

INDIGENOUS RESTORATIVE JUSTICE: APPROACHES, MEANING & POSSIBILITY

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ABSTRACT

This paper seeks to generate further understanding of Indigenous knowledge, methods, and laws relating to Indigenous restorative justice as a means to consider how we might better resolve various forms of disputes and reinvent versus revise Canada's criminal justice system. It also considers some of the ways in which funding and programming decisions of the state might obscure and perhaps even deepen the disparity in the relationship between Canada and Indigenous Peoples. Through various means, such as the use of indicators to support government agendas as well as theories of retribution and proportionality, the criminal justice system continues to be a site of ongoing colonialism. This paper considers how we might engage in decolonization by making more room for the holistic healing found within Indigenous models of restorative justice.

CONTENTS

I.	Coyote Gets a Name	314
II.	Overview	315
III.	Defining Restorative Justice & Diversion.....	316
IV.	Biidaaban: Some Context for Restorative Justice Initiatives	317
V.	Debwewin as Common Ground.....	320
VI.	Painting Pictures by Numbers	321
VII.	Restorative Justice & Indicators	322
VIII.	Colonialism Came...And Settled In	324
IX.	Coyote's Imagination, the Canadian Criminal Justice System & Punishment	327
X.	Addressing Overrepresentation through the Criminal Justice System?	330
XI.	Some Reflections.....	333

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I. COYOTE GETS A NAME¹

In a time before the people came, plants grew in abundance. Trees stood close to each other and grew so high they touched the clouds. One day, messengers called all of the four-legged, winged ones, crawlers, diggers and swimmers to gather at a great lake by the forest. When the animals congregated, a voice spoke. It was a powerful voice that travelled through all of the plants and trees – the original surround-sound. The animals were told people would arrive soon and would want to know what to call them. Everyone at the gathering was instructed to return to the lake at sunrise, when one by one they would be invited into a great lodge and given a name.

Upon hearing this, Coyote jumped up and down with excitement. He spent the remainder of the day bragging to all who would listen that he was going to get a new name. Coyote decided he would be called Grizzly Bear, leader of the mountains. But as he meandered through the forest greeting other animals, he changed his mind and insisted on the name Salmon, chief of the swimmers. Further on, he declared he would be known as Owl, master of the night sky. As dusk came to the forest, Coyote met up with his little brother, Fox. Fox told Coyote that all of the animals were already calling him a new name. Coyote's chest swelled with pride. Fox told his big brother that he was being called Fool. Hiding his hurt feelings, Coyote laughed and told Fox that it did not matter because he would be the first into the lodge and would be given a spectacular new name that would be the envy of all.

Ignoring Fox – as usual – Coyote ran through the forest telling everyone he was staying up all night to be first in line at the lodge. As the moon rose, Coyote lounged around a fire. Soon, his eyes grew heavy and Coyote slept, dreaming of names. He woke with a start and realized the sun was high. Panicked he loped to the lodge and without waiting for an invitation, ran inside. He asked to be called Grizzly Bear, but that name was taken at dawn. He proposed Salmon. It too had already been given. Coyote hung his head when he was told that Owl was also gone.

The voice told Coyote his name was the only one left. If he were named Grizzly, the people would look for him in the mountains, but not in the plains or forests. If he were named Salmon, people would look to catch him in the water and not see his beautiful, bushy tail. The name Owl would mean Coyote's gorgeous coat would be missed in the sunlight while people looked to the trees at night. But most importantly, Coyote was told to keep the name Coyote because it came with two gifts meant only for him. First, he would be able to create whatever he could imagine. Second, he would be able to come back to life after he died. Coyote was so thrilled to have been given these gifts he forgot all about wanting a new name and

¹ There are many stories of Coyote, who is a good teacher. This particular story has been told many times by a number of people much wiser than me. For more on this particular version, see S Strauss, *Coyote Stories for Children* (Oregon: Beyond Words Publishing, 1991).

bolted out of the lodge. Coyote was soon very busy. He ran through the forest creating a world with his imagination, preparing things for the people to come.

II. OVERVIEW

The relationship between Canada and Indigenous Peoples² continues to be fraught with difficulties.³ Yet, approximately twenty-five years ago – circa 1990 – Canada entered into an experiment aimed at addressing the disproportionately large numbers of Indigenous Peoples appearing in courts.⁴ The Crown began funding Aboriginal justice programs⁵ specifically aimed at reducing the number of Aboriginal offenders in the criminal justice system.⁶ In particular, it was recognized that Aboriginal offenders should be dealt with in more culturally appropriate and meaningful ways.⁷ Advocates – including some within the Crown – devised plans to create justice initiatives that might address the system itself.⁸ Various Indigenous communities created restorative justice initiatives⁹ meant to draw together all parties who had been impacted by harm, with a view to restoring community harmony.

² As often as possible, I try to use the names people call themselves. When that is not possible, I use the term ‘Indigenous Peoples’ to identify a larger collective of ‘Aboriginal’ people as defined by the *Constitution Act, 1982*. Sometimes in text the word ‘Aboriginal’ is also used in place of ‘Indigenous’. I look forward to a time when such explanations are no longer needed.

³ John Borrows, “With or Without You: First Nations Law (in Canada)” (1996) 41:3 McGill LJ 629 [Borrows, “With or Without You”].

⁴ For more see: Michael Jackson, “Locking Up Natives in Canada” (1989) 23:2 UBC L Rev 215; Carol La Prairie, “The Role of Sentencing in the Over-Representation of Aboriginal People in Correctional Institutions” (1990) 32:3 Can J Crim 429; Rupert Ross, “Leaving our White Eyes Behind: The Sentencing of Native Accused” (1989) 3 Can NL Rev 1.

⁵ For more of the reports circulated in the late 1980’s and early 1990’s upon which much consideration was given to Aboriginal overrepresentation in the criminal justice system see: Canada, Solicitor General, *Task Force on Aboriginal Peoples in Federal Corrections, Final Report* (Ottawa: Minister of Supply and Services, 1988); Public Safety Canada, *CCRA 5-Year Review: Aboriginal Offenders* (Ottawa: Minister of Supply and Services, 1998); *Report on the Commission on Systemic Racism in the Ontario Criminal Justice System* (Toronto: Queen’s Printer for Ontario, 1995).

⁶ Jonathan Rudin, *Aboriginal Peoples and the Criminal Justice System* (Toronto: Ipperwash Inquiry, 2005).

⁷ PA Monture-Okanee & ME Turpel, “Aboriginal Peoples and Canadian Criminal Law: Rethinking Justice” (1992) 26 UBC L Rev 239; J Harding, YK Macdonald & D Macdonald, *Overcoming Systemic Discrimination Against Aboriginal People in Saskatchewan: Brief to the Indian Justice Review Committee and the Metis Justice Review Committee* (Regional: Prairie Justice Research, 1992); Stephen G Coughlan, “Separate Aboriginal Justice Systems: Some Whats and Whys” (1993) 42 UNB LJ 259.

⁸ Rupert Ross, “Restorative Justice: Exploring the Aboriginal Paradigm,” (1995) 59:2 Sask L Rev 431; AC Hamilton & CM Sinclair, *Report of the Aboriginal Justice Inquiry: The Justice System and Aboriginal People*, vol 1 (Winnipeg: Government of Manitoba, 1991); Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (Ottawa: Canada Communication Group, 1996).

⁹ Though there may be restorative justice initiatives that are non-Indigenous based, this paper focuses on Indigenous – in particular Anishinabe – restorative justice initiatives.

