available to the circle; and (5) where the community is not prepared to be involved in the circle.⁶⁸

⁶²L. Jane McMillan, *Colonial Traditions, Co-Optations, and Mi'kmaq Legal Consciousness*, 36 LAW & SOC. INQUIRY 171, 191 (2011).

⁶³*Id.*

⁶⁴*Id.*

⁶⁵Rashmi Goel, *No Women at the Center: The Use of the Canadian Sentencing Circle in Domestic Violence Cases*, 15 WIS. WOMEN'S L.J. 293, 294-96 (2000).

⁶⁶*Id.*

⁶⁷*Id.*

⁶⁸*Id.*

In addition, Judge Fafard of the Saskatchewan Provincial Court pronounced, in *Regina v. Joseyounen*, the following general criteria for all sentencing circles: (1) the accused must agree to be referred to the circle; (2) the accused must have deep roots in the community in which the sentencing is held and from which the participants are drawn; (3) there are elders or respected non-political community leaders willing to participate; (4) the victim is willing to participate and has not been subjected to coercion or pressure in so agreeing; (5) the court should try to determine beforehand, as best it can, if the victim is subject to battered women's syndrome (if she is, then she should have counseling and be accompanied by a support team in the circle); (6) disputed facts have been resolved in advance; and (7) the case is one in which a court is, or would be, willing to take a calculated risk and depart from the usual range of sentencing.⁶⁹

Finally, it is noteworthy to mention that circle justice inspired the fiction writer, Ben Mikaelson, to write the teen novel, *Touching Spirit Bear*. In this heart-warming tale, Cole Matthews, a fifteen-year-old juvenile delinquent from Minnesota, was sentenced by the circle, to banishment for a year on the barren island near the city of Drake in Southeastern Alaska.⁷⁰ Two Tlingit Indians accompanied Cole.⁷¹ The story unfolded in a series of flashbacks about why Cole ended up on the island.⁷² Cole's story became the inspiration for this paper when the author read it upon the recommendation of her criminal law professor in her first semester of law school.

⁶⁹*Id.*

⁷⁰BEN MIKAELSEN, *TOUCHING SPIRIT BEAR*, HARPER TEEN (2002).

⁷¹*Id.*

⁷²*Id.*

III. DOMESTIC VIOLENCE AND BATTERER INTERVENTION PROGRAMS

There are mixed views on the effectiveness of the circle in the domestic violence context, so two programs are contrasted below, each having received widely opposing reactions.

A. Not in Favor

While the modern day sentencing circle has gained the favor of the Canadian judiciary, and even an acknowledgment in the Canadian Criminal Code, Rashmi Goel asserts that it fails to restore harmony for domestic violence victims and aboriginal women leave the circle without any of the traditional gains in healing, reconciliation, or respect.⁷³ Goel contends that pre-colonial healing circles were never envisioned to address the colonially induced domestic violence now afflicting Aboriginal communities. While current rates of domestic violence, in Canada, are largely consequent to the dismantling of traditional Aboriginal social structures, simply reverting to practices that reintroduce certain traditional or Aboriginal mechanisms for dispute resolution cannot solve the problem.⁷⁴ Therefore, Goel argues that modern day sentencing circles are unacceptable for use in domestic violence cases; and if sentencing circles are to function successfully in such cases, some modification in focus and operation is necessary to correct the tremendous imbalance between men and women that is produced by colonial policies.⁷⁵

Within these Aboriginal communities, the innovation of the sentencing circle does not, however, prevent the maintenance of essential judicial principles and practices. The individual rights of the accused are not compromised by the sentencing circle procedure. The Crown and defense counsel retain their traditional roles as advocates for the state and the offender. Open court is maintained, written summaries or full recordings are filed, upper limits to the sentences

⁷³Rashmi Goel, *No Women at the Center: The Use of the Canadian Sentencing Circle in Domestic Violence Cases*, 15 WIS. WOMEN'S L.J. 293, 294-96 (2000).

⁷⁴*Id.*

⁷⁵*Id.*

remain in place and the accused is, in fact, given greater opportunity to speak to his sentence. Judge Barry Stuart, credited with holding the first circle, reported “All other changes in the court process, being seated in a Circle, using first names, relying on local Keepers to facilitate the process and other Circle practices, do not offend any evidentiary or procedural rules and are instrumental in advancing the sentencing objectives championed by the formal justice system.”⁷⁶

According to Goel, while Canadians wish to rid the community of crime, Aboriginal peoples wish to regain power over their own future. While the judge retains authority over the final imposition of the sentence, the practice has been to defer to the consensus of the circle. Thus, the circle represents a significant step in the ability of Aboriginal communities to regain control over dispute resolution and justice matters. Aboriginal peoples have long spoken of how incarceration only produces more criminals, and does nothing to address the underlying cause, which is colonization. If Aboriginal peoples could demonstrate reduced recidivism among Aboriginal offenders as a result of sentencing circles, there would be a better chance the mainstream will acknowledge that viable alternatives to mainstream sentencing do exist.

This means that the circle has serious political ramifications for Aboriginal peoples. Success in the circle means success for the individual offender, and another step towards recognizing Aboriginal self-government. Goel predicted that given the tension between Aboriginal peoples and the dominant society, it is unlikely the dominant society will exhibit the same patience with circle failures as Aboriginal people have exhibited with respect to failures of the adversarial justice system. In order to be effective, circle practice will have to produce a significant reduction in recidivism rates before it will provide meaningful assistance in the transfer of greater power to Aboriginal peoples. Consequently, the pressure to make the circle

⁷⁶*Id.*

work affects everyone in the community and could prevent the domestic violence victim from participating equally in the circle.⁷⁷

B. In Favor

The following example reflects the opposite, more positive, view. Circles of Peace (“CoP”), also known as *Circulos de Paz*, was founded in Nogales, Arizona, in 2004 by Dr. Linda Mills, professor of social work, public policy, and law, and Mary Helen Maley, an Arizona judge, to address the myriad problems with both the criminal justice response to intimate violence and Batterer Intervention Programs.⁷⁸ CoP, supported by the generosity of the Andrus Family Fund, the Arizona Foundation for Women, and the Arizona Community Foundation, was the first court-referred domestic violence treatment program to use a circle approach to reduce violent behavior in families in the United States.⁷⁹ The program consists of twenty-six to fifty-two weeks of circles, bringing partners who have been abusive together with willing family members, including those who have been abused, support people, a trained professional facilitator, and community volunteers.⁸⁰

The CoP goal is to encourage dialogue about the incident, the history of violence in this family, and meaningful change. The inclusion of the extended family network in the treatment helps those in the circle understand how violence is transmitted across generations and serves to hold applicants accountable to those whom they respect. Someone close to the family is appointed to serve as “safety monitor” before the first circle convenes.⁸¹ The safety monitor performs frequent check-ins with the couple and seeks help if tensions begin to increase.⁸² Finally,

⁷⁷*Id.*

⁷⁸Linda G. Mills, Mary Helen Maley, Yael Shy, *Circulos De Paz and the Promise of Peace: Restorative Justice Meets Intimate Violence*, 33 N.Y.U. REV. L. & SOC. CHANGE 127, 129-30 (2009).

⁷⁹*Id.*

⁸⁰*Id.*

⁸¹*Id.*

⁸²*Id.*

circles are enhanced through mental health and drug and alcohol treatment services, available to both applicants and participants when necessary or helpful.⁸³

Whether or not it is appropriate, effective, and/or safe to handle intimate abuse cases using the circle has been a continual subject of debate among scholars and practitioners.⁸⁴ Critics worry that individuals who have been abused will be harmed again by manipulative tactics of control employed by their partners in circle, or that they may feel coerced into participating in the process, or worse yet, into reconciling with their abusive partners.⁸⁵ Manipulative tactics could include pretending to be civil in circle but threatening or intimidating their partners when they return home; blaming their partners in circle and subtly leading others to agree; or staying quiet in circle and then exploding when they return home.⁸⁶ Such manipulation could lead to new trauma for people who have been abused, who may already feel wounded and afraid, and who would not be in a position to express how they really feel in circle.⁸⁷

Critics also fear for the physical safety of the person who has been abused, worry about the re-privatization of the issue of domestic violence, and doubt whether they can trust community-based agencies with the job of addressing such a large and dangerous problem.⁸⁸ Encouraging people to trust an untrustworthy partner in a circle may therefore be unwise and even dangerous. Finally, effective and safe programs should provide ongoing means by which couples experiencing violence, facilitators, and the larger community can provide feedback and reflect on the process, ensuring that it can be paused and revised if necessary.⁸⁹ The importance of this feedback loop cannot be overstated; it has become an integral part of the circle program in

⁸³*Id.*

⁸⁴*Id.*

⁸⁵*Id.*

⁸⁶*Id.*

⁸⁷*Id.*

⁸⁸*Id.*

⁸⁹*Id.*

Nogales in large part because it allows the participants to identify and absorb the changes and transitions they are experiencing.

Donna Coker's description of the transformative model mentioned earlier in the paper is consistent with the goals of CoP because the circle process does not in any way enforce old dynamics in the violent relationship or interfere with a couple's desire to separate.⁹⁰ On the contrary, CoP promotes new solutions for couples, including separation because couples that participate range from those who choose to stay together to those who are divorcing.⁹¹ In CoP, couples that are separating sometimes want to participate in circles in order to process old trauma and pain and to gain a sense of closure before moving forward.⁹² Additionally, couples that have children often feel connected to each other after the relationship ends and therefore need help to manage the separation process peacefully.⁹³ Even if a person who has been abused wants nothing to do with her partner in the future, she often feels the need to be heard.⁹⁴ It is crucial to remember that healing, rather than reconciliation or forgiveness, lies at the heart of a restorative approach to intimate abuse.⁹⁵

Contrary to the criticism that circles re-privatize violence, these approaches actually have the potential to increase the external validation for people who have experienced abuse and to mobilize the community to respond to the harm instead of sending the violence underground.⁹⁶ Because circles involve people such as extended family and community members beyond just the victim and the offender, these processes have the effect of publicizing the problem, holding people who are abusive accountable to those whom they care about, and creating new

⁹⁰*Id.*

⁹¹*Id.*

⁹²*Id.*

⁹³*Id.*

⁹⁴*Id.*

⁹⁵*Id.*

⁹⁶*Id.*

ways of addressing dynamics still largely hidden from view.⁹⁷ Circles can be a valuable experience for the community as well.

The Centers for Disease Control estimate that 32 million Americans are affected by domestic violence each year.⁹⁸ One study found that 63 percent of children who witness intimate violence fared worse than children who did not witness intimate violence when measuring outcomes such as aggression and withdrawal.⁹⁹ Witnessing domestic violence as an adolescent may breed disrespect for women and provide an example for dating violence.¹⁰⁰ The personal stake all citizens have in resolving the problem of intimate violence can easily be overlooked when it is not directly happening to them or their loved ones.¹⁰¹ However, when communities have the opportunity to participate in circles, where they witness the devastation of families affected by violence, they do not typically see behavior in isolation because they look for underlying causes and examine the complexity of connections to other issues. By participating in a discussion of what happened in a particular family, the community begins to examine itself and this builds the foundation for future prevention efforts, addressing the intergenerational dimensions of domestic violence.¹⁰²

Donna Coker conducted an empirical and theoretical examination comparing peacemaking to formal adjudication proceedings using data from peacemaking files, as well as interviews with Peacemakers, family court judges, and Navajo Nation anti-domestic violence advocates.¹⁰³ Despite finding that circles had some significant problems, including some victims who felt coerced into attending, she concluded that the circles provided benefits that were

⁹⁷*Id.*

⁹⁸*Id.*

⁹⁹*Id.*

¹⁰⁰*Id.*

¹⁰¹*Id.*

¹⁰²*Id.*

¹⁰³*Id.*

unavailable in the formal adjudication process.¹⁰⁴ These benefits included the potential to disrupt social and familial structures that support battering and the potential to change the way abusive partners and their families understand battering through the use of traditional Navajo stories with anti-subordination themes. Coker also saw these circles as avoiding the “cultural and legal focus” on the necessity of permanently separating the couple.¹⁰⁵

In 2008, the Ash Institute at Harvard University’s Kennedy School named CoP one of the “Top 50 Innovations in Government.”¹⁰⁶ CoP and the other innovative circle-based domestic violence programs located around the world are experimenting with ways to accomplish the universal goal of validating the needs of people who have been victimized while providing meaningful treatment options for all members of the family, including those who have been abusive.¹⁰⁷ Both these concepts combine the commitment to acknowledging and understanding abusive behavior with the possibility of actually preventing it, thus creating important opportunities to heal families and transform communities.