Today, in spite of the efforts of restorative justice and the growth of diversion programs, the number of Indigenous Peoples entering the criminal justice system remains disproportionate and at an all-time high.¹⁰ How might we define the success of restorative justice, and what should we use to measure it? What, if anything, have Indigenous restorative justice methods contributed to addressing this overrepresentation? When we consider restorative justice, do we mean something fundamentally different from the Canadian criminal justice system or is it simply the same system - like Coyote - dressed up with a different name?

III. DEFINING RESTORATIVE JUSTICE & DIVERSION

Though definitions of ‘restorative justice’ vary, the foundational tenets of restorative justice support the creation of “social arrangements that foster human dignity, mutual respect and equal well-being.”¹¹ Indigenous restorative justice is typically a healing process based in Indigenous legal traditions.¹² Restorative models seek to attain process-oriented results “specifically associated with victims of crime and those who perpetrate those crimes.”¹³ John Braithwaite offers a broad approach:

[R]estorative justice is not simply a way of reforming the criminal justice system, it is a way of transforming the entire legal system, our family lives, our conduct of the workplace, our practice of politics. Its vision is of a holistic change in the way we do justice in the world.¹⁴

In these ways, restorative justice is not necessarily achieved by what is often referred to in Canada as diversion. In some respects, diversion is similar to restorative justice; in the same way that at a distant glance coyotes and wolves might be mistaken for each other. Principally, a diversion program is an alternative to prosecution.¹⁵ Diversion is the practice of moving an accused out of the courts and into a Crown sanctioned program, which provides an opportunity for the accused to make reparations – often through community service hours. Although Indigenous

¹⁰ Maureen Brosnahan, “Canada’s Prison Population at All Time High” *CBC News* (27 November, 2013) online: <www.cbc.ca/news/canada-s-prison-population-at-all-time-high-1.2440039>.

¹¹ D Miller, *Social Justice* (Oxford: Oxford University Press, 1976) as cited by D Sullivan & Larry Tiftt, “What Are the Implications of Restorative Justice for Society and Our Lives?” in H Zehr & B Towes, eds, *Critical Issues in Restorative Justice* (Colorado: Lynne Rienner Publishers Inc, 2010).

¹² JW Zion, “Monster Slayer and Born for Water: The Intersection of Restorative and Indigenous Justice” (1999) 2:4 *Contemporary Justice Rev* 359; and R Yazzie, “Navajo Peacemaking: Implications for Adjudication-Based Systems of Justice” (1998) 1:1 *Contemporary Justice Rev* 123.

¹³ Jaimie P Beven et al, “Restoration or Renovation? Evaluating Restorative Justice Outcomes” (2005) 12:1 *Psychiatry, Psychol & L* 194 at 195.

¹⁴ John Braithwaite, “Principles of Restorative Justice” in Andrew Von Hirsh et al, eds, *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms?* (Oxford: Hart, 2003) [Braithwaite, “Principles”].

¹⁵ Diversion programs in Canada include young offenders and offenders who suffer from mental health issues. This paper refers to diversion programs focused on Aboriginal offenders. For one such example, see the diversion program of Aboriginal Legal Services of Toronto online at <www.aboriginallegal.ca/#!/community-council-program/c24vq>.

restorative justice models may also include community service hours, they are based on Indigenous legal orders rather than on the Canadian criminal justice model. Restorative justice is a location of decolonization in that Indigenous models of justice assist in revitalizing Indigenous laws through practice.¹⁶ Diversion programs lean toward reform of the criminal justice system, whereas Indigenous restorative justice seeks to reinvent the criminal justice system. Reinvention requires imagination, which Coyote reminds us is a gift – one that we are all possessed of as well. But the question remains: how do we wield it?

IV. BIIDAABAN:¹⁷ SOME CONTEXT FOR RESTORATIVE JUSTICE INITIATIVES

There is a substantial body of literature citing the positive impact of Indigenous-based restorative justice initiatives¹⁸ in redirecting some of the high number of Indigenous offenders away from incarceration¹⁹ and addressing intimate violence,²⁰ which disproportionately impacts Indigenous women.²¹ The literature examines how lower recidivism rates typically result when such programs are in place,²² a result

¹⁶ Val Napoleon & H Friedland, “Indigenous Legal Traditions: Roots to Renaissance” in Markus D Dubber & Tatjana Hörnle, eds, *The Oxford Handbook of Criminal Law* (Oxford: Oxford University Press, 2014) 225.

¹⁷ ‘Biidaaban’ is the Anishinaabe word meaning ‘dawn comes’ or ‘dawn arrives’, as it was taught to me by Lorraine McRae, an Elder from Rama First Nation. Biidaaban is a community healing-based model of restorative justice rooted in Anishinabe legal principles that was created by members of Rama First Nation for offenders from Rama First Nation and the broader Rama community. It opened in 1993 and took years to build within the community. Biidaaban is a model of restorative justice created by the First Nation for the First Nation, founded on the premise that restorative justice requires holistic healing. As such, the program takes time for each of the participants who have harmed and those who have been harmed to come to a place of wellness. For more see: Public Safety Canada, *Biidaaban: The Mnjikaning Community Healing Model* by Joe Couture & Ruth Couture (Ottawa: Public Safety Canada, 2003) online: <www.publicsafety.gc.ca/cnt/rsrscs/pblctns/bdbn/index-en.aspx> [Biidaaban].

¹⁸ For more see: Daniel W Van Ness & Karen Heetderks Strong, *Restoring Justice: An Introduction to Restorative Justice*, 5th ed (New York: Routledge, 2015); Elmar GM Weitekamp & Hans-Jürgen Kerner, eds, *Restorative Justice, Theoretical Foundations* (New York: Routledge, 2011); EJ Dickson-Gilmore & Carol La Prairie, “Will the Circle be Unbroken?”: *Aboriginal Communities, Restorative Justice, and the Challenges of Conflict and Change* (Toronto: University of Toronto Press, 2005); C Andersen, “Governing Aboriginal Justice in Canada: Constructing Responsible Individuals and Communities Through ‘Tradition’” (1999) 31:4 *Crime L & Soc Change* 303; Ross, *supra* note 8.

¹⁹ A Cameron, “Stopping the Violence Canadian Feminist Debates on Restorative Justice and Intimate Violence” (2006) 10:1 *Theor Criminol* 49; CT Griffiths, “Sanctioning and Healing: Restorative Justice in Canadian Aboriginal Communities” (1996) 20:2 *Intl J Comp & Applied Crim J* 195.

²⁰ K Daly & R Immarigeon, “Past, Present, and Future of Restorative Justice: Some Critical Reflections” (1998) 1:1 *Contemporary Justice Rev* 21; Julie Stubbs, “Beyond Apology? Domestic Violence and Critical Questions for Restorative Justice” (2007) 7:2 *Criminol & Crim J* 169; Ruth Busch, “Domestic Violence and Restorative Justice Initiatives: Who Pays if We Get it Wrong?” in Heather Strang & John Braithwaite, eds, *Restorative Justice and Family Violence* (Cambridge: Cambridge University Press, 2002) at 223.

²¹ John Borrows, “Aboriginal and Treaty Rights and Violence Against Women” (2013) 50:3 *Osgoode Hall LJ* 699.

²² Jeff Latimer, Craig Dowden & Danielle Muise, “The Effectiveness of Restorative Justice Practices: A Meta-Analysis” (2005) 85:2 *The Prison Journal* 127.

sometimes insufficient for critics who view such programs as allowing offenders to escape punitive reprimand – as though conviction and imprisonment are the only real forms of punishment.²³ There are also real concerns about victim participation due to the offender-oriented nature of some restorative justice models.²⁴ Some restorative justice programs, such as Biidaaban and Hollow Water,²⁵ address the latter group of concerns by allowing voluntary victim participation and ensuring specific victim supports throughout the process.²⁶ Moreover, though victim participation concerns remain valid, those concerns should be balanced against the frequent lack of restitution for the harm caused to victims, and the way in which court processes often subject victims to ruthless cross-examination. In exploring the value of restorative justice, we need to remember that statistics, numbers and data may conspire to either reveal or subvert meaning. In an era of rising neo-liberal policy-making,²⁷ measurement has become significantly important in rationalizing government choices, including the choice of which areas should receive attention and which should not.²⁸

This dynamic shifts attention from the principles of restorative justice towards the requirements of securing funding for diversion programs – where volume is a key metric of success and where Indigenous knowledge focused on healing becomes less valuable. Community healing is restorative justice,²⁹ but it takes time and effort.³⁰ For example, Biidaaban was established around the core tenet

²³ Allison Morris, “Critiquing the Critics: A Brief Response to Critics of Restorative Justice” (2002) 42:3 Brit J Crim 596.

²⁴ M Achilles & H Zehr, “Restorative Justice for Crime Victims: the Promise, the Challenge” in G Bazemore & M Schiff, eds, *Restorative and Community Justice Cultivating Common Ground for Victims, Communities and Offenders* (Cincinnati: Anderson, 2001) 87.

²⁵ For more on Hollow Water in Manitoba – which helped inform the first thinkers in Rama First Nation relating to Biidaaban – see: Katherine Beaty Chiste, “The Origins of Modern Restorative Justice: Five Examples from the English-Speaking World” (2013) 46:1 UBC L Rev at 33; Megan Stephens, “Lessons from the Front Lines in Canada’s Restorative Justice Experiment: The Experience of Sentencing Judges” (2007) 33:1 Queen’s LJ 19. See also: M Wildcat, “Restorative Justice at the Miyo Wahkotowin Community Education Authority” (2011) 48:4 Atla L Rev 919.

²⁶ *Biidaaban*, *supra* note 17 at 104. It is also of note that although I have used the terms “victim” and “offender” throughout this paper, Biidaaban materials consistently refer to victims as ‘those harmed’ and offenders as ‘those who have harmed’. Participation in the Biidaaban model is intended to both empower and promote healing among victims. This is in contrast to the process often forced on victims by the criminal justice system, which may result in revictimization. That stated, since the criminal justice system considers crimes to be against the state, there are few options for victims within the process that are designed to empower individuals.

²⁷ See Colin Crouch, *The Strange Non-death of Neo-liberalism* (Place: Polity Press, 2011); Erhard Berner and Benedict Phillips, “Left to Their Own Devices? Community Self-help between Alternative Development and Neo-liberalism” (2005) 40:1 Community Development Journal 17; Susanne MacGregor, “Welfare, Neo-liberalism and New Paternalism: Three Ways for Social Policy in Late Capitalist Societies” (1999) 22:67 Capital & Class 91.

²⁸ Sally Engle Merry, “Measuring the World” (2011) 52:3 Current Anthropology S83.

²⁹ ME Turpel-Lafond, “Sentencing within a Restorative Justice Paradigm: Procedural Implications of *R. v. Gladue*” (1999) 43:1 Crim LQ 34; and *Biidaaban*, *supra* note 17 at 81–82.

³⁰ *Ibid.*

that healing must happen not solely between the offender and victim but the whole of the community.³¹ To this end, participation in Biidaaban's process is open for community members. The program has a recidivism rate – defined simply as any return to correctional custody³² – of less than five percent.³³ Almost consistently, recidivism rates in restorative justice models are lower than the criminal justice system.³⁴ Allowing for varying rates between violent and non-violent subsequent offences, offenders in Canada's criminal justice system have a recidivism rate of approximately twenty-seven percent.³⁵ The recidivism rate is slightly higher for Indigenous men.³⁶ By this measure, Biidaaban is a model of success. So, why are the courts not demanding access to Indigenous restorative justice models? Why are legal advocates not rushing in - like Coyote did into the lodge - excited at the successes of Biidaaban and seeking more?

During the last few years, the Crown seems to have leaned toward justice programs that provide high numbers of diverted accused to generate positive statistics versus the longer process of restorative justice. Yet, healing is complicated and takes time. Biidaaban does not adopt a criminal justice model but rather is rooted in Anishinabe legal traditions of restoration with a focus on community healing.³⁷ To participate, both the offender and the victims must provide their consent. If those who have been harmed do not participate, Biidaaban is typically unavailable because the process of healing needs to be engaged by all parties.³⁸ Full participation matters. If those who cause harm are able to address the underlying cause of their actions, repair the harm caused to victims, and form healthier family and community relationships, then their recidivism rate drops. This, in turn, leads to a sustainably reduced harm rate. However, rather than seek to replicate the Biidaaban model, the

³¹ *Biidaaban*, *supra* note 17 at 43-44; 104-107.

³² Calculating recidivism is complicated. For more see: SI Vrieze & WM Grove, "Multidimensional Assessment of Criminal Recidivism: Problems, Pitfalls, and Proposed Solutions" (2010) 22:2 *Psychological Assessment* 382.

³³ *Biidaaban*, *supra* note 17.

³⁴ Morris, *supra* note 23. Though a few studies have demonstrated an increased recidivism rate in relation to restorative justice, the findings are statistically insignificant, particularly when compared to the higher rates arising out of the criminal justice system. For more on these studies see: Richard Delgado, "Goodbye to Hammurabi: Analyzing the Atavistic Appeal of Restorative Justice" (2000) 52:4 *Stan L Rev* 751.

³⁵ See Correctional Services Canada, *So You Want to Know the Recidivism Rate? FORUM on Corrections Research*, vol 5, no 3 (Ottawa: Correctional Service Canada, 1993), online: <www.csc-scc.gc.ca/research/forum/e053/e053h-eng.shtml>. Almost as soon as data is released, it risks being dated. That stated, the data on recidivism is often dated, as with the data from Correctional Services Canada. Nevertheless, this data is relevant for this paper as it was calculated during the years that Biidaaban was at its height of operations. Thus, it is likely a more even comparator, if such a comparator might exist.

³⁶ See Public Safety Canada, *The Reconviction Rate of Federal Offenders* by J Bonta, T Rugge & M Dauvergne (Ottawa: Solicitor General Canada, 2003) online: <www.publicsafety.gc.ca/cnt/rsrscs/pblctns/rcvd-fdffndr/index-eng.aspx>.

³⁷ *Biidaaban*, *supra* note 17 at 81-82; 104-107.

³⁸ *Ibid* at 105.

Crown no longer funds the initiative. What are the impacts on community healing and related Indigenous knowledge? Do restorative justice initiatives create room for Indigenous values and laws, or is the preference for such initiatives merely to replicate the criminal justice system with an Indigenous name in front?