IV. KEEPING KIDS IN SCHOOLS

Although the use of restorative justice in schools is hardly new globally, the emergence of school-based restorative justice in the United States as an educational practice to address the far-reaching negative impacts of punitive discipline policies is a more recent phenomenon.¹⁰⁸ School-based restorative justice programs in the United States have grown exponentially in the last six years. Within the school context, restorative justice is broadly defined as an approach to discipline that engages all parties in a balanced practice that brings together all people impacted

¹⁰⁴*Id.*

¹⁰⁵*Id.*

¹⁰⁶*Id.*

¹⁰⁷*Id.*

¹⁰⁸Thalia Gonzalez, *Keeping Kids in Schools: Restorative Justice, Punitive Discipline, and the School to Prison Pipeline*, 41 J.L. & EDUC. 281 (2012).

by an issue or behavior. It allows students, teachers, families, schools, and communities to resolve conflict, promote academic achievement, and address school safety. Restorative justice practice in schools is often seen as building on existing relationships and complementary with other non-discipline practices, such as peer mediation or youth courts.¹⁰⁹

A. Cole as a Model

Under the model at Cole Middle School in Oakland, California, the circle includes students directly harmed or involved in an incident, additional students, teachers, parents, coaches, administrators, and any other member of the school community who was involved or indirectly harmed by the incident. Within the first year of the pilot project, a restorative justice framework was adopted into non-disciplinary community building activities. In the second year, the disciplinary case manager began whole-school implementation, teaching a restorative justice class to seventh grade and eighth grade students. Suspension rates decreased significantly in 2007, the year that restorative justice was introduced to the entire school. The average suspension rate in the three years before restorative justice was implemented was 50 suspensions per 100 students. In the two years after restorative justice was implemented, the rate fell to only 6 suspensions per 100 students. Additionally, expulsions at Cole Middle School also decreased.¹¹⁰

B. Other Models

At the same time the Cole Middle School program was being piloted and studied, the Oakland Unified School District passed a resolution adopting restorative justice as a system-wide alternative to zero tolerance discipline and as an approach to creating healthier school

¹⁰⁹*Id.*

¹¹⁰*Id.*

communities.¹¹¹ At Children’s Home Kiefer School in Illinois, an alternative day school for children with severe emotional and behavior problems, the Children’s Home Association of Illinois implemented the circle to help to set standards of classroom behavior and resolve classroom disputes.¹¹² As of 2008, detention referrals had dropped by 35 percent in those schools, and the percentage of referrals dropped more dramatically among African-American students with a decrease of 43 percent.¹¹³

Since 2007, Community Conflict Services has taken a whole-school implementation approach at Long Middle School in St. Louis, Missouri. The organization trains faculty in circles, and leads a six-week curriculum for students designed to build understanding about restorative principles and talking circles. In addition to biweekly circles led by teachers and staff, Community Conflict Services works with the administration to identify and assist teachers with high referral rates, offers special circles for students with repeated disciplinary problems, and facilitates re-entry circles for suspended students and their parents.¹¹⁴

After only two years of implementing restorative practices, Long Middle School saw a 27 percent decrease in the severity of suspensions, and an 18 percent reduction in affinity group-based violence. In programs targeting specific students with discipline problems, teachers have seen increases in attendance, timeliness, and accountability for behavior. The entire school community embraced restorative justice: the compliance rate with restorative agreements over four years averaged at 90.5 percent, and in surveys taken by parents, there was 98 percent satisfaction with re-entry circles. Restorative practices were so effective at Long Middle School that Roosevelt High School in St. Louis, Missouri, started working with Community Conflict

¹¹¹*Id.*

¹¹²*Id.*

¹¹³*Id.*

¹¹⁴*Id.*

Services to revamp the high school discipline program and began training high school student mentors in 2011 to facilitate at Long Middle School.¹¹⁵

In 2010, the Santa Fe Public Schools Restorative Justice Coordinator, Mary Beth Brady, supported training and provided technical assistance to middle and high schools, and co-facilitated circles with site staff at the elementary level. During the 2010-2011 academic year, Brady and a hip-hop artist from a local non-governmental organization co-facilitated the School Success Class, a program for thirty high-risk middle school students with a restorative justice and art focus. The program was highly successful with a 40 to 50 percent reduction in serious incidents and out-of-school suspensions.¹¹⁶

C. School Circle Success

Active listening is one of the reasons for the great results when using circles in the school setting.¹¹⁷ It is impossible to overemphasize how important it is for the leader, at the outset of the circle process, to model listening by actually listening to the students and to everyone else involved in the process. It is often easy for adults to tell students what they did wrong and what they **need** to do to fix the problem. However, when students see an adult leader of a circle actively listening, being engaged, and respecting their stories, students find it much easier to follow suit and are much more comfortable being reminded to listen actively. A circle leader's genuine listening is an important first step in reducing the barriers that such assumptions create and can open students' minds to seeing connections with other people that they otherwise would never appreciate.¹¹⁸

¹¹⁵*Id.*

¹¹⁶*Id.*

¹¹⁷*Restorative Justice in Schools: Restoring Relationships and Building Community*, DISP. RESOL. MAG., Summer 2012, at 10, 12-13.

¹¹⁸*Id.*

Feeling safe is another reason for the great results when using circles in the school setting. This is why it is paramount to include in the circle people who have experiences that are much closer to the experiences of the participants than those of the leader. If a victim or an offender believes that she is seen in a particularly positive light by a cousin, sibling, or grandparent, the presence of such a person in the circle can encourage the participant to hold onto that image of herself during the process. Holding onto a positive self-image can improve an offender's openness to accountability and empathy. The presence of people who are close to a participant also can help her feel acknowledged and validated and can even encourage her to feel a sense of self that is not defined by the specific conduct or events that led to the restorative justice process. It is crucial for participants to feel that their person, their experiences, and their circumstances are recognized without being judged.¹¹⁹

Circle justice has other benefits within the school setting. Training, or first-hand exposure by participation in its processes, can also dramatically affect the way in which some teachers and administrators understand the implications and effects of their interactions with students. Some educators assume that respect should flow only in one direction, i.e. from the students to the adults. Circle justice, however, exposes educators to the constructive power of reciprocal respect by teaching teachers to learn from others and about their students.