V. DEBWEWIN³⁹ AS COMMON GROUND

When an ‘Anishinaubae’ says that someone is telling the truth, he says ‘w’daeb-awae’. It is at the same time a philosophical proposition that, in saying, a speaker casts his words and his voice only as far as his vocabulary and his perception will enable him. In so doing the tribe was denying that there was an absolute truth; that the best a speaker could achieve and a listener expect was the highest degree of accuracy. Somehow that one expression ‘w’daeb-awae’ sets the limits of a single statement as well as setting limits on all speech.⁴⁰

How we understand truth matters. Coyote understood the truth of his brother Fox’s words but rather than recoil he continued forward, undaunted, with dreams of something better for himself. Canadian law is premised on the idea that there is an objective truth – the finding of which resolves conflict one way or another. In other words, truth’s objectivity is subjectively informed by experience, perspective and reputation. As Johnston explains, Anishinaabe legal tradition holds there is no objective truth. Rather, there is an accuracy defined by one’s own knowledge alongside a concept of objectivity against which one “does not separate the world from the self.”⁴¹ For example, Coyote took in not only his brother’s motives for truth-telling but also the motives of the other animals who took to calling Coyote a fool. For Coyote, perspective mattered and helped him determine his next course of action.

At first blush, Canadian and Anishinaabe legal constructions of truth may seem oppositional and irreconcilable. Upon closer consideration, however, there are some similarities. For example, Canada’s foremost arbiters of truth – judges – are appointed on the basis of individual experience, perspective and reputation.⁴² Johnston asserts that all Anishinaabe people – not just those specially trained – are

³⁹ The spelling of “w’daeb-awae” (truth) is reproduced here as Basil Johnston wrote it. I recognize there are other ways to spell and pronounce ‘truth’ in Anishinaabemowin, such as ‘Te Bew Win’ or ‘Debwewin,’ as it was taught to me by Elders Lorraine McRae and Irene Snache. I use the latter throughout this paper.

⁴⁰ Basil H Johnston, “One Generation from Extinction” in Terry Goldie & Daniel David Moses, eds, *An Anthology of Canadian Native Literature in English* (Toronto: Oxford University Press, 1998) 101.

⁴¹ Emma Laroque, “Preface – or Here Are Our Voices – Who Will Hear?” in Sylvia Vance & Jeanne Perreault, eds, *Writing the Circle* (Edmonton: NeWest Press, 1990) xxi.

⁴² For more on judicial appointments process and considerations see: Benjamine Alarie & Andrew Green, “Policy Preference Change and Appointments to the Supreme Court of Canada” (2009) 47:1 Osgoode Hall LJ 1; Lorne Sossin, “Judicial Appointment, Democratic Aspiration and the Culture of Accountability” (2008) 58 UNBLJ 11; Adam Dodek, “Judicial Independence as a Public Policy Instrument” (2009) 5:2 CLPE Research Paper 1.

imbued with the ability to know truth when they hear it. The principle of seeking truth through experience, perspective and reputation then, forms common ground in both legal systems. No matter which conceptualization of truth is relied upon – either objective or contextualized – truth is complicated, especially when based on “the highest degree of accuracy.”⁴³ Coyote could have complicated matters further by demanding to know, among other things, how many of the other animals teased him. Instead, Coyote accepted Fox’s words without scrutiny because he knew his little brother to be reliable.

VI. PAINTING PICTURES BY NUMBERS

Numbers paint pictures. In the instance of Indigenous Peoples in Canada, particularly in relation to the criminal justice system, the numbers are staggering and the picture is ominous. For example, approximately four percent of Canada’s population is Indigenous,⁴⁴ which translates into just over 1.1 million people.⁴⁵ The Indigenous population is growing at a rate almost six times faster⁴⁶ than the general population and “is much younger than the non-Indigenous population.”⁴⁷ The average unemployment rate on reserves in Canada is approximately three times higher than Canada’s unemployment rate.⁴⁸ The number of incarcerated Indigenous Peoples has increased in the past decade⁴⁹ by approximately seventy-five percent.⁵⁰ It costs an average of \$117,000 a year to imprison a male inmate⁵¹ and nearly twice as much to imprison a female inmate in Canada.⁵² In other words, it costs approximately six times more to keep an Indigenous offender in prison than the average household

⁴³ Johnston, *supra* note 40.

⁴⁴ Statistics Canada, *Aboriginal Peoples in Canada in 2006: Inuit, Métis and First Nations, 2006 Census* (Ottawa: Statistics Canada, 2008) online: <www12.statcan.ca/census-recensement/2006/as-sa/97-558/pdf/97-558-XIE2006001.pdf>. There has been both a 2010 update and 2012 update, which are not as comprehensive as the 2006 census report. Where possible, the updated numbers of 2010 and 2012 are specifically noted.

⁴⁵ Statistics Canada, *Aboriginal Statistics at a Glance* (Ottawa: Statistics Canada, 2010) online: <www.statcan.gc.ca/pub/89-645-x/2010001/count-pop-denombrement-eng.htm>.

⁴⁶ Statistics Canada, *Aboriginal People Living Off-reserve and the Labour Market: Estimates from the Labour Force Survey, 2008-2009* by Danielle Zietsma (Ottawa: Statistics Canada, 2010) online: <www.statcan.gc.ca/pub/71-588-x/71-588-x2010001-eng.pdf>.

⁴⁷ Statistics Canada, *First Nations, Métis and Inuit Women* by Vivian O’Donnell and Susan Wallace (Ottawa: Statistics Canada, 2011) online: <www.statcan.gc.ca/pub/89-503-x/2010001/article/11442-eng.pdf> at 9.

⁴⁸ Assembly of First Nations, *Quality of Life of First Nations, June 2011* online: <www.afn.ca/uploads/files/factsheets/quality_of_life_final_fe.pdf>.

⁴⁹ The Correctional Investigator Canada, *Annual Report of the Office of the Correctional Investigator, 2013-2014* (Ottawa: Office of the Correctional Investigator Canada, 2014); Brosnahan, *supra* note 10.

⁵⁰ Brosnahan, *supra* note 10.

⁵¹ Public Safety Canada, *Annual Report: Corrections and Conditional Release Statistical Overview* (Ottawa: Public Safety Canada, 2013) at 25-26.

⁵² *Ibid.*

income on-reserves, the latter of which is approximately \$19,000 – approximately thirty-percent lower than the Canadian national average.⁵³

With a very low recidivism rate,⁵⁴ the costs of Biidaaban are extraordinarily small as compared to the annual costs of housing inmates. Given that the number of Indigenous inmates remains high, even with the existence of Indigenous restorative justice programs, it might be presumptive to conclude that restorative justice has failed insofar as there has been no diminishment in the number of incarcerated Indigenous offenders – an initial objective of creating restorative justice models in the first instance. It is important to understand, however, that the Crown’s numbers relating to all Indigenous justice initiatives are consolidated into larger government departmental budgets and therefore difficult to untangle, making it difficult to determine an accurate return on investment.⁵⁵

As I discuss further, numbers can paint different pictures - particularly when used as indicators, which become determinative of what gets measured and funded. For example, the exchange between Coyote and Fox was straightforward and unencumbered by data - other than what was necessary. Similarly, here numbers are presented as a means of developing a common understanding of the relationship between Indigenous and non-Indigenous Canadians. The numbers are offered to promote critical dialogue, which is a vitally important process.⁵⁶ However, numbers in the realm of government decision-making too often escape the value of in-depth consideration, analysis and critique.⁵⁷

VII. RESTORATIVE JUSTICE & INDICATORS

A healthy dose of skepticism is necessary in relation to policy, funding and law-making decisions⁵⁸ – particularly relating to human interaction with the state.⁵⁹ As Kevin E Davis et al set out:

⁵³ Daniel Wilson & David Macdonald, *The Income Gap Between Aboriginal Peoples and the Rest of Canada* (Ottawa: Canadian Centre for Policy Alternatives, 2010), online: <www.policyalternatives.ca/publications/reports/income-gap-between-aboriginal-peoples-and-rest-canada>.

⁵⁴ *Biidaaban*, *supra* note 17.

⁵⁵ Conversely, the reporting requirements via *First Nation Fiscal Accountability Act* require First Nation’s to comply with a level of financial scrutiny, detail and compliance filing dates that the federal government itself is not subject to.

⁵⁶ Sally Engle Merry, “Legal Pluralism and Legal Culture: Mapping the Terrain” in Brian Z Tamanaha, Caroline Mary Sage & Michael JV Woolcock, eds, *Legal Pluralism and Development: Scholars and Practitioners in Dialogue* (Cambridge: Cambridge University Press, 2012) at 66.

⁵⁷ *Ibid.*

⁵⁸ J Braithwaite, “Methods of Power for Development; Weapons of the Weak, Weapons of the Strong” (2004) 26:1 *Mich J Intl L* 297; Benedict Kingsbury, Nico Krisch & Richard B Stewart, “The Emergence of Global Administrative Law” (2005) 68 *Law & Contemp Probs* 15.

The burgeoning production and use of indicators in global governance has the potential to alter the forms, the exercise, and perhaps even the distributions of power in certain spheres of global governance. Yet the increasing use of indicators has not been accompanied by systematic study of and reflection on the implications...⁶⁰

In relation to Indigenous restorative justice initiatives, such as Biidaaban, the Crown emphasizes some indicators, such as the sheer numbers of offenders participating over others, such as lower recidivism rates. Without engaging in public debate or participating in a conversation with First Nations directly, the Crown is free to commission data and generate indicators as it sees fit in order to support its agenda. Therefore, indicators run the risk of altering the substance and form of restorative justice by molding it to resemble the criminal justice system and maintaining the status quo. My argument is not that indicators have no value, but rather that they must be taken into context and considered carefully; that they must be discussed, criticized, and publicly debated in order to sift through it all and move towards Debwewin. In a world full of indicators is there room for community-based justice initiatives?⁶¹

Restorative justice models have been criticized as being too humanistic rather than supported by so-called objective empirical data.⁶² Yet the collection and use of indicators is not objective. Indigenous restorative justice initiatives that promote low recidivism rates and community healing require sustained, permanent investment. What is needed is more Debwewin. In the criminal justice system, punishment focuses on the individual harm as against the state and fails to address underlying systemic issues felt by Indigenous Peoples that may have led to the harmful action in the first instance.⁶³ Indigenous-based restorative justice programs, on the other hand, are community initiated and bear little resemblance to the criminal justice system itself. They produce results focused on healing individual and community harm – including the underlying harms of ongoing colonization. Recall what Fox told his big brother. Was it Coyote's pride that let him ignore Fox? He never troubled himself by asking why the others were calling him Fool.

⁵⁹ A Rosga & ML Satterthwaite, "Indicators in Crisis: Rights-based Humanitarian Indicators in Post-earthquake Haiti" (2011) 43 NYUJ Intl L & Pol 865; Beth A Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (Cambridge: Cambridge University Press, 2009).

⁶⁰ Kevin E Davis, Benedict Kingsbury & Sally Engle Merry, "Indicators as a Technology of Global Governance" (2012) 46:1 Law & Soc'y Rev 71 at 72.

⁶¹ Janine Brodie, "Reforming Social Justice in Neoliberal Times" (2007) 1:2 Studies in Social Justice 93.

⁶² Sharon Levrant et al, "Reconsidering Restorative Justice: The Corruption of Benevolence Revisited?" (1999) 45 Crime & Delinquency 3.

⁶³ Val Napoleon, "Raven's Garden: A Discussion About Aboriginal Sexual Orientation and Transgender Issues" (2002) 17:2 CJLS 149 at 164.

VIII. COLONIALISM CAME... AND SETTLED IN

When the settlers arrived in what is now known as Canada, they brought with them a legal system, which was subsequently imposed on Indigenous Peoples without conquer, surrender or consent,⁶⁴ as though Indigenous legal orders did not exist. As we have seen – such as with the concept of truth – the settlers’ legal systems differ considerably. But it was not only the imposition of settlers’ laws that has resulted in a river of Indigenous men and women flowing into the criminal justice system. It is colonization itself for which Canada continues to reap the benefits and still displaces Indigenous Peoples. So long as colonization continues without redress, so too will the strained relationship between Canada and Indigenous Peoples. It is difficult to believe that Coyote dreamed colonization into being.

As a founding partner, Indigenous Peoples contributed all of the lands and resources to what is now Canada.⁶⁵ Meanwhile, the colonial powers sought to ensure the original inhabitants were fundamentally changed through a variety of means such as physical elimination, cultural extinction or assimilation within the larger population.⁶⁶ The land quickly became a primary focus of settler colonialists,⁶⁷ which was required for permanency.⁶⁸ The systematic dispossession of Indigenous Peoples from land as a means to increase production makes land – and subsequently the rights of Indigenous Peoples – central as an “ontological framework for understanding relationships.”⁶⁹ Thus, settler colonialism never ends until those first objectives of physical elimination, cultural extinction or assimilation have been met. By virtue of the continued existence of Indigenous Peoples, cultures, and laws, along

⁶⁴ John Borrows, “Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-government” in Michael Asch, *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality and Respect for Difference* (Vancouver: UBC Press, 1997) 155 [Borrows, “Wampum at Niagara”].

⁶⁵ James C Hopkins & Albert C Peeling, *Aboriginal Judicial Appointments to the Supreme Court of Canada* (Indigenous Bar Association, 2004), online: <www.indigenousbar.ca/pdf/Aboriginal%20Appointment%20to%20the%20Supreme%20Court%20Final.pdf>.

⁶⁶ *The Oxford English Dictionary*, 2014, defines colonialism as “the policy or practice of acquiring full or partial political control over another country, occupying it with settlers, and exploiting it economically.” Further, RJ Horvath’s definition of colonialism as set out in “A Definition of Colonialism” (1972) 13:1 *Current Anthropology* 45 is “exogenous domination” that contains two elements: (1) original displacement and (2) unequal relations. The ‘colonialism/post-colonialism’ debate is a subject of increasing scholarship. As to whether Canada is “post-colonial,” I leave for another day but rather for the purposes of this thesis suggest that so long as settlers remain in Canada, there is a settler/colonial element we must contend with as a practical reality. For more on “post-colonialism” see: Bill Ashcroft, Gareth Griffiths & Helen Tiffin, *The Empire Writes Back: Theory and Practice in Post-Colonial Literature* (London: Routledge, 2003); V Mishra & B Hodge, “What Is Post(-)colonialism?” (1991) 5:3 *Textual Practice* 399; BJ Moore-Gilbert, Gareth Stanton & Willy Maley, eds, *Postcolonial Criticism* (London: Routledge, 2014); Ania Loomba, *Colonialism/Postcolonialism* (London: Routledge, 2007).

⁶⁷ Patrick Wolfe, *Settler Colonialism and the Transformation of Anthropology: The Politics and Poetics of an Ethnographic Event* (London: Cassell, 1999).

⁶⁸ Glen S Coulthard, “Subjects of Empire: Indigenous Peoples and the ‘Politics of Recognition in Canada” (2007) 6:4 *Contemporary Political Theory* 437.