It can cause faculty and administrators to pause before reflexively resorting to the simple imposition of punishment. It can help those in authority see not only that there is another way, but also that their old ways are part of the problem. It can encourage an openness and flexibility in responding to problems that promotes creativity and elicits positive reactions from students. As a result, restorative justice programs can provide insight and tools to all members of the educational community, thus improving its health from multiple directions.¹²⁰

¹¹⁹*Id.*

¹²⁰*Id.*

Though it would seem that circles work well within schools, there are still many obstacles to overcome before it spreads rampantly within the realm of public education. One major obstacle is the feeling held by some educators, political leaders, and parents that circle justice is too soft to work. This barrier could be overcome if these people were to recognize the demands that circle justice makes on participants. Alternatively, these people could broaden their vision of what constitutes success. Students typically believe that it is easier to be suspended, or serve time in detention, than to confront the consequences of their conduct and the people their actions have harmed, and then to help construct a remedy or response for which they will be held responsible.

Another huge obstacle is rooted in the attitudes of the administrators and teachers who believe that they need not respect students as individual human beings and have a right to select the form of punishment for misconduct simply because they are the adults, or because they are in positions of authority. While such attitudes are by no means pervasive in public schools, they are not as uncommon as one might hope.¹²¹ Finally, other obstacles arise out of severe budget pressures and time constraints felt by teachers and administrators. Initially, moving circles into a school takes time and consumes financial resources, and some educators are immobilized by just the thought of being asked to do something more. However, over time, circles reduce demands on teachers and administrators, even if finding the resources for the initial investment is a real challenge.

For circle justice to be successful in schools: (1) it needs informed support from faculty and administration, (2) it must be administered in a manner that every time an occasion for its use arises, it is begun very promptly, and (3) it must be well integrated into and coordinated with a comprehensive plan for discipline that includes additional kinds of responses to particularly serious forms of misconduct.¹²²

¹²¹*Id.*

¹²²*Id.*

These are formidable challenges, but rising to meet them, over time, promises to yield extremely rich rewards for students, teachers, schools, and communities.¹²³ For example, a school-based circle in Minnesota succeeded in reducing behavioral referrals by 75 percent over the three years of its implementation.¹²⁴ Whether this qualifies as diversion, due to a reduction of referrals, or recidivism, by prevention of further infractions, may be subject to debate, but the result is nonetheless impressive. Preventing recidivism is often used as a long-term measure of the effectiveness of such programs and such prevention benefits offenders directly, and more broadly, benefits communities.¹²⁵

There has been some concern that the demonstrable outcome of reduction in recidivism should not be the only measure of effectiveness, but rather it should be placed in a broader context that includes the range of restorative goals. When examining the impact of the two most widespread forms of restorative justice dialogue on juvenile recidivism, a recent meta-analysis, by William Bradshaw and David Roseborough, found that victim offender mediation and family group conferencing together contributed to a 45 percent reduction in recidivism, with victim-offender mediation contributing to a 34 percent reduction and family group conferencing contributing to an 11 percent reduction.¹²⁶

V. ANTI-BULLYING SCHOOL PROGRAMS

This shall be quite a short chapter as the overall consensus in this field is that circles are better adapted than victim-offender mediation that unfortunately is relied on by many schools

¹²³*Restorative Justice in Schools: Restoring Relationships and Building Community*, DISP. RESOL. MAG., Summer 2012, at 10, 12-13.

¹²⁴*Id.*

¹²⁵Mark S. Umbreit & Betty Vos, Robert B. Coates, Elizabeth Lightfoot, *Restorative Justice: An Empirically Grounded Movement Facing Many Opportunities and Pitfalls*, 8 CARDOZO J. CONFLICT RESOL. 511, 543-44 (2007).

¹²⁶William Bradshaw & David Roseborough, *Restorative Justice Dialogue: The Impact of Mediation and Conferencing on Juvenile Recidivism*, FEDERAL PROBATION, December 2005, at 18.

today when it comes to the bullying problem.¹²⁷ Picking the appropriate restorative justice intervention must be carefully considered to lessen the likelihood of re-victimizing the victim. Because the nature of bullying involves intimidation and domination, victim offender mediation may be too threatening to a victim. Circles or family group conferences provide more support for the victim and better balance the playing field.

Failing to engage in circle justice often marginalizes the victims' needs to communicate their feelings and ask questions. Re-victimization can occur when victims are not empowered and their needs go unmet. Victims need the chance to repair the psychological harm and relational damage by participating in the process, and circle justice provides more of an opportunity for that to occur than with a punishment regime. The re-integrative shame of the offender is best accomplished when received from respected members of a person's circle of care and not authority figures such as principals and teachers. Offenders respond more readily to this disapproval if it comes from people with whom they have personal bonds. In addition, hearing directly from victims themselves impacts offenders to a much greater degree. Hearing from the victim and their own supporters often forces the offender to abandon rationalizations concerning why their behavior is not wrong.¹²⁸

VI. HEALING FROM HATE-CRIMES IN THE COMMUNITY

Throughout human history people have committed horrible offenses against individuals and cultural groups, motivated by hatred, racism, and persecution; indeed history is rife with examples that show this dark side of mankind. These hate crimes, as they have been specifically designated within the last three decades, include vandalism, robbery, harassment, assault, rape, murder, and other criminal acts where the victim is chosen because they belong to one of the

¹²⁷Susan Hanley Duncan, *Restorative Justice and Bullying: A Missing Solution in the Anti-Bullying Laws*, 37 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 267, 291 (2011).