⁶⁹ Glen S Coulthard, “Place Against Empire: Understanding Indigenous Anti-colonialism” (2010) 4:2 *Affinities: A Journal of Radical Theory, Culture and Action* 79.

with Indigenous Peoples' refusal to be assimilated, colonialism is not only part of Canada's history but is ongoing. Without having conquered Indigenous Peoples,⁷⁰ colonialism allows Courts to continue to exercise authority over Indigenous Peoples, turning large numbers into offenders. Colonialism permits a continued refusal to acknowledge and make room for Indigenous laws that existed in Canada long before confederation.⁷¹ In this way, the law has been an instrument of colonization.⁷²

The *Indian Act*⁷³ serves as an authoritative example. This legislation has been rife with problems and prejudice from its inception in 1876, yet it remains Canadian law. In making further amendments to the *Act*, Duncan Campbell Scott, Deputy Superintendent of the Department of Indian Affairs from 1913 to 1932, proclaimed that the purpose of the *Act* was to:

[G]et rid of the Indian problem. I do not think as a matter of fact, that the country ought to continuously protect a class of people who are able to stand alone... Our objective is to continue until there is not a single Indian in Canada that has not been absorbed into the body politic and there is no Indian question, and no Indian Department, that is the whole object of this Bill.⁷⁴

The *Act* 'Indianized' Indigenous People by defining 'Indians' and legislatively sought to eliminate them.⁷⁵ The *Act* homogenized Indigenous People possessed of distinct cultures, languages, laws, practices and traditions into a singular "Indian" category; denied the 'Indian' identity of every Indian woman who married a non-Indian man;⁷⁶ and removed scores of First Nation children from their

⁷⁰ Borrows, "With or Without You", *supra* note 3.

⁷¹ Borrows, "Wampum at Niagra", *supra* note 64.

⁷² Brian Slattery, "The Metamorphosis of Aboriginal Title" (2007) 85:2 Can Bar Rev 255.

⁷³ The *Indian Act*, 1876 ("Act"), was a consolidation of laws that were previously enacted pre-confederation and was passed under s. 19(24) of the *Constitution Act, 1867*. The *Act* replaced Upper Canada's *Gradual Civilization Act, 1857* and the *Gradual Enfranchisement Act, 1869*. The *Act* created reserve lands and its initial purpose was to administer Indians in a manner that forced Indians to renounce their status under the *Act* and become members of Canada's civilized society – also known as enfranchisement. The *Act* has gone through numerous amendments over the years from 1877 up to and including 2013.

⁷⁴ Department of Indian Affairs and Northern Development, *The Historical Development of the Indian Act*, 2 ed, by J Leslie (Ottawa: Department of Indian Affairs and Northern Development, Treaties and Historical Research Branch, 1978) at 114.

⁷⁵ Mary Ellen Turpel, "Patriarchy and Paternalism: The Legacy of the Canadian State for First Nations Women" (1993) 6:1 CJWL 174.

⁷⁶ Bill C-31 was introduced to change the definitions within the *Indian Act* that determine who is entitled to status under the *Act* and who is not. Ultimately, the Bill was passed and the *Act* amended. Sharon McIvor brought litigation against Canada for the Bill citing its limitations of which Aboriginal women were entitled to regain their Indian status prior to 1985 and which women were not. The time period for entitlement matters because if a woman who lost status was able to regain it – even after her death – then so too was there potential for her descendants to regain Indian status. The provisions of Bill C-35 merely displaced the discrimination based on gender down to another generation whose offspring will face the same challenges of who has status and who does not based on whom they choose to have children with.

families by requiring Indian children to attend Indian Residential Schools. Not only did the government subsequently attempt a mass beating of the culture and language out of Indigenous children but it sought to eliminate Indian status upon graduation. Earlier versions of the *Indian Act* enfranchised graduates, meaning they could not own property on reserve. Indeed, graduates could not step onto a reserve without permission of the white Indian agent or face being charged with trespass. They were no longer legally entitled to live at home. The result was the brutal displacement of Indigenous Peoples instigated by the Crown in collusion with the churches who operated Indian Residential School programs, slamming the doors of home in the faces of entire generations of Indigenous Peoples. This trauma is hauntingly illustrated in Maurice Kenny's poem "Going Home":

The book lay unread in my lap
 snow gathered at the window
 from Brooklyn it was a long ride
 the Greyhound followed the plow
 from Syracuse to Waterton
 to country cheese and maples
 tired rivers and closed paper mills
 home to gossipy aunts...
 their dandelions and pregnant cats...
 home to cedars and fields of boulders
 cold grave under willow and pine
 home from Brooklyn to the reservation
 that was not home
 to songs I could not sing
 to dances I could not dance
 from Brooklyn bars and ghetto rats
 to steaming horses stomping frozen earth
 barns and privies lost in blizzards
 home to a nation, Mohawk
 to faces, I do not know
 and hands which did not recognize me
 to names and doors
 my father shut.⁷⁷

As "Going Home" conveys, the effects of Indian Residential Schools have not ended – Canada's apology or not.⁷⁸ Intergenerational effects – meaning the long-term impacts of abuse, broken families, violence, pain and suffering passed on by one generation to the next – continue to ripple through Indigenous communities.⁷⁹ The complexities arising from these harms often lead Indigenous Peoples to entanglements with the criminal justice system. Kenny explains the painful effects

⁷⁷ Maurice Kenny, "Going Home" in Sheena Gillespie, Terezinha Fonseca & Tony Pipolo, eds, *Literature Across Cultures* (Toronto: Allyn and Bacon, 1998) 145 at 145.

⁷⁸ Indigenous and Northern Affairs Canada, *Statement of Apology to Form Students of Indian Residential Schools* (Ottawa: Indigenous and Northern Affairs Canada, 2011) online: <www.aadnc-aandc.gc.ca/eng/1100100015644/1100100015649>.

⁷⁹ A Bombay, K Matheson & H Anisman, "The Impact of Stressors on Second Generation Indian Residential School Survivors" (2011) 48:4 *Transcultural Psychiatry* 367.

of Indian Residential Schools, the *Indian Act*, and colonization, all of which continue to live among us today. The poem emphasizes the depth of damage and the healing that remains to be done. “Going Home” speaks to the alienation from family and highlights some of the complications restorative justice models seek to address. In some ways, incarceration achieves the same sense of estrangement and isolation as Indian Residential Schools by removing Indigenous Peoples from their land, culture and laws. So why continue with the same actions in courtrooms across Canada every day? Critics of restorative justice must acknowledge that increased incarceration rates of Indigenous Peoples have not resulted in a decrease in crime.⁸⁰ If the problems were created by and sustained through the ongoing violence of colonialism, it is unlikely the same imperial system’s model of criminal justice can offer a remedy.

Alternatively, Indigenous restorative justice models, such as Biidaaban, take aim at the underpinning colonial violence by letting Indigenous Peoples heal through a process and a legal order that is culturally relevant. Yet, when statistics are gathered and interpreted through a colonialist lens, the essential Indigenous dimensions of restoration are filtered out. On its own, data is not the problem. Indeed, data was presented earlier within this paper to paint a particular picture of the Indigenous Peoples in Canada in the criminal justice system. The problem, rather, is what data we choose to gather and how we use that data to tell a story. Too often, data is used to support the criminal justice system and deny room for reinvention through the use of restorative justice initiatives, which are built on Indigenous laws. Thus, if we really want to see change, Canada needs to permanently fund restorative justice initiatives and step out of the way, making room for Indigenous legal orders to address the underlying problems. If we asked, perhaps Fox might say that for sustainable space to be made for Indigenous laws in addressing criminal activities, the juggernaut of settler-colonialism and a white-knuckled grip on power must be relinquished.