¹²⁸*Id.*

below-mentioned groups. The term hate crime is applied to any “criminal offense committed against a person or property which is motivated in whole or in part by the offender’s bias against a race, religion, disability, sexual orientation or ethnic/national group.”¹²⁹

Victims of hate crimes experience all of the typical symptoms of posttraumatic stress: Vulnerability, anger, depression, physical ailments, learning problems, and difficult interpersonal relations. Moreover, victims tend to suffer these debilitating symptoms for longer periods of time than do victims of ordinary crime. Some victims can never overcome these effects and experience dramatic reductions in the quality of their lives.¹³⁰

People of all ages, races, and religions have been convicted of hate crimes. Although there are several recognized economic and political factors that may fuel the fires of hate, it is primarily cultural animosity and ignorance, which compel someone to act out against a targeted minority in a violent and destructive manner. People are quick to blame those who are different from themselves for any of their problems; blame then leads to fear and anger, which open the door for violence. One theme present in all hate crimes, regardless of their initial motivation, is their ability to send a message to all those similar to the victim that they are unwanted and are potential targets; this itself may often be the initial impetus for the crime. The danger in this type of crime lies not only in the harm done to the victim, but also in the fear and anger it spreads to the entire community.¹³¹ Therefore, this type of emotional wound to the community is well suited to be healed by circle justice. However, the circle should be used in conjunction with, not in lieu of, traditional penal systems.

Because the effects of hate crimes are particularly damaging to the community, it is imperative that the circle should incorporate the community into the healing process to allay the community’s fears as well as prepare them for the eventual reincorporation of the offender back

¹²⁹Brian Sapiro, *Healing A Fractured Community: The Use of Community Sentencing Circles in Response to Hate Crimes*, 9 CARDOZO J. CONFLICT RESOL. 207, 221-23 (2007).

¹³⁰*Id.*

¹³¹*Id.*

into the neighborhood. This can be achieved by bringing the healing of the victim to the forefront, rehabilitating the offender, and involving the community throughout the process.¹³²

Combining incarceration and other punishments with circle justice sends the message that while there are still consequences for one's actions, one will not simply be locked away and forgotten about, but rather, all the parties involved will have a chance at rehabilitation and at achieving a greater mutual understanding and appreciation of each other.

A. Circle v Hate Crime

Hate crime is different from other types of criminal activity in that even the most minor offenses can stir up deep-seated feelings of fear and anger. The impetus behind such crimes is the ignorance, bias and stereotypes harbored by the offender. Therefore, curing ignorance and erasing negative stereotypes is the only way to defeat such crimes. That is why circle justice is so effective with these crimes because through its processes, the victim and offender delve deep into the underlying causes of the crime and seek to remove any negative feelings towards one another.¹³³

The circle works well because it allows the community to take a very active role in the healing. Hate crimes have the unsavory ability to tear a community apart along racial, ethnic, and religious lines. Circle justice recognizes that factors contributing to hate crime could very well be problems stemming from the community at large. In communities with diverse populations, essentially throughout every corner of the melting pot that is the United States, a hate crime can make the targeted minority feel as though the entire majority is coming down on them.

If the actual perpetrator is caught and brought to justice, it is typically only the direct victim who is thought to be vindicated; so unless the crime reaches national media

¹³²*Id.*

¹³³*Id.*

attention the community is not considered and simply thought to have forgotten the event and moved on. But without treatment these emotions can fester and grow to create a general state of anxiety and resentment.¹³⁴

The circle creates an opportunity for the community to meet the offender and come face to face with the person who has caused so much fear and anger. Listening to their story and hearing their apology helps to remove the view of the offender as some sort of monster, thereby enabling the community to see him or her as just another misguided person. Removing the monstrous and often overwhelming facade of the offender can alleviate fears the community may have about such a person living amongst them. Participating in the circle can lead to a feeling of empowerment for the minority members of the community because the experience can transform the negative and consistently unsatisfied energy of rage into a powerful and socially productive yearning to go out into the community and address the topics discussed. By learning of the negative and ignorant ways they might be viewed, the community can educate others similar to the offender in such a way as to prevent further incidents.

Additionally, when the community gains a greater understanding of the offender, it facilitates a much smoother reintegration of the offender back into the community without any negative stigmas. Furthermore, after going through such a positive experience, the offender can be motivated to return to the community and educate others on the wrongs of bias and hate.¹³⁵ Finally, because the circle routinely allows community members to discuss in great depth community-wide problems and presents the opportunity to affirm community norms

¹³⁴*Id.*

¹³⁵*Id.*

and expectations of behavior, leading to significant change, the view spreads that in circle justice lays the seeds of true social or participatory democracy.¹³⁶

B. The Milwaukee Model

The following small excerpt describes a circle being used in one Milwaukee community. It is included here to enable the reader to visualize the circle in the same way, as did the fictitious opening paragraph of this paper.

They gathered on the north side of the city, where most of Milwaukee's violent crimes occur. There were two dozen members of the community and eight special guests - offenders, who had committed severely violent crimes, returning from prison. They sat in a traditional Native American talking circle on the second floor of what used to be a bank. It is now a community center for this poor, African-American neighborhood. With a lit candle in the center, the facilitator explained the purpose of the gathering and of the restorative practice of meeting in a circle. Those gathered included victims, neighborhood residents, the community prosecutor, faith leaders, business owners, police officers, parents of local school children, and the federal prosecutor who leads the Safe Streets Initiative. For the next two hours, participants reflected on how violence affected their lives. For some, it brought tears. For others, it brought a chance to tell their story. But for all, it was a transforming experience.¹³⁷

In 2007, because of its collaborative efforts in addressing crime, Milwaukee became one of eight cities in the country to implement a pilot project to decrease crime.¹³⁸ In particular, Milwaukee implemented the Safe Streets Initiative, emphasizing a second chance that included circles for offenders returning from prison and as an alternative to prosecution or incarceration for first-time offenders. This project, funded by a grant from the U.S. Department of Justice, sought to decrease crime by implementing alternative means of law enforcement, increased community engagement, and new practices in the Department of Corrections.¹³⁹ Since 2007, while law enforcement agencies have been conducting intensive surveillance, research, and

¹³⁶James Coben & Penelope Harley, *Intentional Conversations About Restorative Justice, Mediation and the Practice of Law*, 25 HAMLINE J. PUB. L. & POL'Y 235, 246-47 (2004).

¹³⁷*Neighborhoods Healed Through Restorative Justice*, DISP. RESOL. MAG., Fall 2008, at 16.

¹³⁸*Id.*

¹³⁹*Id.*

planning for gang take downs, Marquette Law School's Community Coordinators have been developing relationships, strengthening community ties, and holding circles for a variety of constituencies.

These experiences have been indisputably positive. For example, at one particular circle on the south side, a young member of the brutal gang, the Latin Kings, had just been released from prison. This gang member approached a compassionate officer after the circle and told him, "I've never had a cop talk like that to me before."¹⁴⁰ The police officer gave him his card and said, "If there's ever anything I can do to help you, give me a call."¹⁴¹ And the gang member did. Additionally, at these pilot sites for this program around the country, these contact notifications have been shown to reduce recidivism significantly. It is hard to deny that circles work their magic because they create a safe place for everyone at the table (pun intended as no tables are actually used in a circle!) while removing the boundaries that keep people separated. This is how the healing process evolves.

VII. CRIMINAL CASES- OFFENDER CONFERENCES

Probably the most prolific use of the circle occurs in the criminal justice arena. As outlined below, a comparison will illustrate the benefits as well as the shortcomings between a circle and another often used method, the victim offender mediation.

A. *The Circle*

In 2005, Hawaii Restorative Circles ("HRC"), a pilot program through the state's Department of Corrections, utilized the circle as an institutional re-entry initiative.¹⁴² The HRC program involves an offender, prison support staff, as well as family or natural support of the

¹⁴⁰*Id.*

¹⁴¹*Id.*

¹⁴²Jessica A. Focht-Perlberg, *Two Sides of One Coin - Repairing the Harm and Reducing Recidivism: A Case for Restorative Justice in Reentry in Minnesota and Beyond*, 31 *HAMLIN J. PUB. L. & POL'Y* 219, 253-56 (2009).

offender. The objectives of the circle are to reconcile harm caused by crime and to promote offender accountability. This is accomplished by identifying the necessary resources to develop a re-entry plan for the offender by creating a blueprint for a post-incarceration employment and housing plan.¹⁴³

Facilitators provide a written plan to all circle participants, and the group may schedule re-circles to provide follow-up support to the offender after release. Program outcomes are measured with non-controlled participant satisfaction surveys of a relatively small sample and the initial surveys yielded very positive satisfaction outcomes. The program's achievements have garnered renewed and increased support and funding from the Hawaii legislature to expand the programs to both men and women inmates at all Hawaii prison facilities.¹⁴⁴

B. Victim Offender Mediation

Bridges to Life ("BTL"), a nonprofit program run in conjunction with the Texas Department of Criminal Justice is designed to impact re-entry success for returning offenders.¹⁴⁵ BTL currently operates in twenty-five Texas prisons. However, unlike the Hawaii program, which uses the circle, BTL utilizes Victim Offender Mediated Dialogue ("VOMD"), a facilitator-mediated restorative process involving offenders, victim surrogates, and trained volunteer facilitators, but the community is not involved.

BTL is a pre-release, faith-based, in-prison VOMD program that focuses on offender rehabilitation through reparation to the victim. The structure of the BTL program is a twelve-week, two-hour, volunteer-facilitated group session with offenders and surrogate victims. BTL uses a combination of victim impact panels and a curriculum focusing on reparations, healing and accountability. The program has two key goals: (1) to reduce recidivism; and (2) to promote

¹⁴³*Id.*

¹⁴⁴*Id.*

¹⁴⁵*Id.*

reparation between victims and offenders. The stark difference is that the community is not involved as in the circle, just the victim and the offender.¹⁴⁶

C. Youth Circles

In *Peacemaking Circles & Urban Youth*, Carolyn Boyes-Watson provides a telling narrative that offers readers a descriptive overview of the minutia and miracles of a circle in action.¹⁴⁷ In this story, Boyes-Watson, a sociologist who heads Suffolk University's Center for Restorative Justice, paints a lively picture of local community groups and their members working together to break down organizational as well as individual barriers between them. At the center of *Peacemaking Circles & Urban Youth* is an innovative restorative justice-oriented community-based youth organization, Roca, which is Spanish for rock, that serves the communities of Chelsea, Revere, and East Boston, Massachusetts. Circles of accountability, or peacemaking circles are a key component of Roca's interventions with local young people. For this study, Boyes-Watson interviewed forty-three people, including young people, agency staff, and various community partners. Many of the staff members, themselves in their late teens or early twenties, originally came to the program as "gang-involved, immigrant, or street-wise teens."¹⁴⁸ Boyes-Watson also participated in, or observed, many Roca peacemaking circles, trainings, and meetings over a multi-year period.

Roca's mission is to promote opportunities for youth to live safe, self-sufficient lives. *Peacemaking Circles & Urban Youth* opens with an overview of the everyday challenges confronting urban youth, including discrimination and neglect, violence and abuse, poverty, addiction, and incarceration. Subsequent chapters describe Roca's model for positive youth development and the ways peacemaking circles help create meaningful opportunities, space,

¹⁴⁶*Id.*

¹⁴⁷Russ Immarigeon, *Restorative Justice Is Changing*, FED. PROBATION, June 2010, at 53, 54-55.

¹⁴⁸*Id.*

emotional awareness and healing, and responsive organizations for young people confronting these “modern monsters.”¹⁴⁹In the final chapter, Boyes-Watson concludes,

Injustices within our society rarely find remedy within the narrow confines of our legal system. Indeed, the young people at Roca are quite cynical about the meaning of justice within our society. They are not cynical, however, about peacemaking circles. Quite the opposite, they intuit a deep connection between their experience within circles and a very different meaning of justice that emerges for themselves and their communities as a result.¹⁵⁰

D. Prison Circles

Cheryl Swanson’s *Restorative Justice in a Prison Community* explores the use of circles at the other end of the correctional spectrum. Swanson, an associate professor of criminal justice and legal studies at the University of West Florida, was given access to a faith-based restorative justice honor dorm at the W.C. Holman Correctional Facility, a maximum-security prison in southwest Alabama. According to Swanson,

The organizational hierarchy of the dorm facilitates responsibility and gives inmates an opportunity to learn skills such as supervision, report writing, program implementation, rule application, data entry, and working with others. Some components of the dorm focus more directly on restorative philosophy emphasizing peaceful conflict resolution, inclusiveness, accountability, respect, and integrity. These include circles, education, and mentoring.¹⁵¹

Swanson collected data for her book through direct observation and prisoner and prison staff surveys. In 2006, for example, she interviewed sixty-three corrections officers and their supervisors, which equated to about two-thirds of the prison’s staff. These officers reported mixed feelings about the use of restorative justice. Some officers raised concerns about conflicts between rule enforcement and restorative justice that mirrored the concerns of the youth detention administrator, about the quality of screening devices used for identifying particular

¹⁴⁹*Id.*

¹⁵⁰*Id.*

¹⁵¹*Id.*

prisoner participants, and about security sentiments because some officers felt too many life-without-parole prisoners were allowed in the program. More favorably, other officers liked the improved opportunities such programming gave prisoners to change and accept responsibility for their behavior. They also appreciated how the program seemed to enhance prisoner cooperation and respect and reduce the number of rule violations. In particular, officers saw that the program improved self-governance in the dorm and that the general atmosphere of the facility was clean, quiet, and orderly.