IX. COYOTE’S IMAGINATION, THE CANADIAN CRIMINAL JUSTICE SYSTEM & PUNISHMENT

There are essentially three deficits in the Canadian criminal justice system that are the primary focus of restoration: crime is viewed as harm against the state, not as against the collective society and the individuals who comprise it; the criminal justice system focuses on punishment while neglecting victims, except perhaps through limited financial compensation; and finally, there is little emphasis on offender reintegration into society.⁸¹ Braithwaite posits that restoration aims to

⁸⁰ Carrie J Petrucci, “Apology in the Criminal Justice Setting: Evidence for Including Apology as an Additional Component in the Legal System” (2002) 20:4 Behav Sci & L 337.

⁸¹ Beven et al, *supra* note 13.

transform the way we construct justice itself,⁸² including what we mean by proportionality.⁸³

All societies, Indigenous included, require rules and the enforcement of such rules in order to survive.⁸⁴ Voluntary compliance is generally not assumed and in Canada considerable public resources are expended on the prevention of offences, the apprehension of offenders, and the process of obtaining a conviction.⁸⁵ Based on the premise that punishment should suit the crime, there are a wide variety of potential punishments Courts may draw from – ranging from varying lengths of incarceration for the most serious and violent offences, to a nominal fine for minor ones.⁸⁶ Still, current Canadian approaches to sentencing policy are bound up in rhetoric that “sentences are not harsh enough.”⁸⁷ Perhaps unsurprisingly then, restorative justice is criticized for being socially destructive.⁸⁸

But as with restorative justice and diversion, there are also differences between restoration and retribution. Sometimes the differences are subtle insofar as there is an unavoidable element of punishment contained within restorative justice.⁸⁹ For example, in the Biidaaban process, reciprocity is fundamental.⁹⁰ Those who have harmed must repair the harm caused, which could be through the provision of volunteer time in a store that was robbed, in addition to attendance at a substance abuse program or ongoing counseling. In other words, restorative justice does not

⁸² Braithwaite, “Principles”, *supra* note 14.

⁸³ For a further discussion on proportionality – meaning the punishment must fit the crime – see: Kent Roach, “Changing Punishment at the Turn of the Century: Restorative Justice on the Rise” (2000) 42:3 Can J Crim 249; BP Archibald, “Fault, Penalty and Proportionality: Connecting Sentencing to Subjective and Objective Standards of Criminal Liability (with Ruminations on Restorative Justice)” (1998) 40:3 Crim LQ 263.

⁸⁴ L Walgrave, “Has Restorative Justice Appropriately Responded to Retribution Theory and Impulses?” in H Zehr and B Toews, eds, *Critical Issues in Restorative Justice* (Monsey: Criminal Justice Press, 2004) 47.

⁸⁵ GS Becker, “Crime and Punishment: An Economic Approach” in Gary S Becker and William W Landes, eds, *Essays in the Economics of Crime and Punishment* (New York: National Bureau of Economic Research, 1974) 1.

⁸⁶ Kevin S Douglas & James RP Ogloff, “Public Opinion of Statutory Maximum Sentences in the Canadian Criminal Code: Comparison of Offences Against Property and Offences Against People” (1997) 39:4 Can J Crim 433.

⁸⁷ Anthony N Doob, “Transforming the Punishment Environment: Understanding Public Views of What Should be Accomplished at Sentencing” (2000) 42:3 Can J Crim 323.

⁸⁸ G Bazemore & L Walgrave, “Restorative Juvenile Justice: In Search of Fundamentals and an Outline for Systemic Reform” in G Bazemore & L Walgrave, eds, *Restorative Juvenile Justice: Restoring the Harm of Youth Crime* (Monsey: Criminal Justice Press, 1999) 45; J Braithwaite, *Restorative Justice and Responsive Regulation* (Oxford: Oxford University Press, 2002).

⁸⁹ K Daly, “Revisiting the Relationship between Retributive and Restorative Justice” in Heather Strang & John Braithwaite, eds, *Restorative Justice: Philosophy to Practice* (Dartmouth: Ashgate, 2000) 33.

⁹⁰ *Biidaaban*, *supra* note 17 at 104–105.

remove punishment but rather seeks to induce a form of punishment that is most likely to reduce reoccurrence and address the underlying issues.⁹¹ This is not to state that punishment is the best means by which to achieve restoration; it is merely an element to be accessed within the larger objective of restoring all involved. The intentional infliction of pain as criminal punishment is counterproductive – particularly so in relation to restoration.⁹² Thus, the way in which punishment is defined matters.

Though there are additional theories behind sentencing in the criminal justice system, such as rehabilitation, among the most influential is retribution, which tells us that punishment as ‘pain delivery’ is a critical element.⁹³ If punishment is considered as inclusive of “every painful obligation that follows,”⁹⁴ consider that an accused being met directly with the hurt and disapproval of family and harmed community members is often a painful process. Often times this can be more difficult than incarceration in that there is nowhere else to go after a sentence has been served in a distant prison.⁹⁵ When pain is retributive by means of incarceration, it sometimes amplifies harm⁹⁶ – particularly for repeat offenders caught in the cycle of the system. Restorative justice, however, is distinguishable from retribution theory⁹⁷ insofar as Indigenous-based models deem changes in offending behavior to be a reasonable outcome.⁹⁸ Rather than the intentional infliction of pain as punishment, pain within restorative justice is a means to both restore harmony and healing by addressing the underlying truth.⁹⁹ But, as we know from Basil Johnston, there is more than one conception of truth.

Recall that even though Coyote slept past dawn when Salmon, Grizzly Bear and Owl were assigned their names, Coyote was given gifts the others were not. Coyote would be able to create whatever he could imagine. With such a powerful gift, Coyote could have run through the forest imagining terrifying punishments to inflict upon all those who called him Fool. But he did not. Rather than abuse his power, he prepared things for the people to come. Might we learn from Coyote?

⁹¹ RA Duff, “Restorative Punishment and Punitive Restoration” in L Walgrave, ed, *Restorative Justice and the Law* (Devon: Willan Publishing, 2002) 82.

⁹² Lawrence W Sherman, “Reason for Emotion: Reinventing Justice with Theories, Innovations and Research—The American Society of Criminology 2002 Presidential Address” (2003) 41:1 *Criminology* 1.

⁹³ N Christie, *Limits to Pain* (Dartmouth, UK: Ashgate, 2000).

⁹⁴ Walgrave, *supra* note 84 at 48.

⁹⁵ *Ibid.*

⁹⁶ *Ibid* at 49.

⁹⁷ Morris, *supra* note 23.

⁹⁸ Beven et al, *supra* note 13.

⁹⁹ *Biidaaban*, *supra* note 17 at 81–82.

X. ADDRESSING OVERREPRESENTATION THROUGH THE CRIMINAL JUSTICE SYSTEM?

Restorative justice models are not only a means of addressing crime and the harm caused by crime, but are also a way for communities to heal from the damage inflicted by systemic entanglements while drawing upon Indigenous legal orders. With that said, room should be made for restorative justice models to develop more fully, given that the system currently in place is simply not working. The overrepresentation of Indigenous Peoples – particularly women¹⁰⁰ – in the Canadian criminal justice system remains disproportionately high and “some could legitimately argue is getting worse.”¹⁰¹

In 1996 the *Criminal Code* was amended to include section 718.2(e), which provides that:

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.