E. Family Circles

Finally, circles of various kinds extend the family group conferencing idea, within the context of gender violence, to include community members who may not be directly related to the offender or victim, but who nevertheless have been affected by the crime.¹⁵² In circles, whether they are limited to family and friends or not, the emphasis is similarly on direct communication, truth-telling, and accountability by: (1) establishing a consensus about the harms done in the past; (2) facilitating an emotional interchange between perpetrator and victim; and (3) forging an agreement about what will be done in the future to address past harms and avoid future ones.¹⁵³ In a circle, the perpetrator of gender violence is not able to ignore, avoid, or belittle criticism of his actions, and is forced to give a justifying account, not only to the victim, but also to third parties. Circle justice seems well positioned to engage the perpetrator of gender violence in a process that might bring him to genuine change by providing an environment that is supportive rather than traumatizing.

Many believe that states could curb costs incurred by their Department of Corrections and their formal justice system through the use of circles as opposed to releasing prisoners and

¹⁵²Angela P. Harris, *Heteropatriarchy Kills: Challenging Gender Violence in A Prison Nation*, 37 WASH. U. J.L. & POL'Y 13, 43 (2011).

¹⁵³*Id.*

repealing mandatory minimum sentences. Circles are community-directed processes that cost significantly less than formal justice processes, and provide significantly greater benefits. Overall, circles provide a “less costly means of processing cases often in a much shorter time span between offence and disposition” than the formal justice system.¹⁵⁴ Circles benefit communities by incorporating “local concerns and rely[ing] extensively upon local resources to implement sentencing plans.”¹⁵⁵ Since circles use community-based resources, they are able to generate “substantial savings by lowering process[ing] costs and by improving results.”¹⁵⁶ In general, circles can significantly lessen expenditures by “reducing demands on justice services, by reducing recidivism, by enhancing preventive capacities within communities and by supplementing justice services.”¹⁵⁷

How much judicial sway do circles garner in the criminal law field? In one instance, the Minnesota Supreme Court held that a District Court had the authority to stay adjudication of an offender’s guilt based upon a circle’s recommendation.¹⁵⁸ In *State v. Pearson*, the offender was charged with two counts of felony theft. Instead of permitting the court to adjudicate the case, “the [offender] and the State negotiated a plea agreement, under which the case would be referred to a circle prior to sentencing by the court.” The circle considered numerous factors, which influenced its decision, including the fact that Pearson was not a risk to public safety because: (1) she did not have a felony record; (2) she had no pattern of breaking the law; (3) a felony record would impede her ability to obtain future employment; (4) a traumatic family event was a contributing factor in the offense; and (5) Pearson’s case would likely have been diverted

¹⁵⁴*Id.*

¹⁵⁵*Id.*

¹⁵⁶*Id.*

¹⁵⁷*Id.*

¹⁵⁸Janelle Smith, *Peacemaking Circles: The "Original" Dispute Resolution of Aboriginal People Emerges As the "New" Alternative Dispute Resolution Process*, 24 HAMLINE J. PUB. L. & POL’Y 329, 330-36 (2003).

from felony prosecution had she been able to pay down the amount of restitution owed.¹⁵⁹ Therefore, based on these factors, the circle decided that the offender should “receive a stay of adjudication, pay restitution, obtain credit counseling, perform community service, participate in support/follow up circles, have no same or similar offenses, remain law abiding, and appear in court for sentencing.”¹⁶⁰ Appropriately, the District Court sentenced the offender according to the circle’s recommendation. Thus, in its decision to reinforce the circle’s decision-making authority, the Minnesota Supreme Court recognized the value of circles.

First, circles offer support for victims and reintegrate “victim[s] and offender[s] back into community life.” Second, offenders are given the chance to “better understand the impact of their conduct” when they are brought together with victims during the circle process. Third and lastly, circles offer victims an opportunity to assist in the resolution of the offense. Overall, circles are beneficial community-based programs that strive to prescribe appropriate sanctions that reintegrate offenders back into the community, while offering support to offenders, victims, and communities.¹⁶¹

In several United States cities, namely Austin, Texas, Des Moines, Iowa, and Milwaukee, Wisconsin, prosecuting attorney offices routinely offer to victims of crime the choice to participate in restorative dialogue with the offender and others affected by the crime through victim-offender mediation, family group conferencing, circles, or related programs.¹⁶² A program in Indianapolis works closely with the police department in offering family group conferencing services, during which young offenders and their families meet the individuals they have

¹⁵⁹*Id.*

¹⁶⁰*Id.*

¹⁶¹*Id.*

¹⁶²Mark S. Umbreit & Marilyn Peterson Armour, *Restorative Justice and Dialogue: Impact, Opportunities, and Challenges in the Global Community*, 36 WASH. U. J.L. & POL’Y 65, 71-72 (2011).

victimized and participate in dialogue with each other toward repairing the harm, resulting in a significant reduction in recidivism among these offenders.

VIII. CRIMINAL CASES - JUVENILE RECIDIVISM

The literature on circles is primarily descriptive.¹⁶³ There are only two known studies of circles, both of which reported many positive impacts.¹⁶⁴ Neither study, however, examined the effect of circles on recidivism. Bradshaw and Roseborough, mentioned earlier in this paper, conducted the first meta-analysis that examined the effectiveness of the two most prominent restorative justice dialogue programs in reducing juvenile recidivism. The use of meta-analytic methods provided a useful means for summarizing diverse research findings across restorative justice studies and synthesizing these findings in an objective manner. The use of an effect size was an easily interpreted way of assessing the strength of an intervention effect.¹⁶⁵ To be included in the meta-analysis, each study had to: (1) focus on juvenile offenders; (2) examine restorative justice intervention outcomes on recidivism; and (3) utilize a restorative justice intervention group and a comparison group. The search identified thirty-three articles in the area of restorative justice and recidivism, of which nineteen studies met the selection criteria. The sample for this study included 11,950 juveniles from twenty-five different service sites.

The average effect size of .26 found in this study represented an intervention effect that was double that of the previously reported effect sizes of .10 found in traditional justice programs.¹⁶⁶ These results are particularly meaningful given the typical brevity of restorative justice dialogue interventions. They add to the empirical base of the effectiveness of restorative

¹⁶³Morris, R. (2000). Stories of transformative justice.

¹⁶⁴Stuart, B. (1996). Circle sentencing in Canada: A partnership of the community and criminal justice system. *INTERNATIONAL JOURNAL OF COMPARATIVE AND APPLIED CRIMINAL JUSTICE*, 20, 2.

¹⁶⁵ William Bradshaw, Ph.D. & David Roseborough, MSW, *Restorative Justice Dialogue: The Impact of Mediation and Conferencing on Juvenile Recidivism*, FED. PROBATION, December 2005, at 15, 16.

¹⁶⁶Lipsey, M. (1995). What do we learn from 400 research studies on the effectiveness of treatment with juvenile delinquents? In J. McGuire (Ed.), *What works: Reducing reoffending - guidelines from research and practice* (pp. 63 - 78). New York: John Wiley & Sons.

justice dialogue programs in reducing juvenile recidivism and support the use of restorative justice programs as empirically supported interventions for juvenile offenses.¹⁶⁷

IX. WELFARE-TO-WORK PROGRAMS

Welfare-to-work programs, according to Marie Failing, have not caught on to the fact that simplistic work rules that tie benefits, and thus, a mother's ability to meet her family's basic needs, to the failure to be successful in market economy work cannot succeed for the same reasons they do not work in criminal sentencing situations.¹⁶⁸ Founding these work programs on paradigms that punish recipients, treat them as diseases upon the body politic, or send forth a multitude of unclear expectations about what a recipient owes the public for support are ultimately self-defeating. Their embrace of unrealistic expectations about the trajectory of human life, its roller coaster of successes, stalls and defeats, and failure to attend to the critical need for relational support in order for change to occur virtually guarantees the defeat of these programs. Restorative programs, by contrast, offer a realistic alternative that considers the complexity of reasons why individuals need public assistance and the obstacles that make it difficult for them to participate in the market economy. Just as they do with criminal circles, restorative circle participants bring with them the core values that we may expect those in the market economy to embrace and participate with welfare recipients in living out those values.¹⁶⁹

Failing contends that circles are not "pie-in-the-sky" alternatives.¹⁷⁰ They may appear economically inefficient in their pairing of several members of the community with one welfare recipient rather than one harried caseworker with dozens of recipients. Thus, local communities

¹⁶⁷ William Bradshaw, Ph.D. & David Roseborough, MSW, *Restorative Justice Dialogue: The Impact of Mediation and Conferencing on Juvenile Recidivism*, FED. PROBATION, December 2005, at 15, 16.

¹⁶⁸ Marie A. Failing, *A Truly Good Work: Turning to Restorative Justice for Answers to the Welfare-to-Work Dilemma*, 15 GEO. J. ON POVERTY L. & POL'Y 209, 234-43 (2008).

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

that adopt these circles to surround welfare-to-work recipients may find the need to focus their efforts on that subgroup of welfare recipients who cannot easily transition to mainstream employment because of the barriers they face, from lack of education to domestic abuse to limited work skills and family obligations or health crises. However, the promise of restorative justice is that it involves the community as a whole in the process of healing itself. In the process, such programs serve the additional valuable purpose of dispelling the many myths about welfare recipients and their families. Most importantly, the countless accounts of the success of restorative programs, particularly in the criminal system, attest that restorative justice largely works. Except for its success in scaring or wearing recipients down as they attempt to secure public benefits, the current welfare-to-work effort cannot say the same.¹⁷¹ This realistic and multi-faceted approach to human motivations, needs, drives, and relationships anchored in the recipient's willingness to change is much more likely to succeed with a welfare recipient who is facing the employment market than the threat of loss of benefits.¹⁷²

X. CONCLUSION

You have now seen how circle justice has been used in Australia, Canada, and the United States in the context of: (1) domestic violence and batterer intervention programs; (2) programs aimed at keeping kids in schools; (3) anti-bullying programs in schools; (4) healing fractured communities when hate crimes have run rampant; (5) offender conferences in criminal cases; (6) recidivism in juveniles; and (7) welfare-to-work programs. It was this author's intent to reveal the healing within the once-abusive relationships in the domestic realm, the school realm, and the community realm, including prison. Did you feel the healing that took place when people shared their pain, their anger, their joy, and their happiness . . . when people had a voice? At the start of

¹⁷¹*Id.*

¹⁷²*Id.*

the paper, the hope and intent was to have not only educated you on circle justice, but more importantly inspired you to seek out ways to use circle justice within your realm of law and ultimately to heal clients in a more holistic way than cold hard black letter law alone could ever do. Have I achieved that goal?

I ask you to share my vision. Circle justice as a tool to heal families torn apart by the side effects of divorce; so that instead of children being used to wage war between one parent and the other, the family can find an amicable way to raise the children in separate, but calm households. Circle justice as a tool to help neighborhood disputes, within the confines of, say, homeowners associations, from barking dogs' complaints to neighborhood block watch programs. Circle justice as a tool used every time a criminal re-enters society after incarceration so that with the community's ongoing support he or she would be less likely to re-offend and the community would be less likely to fear a felon and instead offer him or her work to enable return to the status of a productive member of society. Circle justice as a tool used within the workplace, to restore communication, whenever employees' discussions with each other or with management break down. Circle justice as a tool used within a college or university, to resolve conflict between students or between students and administration. Can you think of other uses? The possibilities are as bountiful as the thoughts in the human mind.