This section was created to ameliorate the overrepresentation of Indigenous Peoples in prisons.¹⁰² In 1999, the Supreme Court of Canada in *R v Gladue*¹⁰³ set out the guiding principles applicable to the sentencing of Indigenous offenders under s.718.2(e).¹⁰⁴ The accused was a nineteen-year-old Indigenous woman who pled guilty to stabbing her common law husband. Upon sentencing at trial, however, there was no s.718.2(e) analysis. Since Gladue lived in a city and not on-reserve, the trial judge did not consider her to be a person “within the aboriginal community.”¹⁰⁵ The resulting sentencing decision was a three-year prison sentence. This obvious stereotyping of Gladue by the trial judge is deeply concerning, yet in some ways is

¹⁰⁰ Angela Tomporowski, “*R. v. Gladue: Sentencing and the Gendered Impacts of Colonialism*” in John D Whyte, ed, *Moving Toward Justice: Legal Traditions and Aboriginal Justice* (Saskatoon: Purich, 2008) 160.

¹⁰¹ Harry S LaForme, “The Justice System in Canada: Does it Work for Aboriginal People?” (2005) 4 *Indigenous LJ* 1 at 15.

¹⁰² Turpel-Lafond, *supra* at note 29.

¹⁰³ *R v Gladue*, [1999] 1 SCR 688, 133 CCC (3d) [*Gladue*].

¹⁰⁴ Brian R Pfefferle, “Gladue Sentencing: Uneasy Answers to the Hard Problem of Aboriginal Over-incarceration” (2008) 32:2 *Man LJ* 113.

¹⁰⁵ *Ibid.*

acceptable by operation of the *Indian Act*. But such “assumptions are a dangerous thing.”¹⁰⁶

Ultimately, the Supreme Court of Canada held that sentencing judges must consider “other systemic issues faced by Indigenous offenders including ‘poor social and economic conditions’ and a ‘legacy of dislocation’ faced by Aboriginal peoples,”¹⁰⁷ even in violent offences. Moreover, the Court concluded that “widespread racism has translated into systemic discrimination in the criminal justice system.”¹⁰⁸ In other words, a history of colonization has taken a toll on Indigenous Peoples in Canada and courts should be alive to such patterns and considerations upon sentencing. How? The Court had an answer for that by ruling:

[T]he sentencing judge must look to circumstances of the aboriginal offender...it may be that these circumstances include evidence of the community’s decision to address criminal activity associated with social problems, such as sexual assault, *in a manner that emphasizes the goal of restorative justice.*¹⁰⁹

The goal of restorative justice is to transform the entire legal system.¹¹⁰ In theory, *Gladue* has meant courts are to be provided a pre-sentencing Gladue Report¹¹¹ for each Indigenous offender. But Gladue Reports are not being presented for every Indigenous offender and even when Reports are available they are not consistently given sufficient weight. In *R v Kakekagamick*,¹¹² Justice Laforme of the Ontario Court of Appeal clarified that s. 718.2(e) is not a “get out of jail free card”¹¹³ and reaffirmed that the onus is on Crown counsel to ensure a *Gladue* analysis

¹⁰⁶ Thomas King, “Gozilla vs. Post-Colonial” in Ajay Heble, Donna Palmateer Pennee & JR Struthers, eds, *New Contexts of Canadian Criticism* (Peterborough: Broadview Press, 1997) 241 at 241.

¹⁰⁷ Pfefferle, *supra* note 104 at 118.

¹⁰⁸ *Gladue*, *supra* note 103 at para 61.

¹⁰⁹ *Ibid* at para 33 [emphasis added].

¹¹⁰ Braithwaite, “Principles”, *supra* note 14.

¹¹¹ A ‘Gladue Report’ is essentially a pre-sentence document that sets out the personal history, circumstances and background of each offender. In *R v Linklater* [2004] 2 CNLR 204 (Ont Sup Ct) at para 13, n 1, LaForme J writes:

Briefly, a Gladue Report is part of the response of the Aboriginal community, together with the Attorney General of Ontario and the Attorney General of Canada, to the Supreme Court of Canada decision of *R. v. Gladue*...Many others, including judges and Legal Aid Ontario, developed a process and aims for sentencing of Aboriginal offenders. Among other things, the Toronto Gladue (Aboriginal Persons) court was established, along with a Gladue Court caseworker that is affiliated with the Aboriginal Legal Services of Toronto. Where an Aboriginal person is convicted of an offence, the Gladue Court caseworker, when requested, will prepare a report as a sentencing aid – similarly to that of a pre-sentence report. It is not a substitute for a pre-sentence report but can be an adjunct to one. One significant difference will be an awareness of Aboriginal aspects that attempt to respond to the concerns observed by our Supreme Court in *R. v. Gladue*.

¹¹² *R v Kakekagamick* (2006), 81 OR (3d) 664, 211 CCC (3d) 289 (Ont CA).

¹¹³ *Ibid* at para 34.

occurs.¹¹⁴ Similarly, thirteen years after *Gladue*, the Supreme Court of Canada released its decision in *R v Ipeelee* and *R v Ladue*¹¹⁵ together. In a nutshell, both cases reminded us that all judges are under a positive duty to consider an Indigenous offender's history upon sentencing.¹¹⁶ Even considering differences among offenders, Gladue Reports all say the same thing: it is the system that is failing, not the individual Indigenous offender standing before the court.¹¹⁷ The numbers tell us that overrepresentation is not ultimately being reduced – even with s.718.2(e) – and that recidivism rates are typically lower in restorative justice models. Therefore, rather than quietly phase them out, restorative justice models should be fully funded as a means of reinventing the criminal justice system.

The Supreme Court of Canada in *Gladue* held that the goals of restorative justice are a necessary objective. Contrastingly, in 2009 the federal government set out its preference for punishment by enacting the so-called *Truth in Sentencing Act*,¹¹⁸ which limited the discretion of a sentencing judge to provide an offender with credit for time already served prior to conviction.¹¹⁹ The truth about the *Truth in Sentencing Act* is the government's own indicators – provided only after the law was passed, and not publicly scrutinized or debated – demonstrate a willingness to spend capital on punishment well beyond the costs of restoration. For example, the *Truth in Sentencing Act* added over \$618M to the annual budget to house inmates for longer sentences; it requires an additional \$363 million per year spread over five years for additional prison cells; and, on average, each inmate is likely to spend an additional 159 days incarcerated.¹²⁰ By prioritizing punishment, the *Truth in Sentencing Act* takes us further away from restorative justice. Moreover, *Gladue* and has only begun to construct a road of reinvention.

¹¹⁴ *Ibid* at para 52.

¹¹⁵ *R v Ipeelee*, 2012 SCC 13, [2012] 1 SCR 433.

¹¹⁶ Jonathan Rudin, "Looking Backward, Looking Forward: The Supreme Court of Canada's Decision in *R. v. Ipeelee*" (2012) 57 SCLR 375.

¹¹⁷ J Gevikoglu, "*Ipeelee/Ladue* and the Conundrum of Indigenous Identity in Sentencing" (2012) 63 SCLR 205.

¹¹⁸ *Truth in Sentencing Act*, SC 2009, c 29.

¹¹⁹ In *R v Wust*, 2000 SCC 18, [2000] 1 SCR 455 [*Wust*], the Supreme Court of Canada established that credit for pre-sentencing custody was not determined by way of a mathematical formula – sometimes referred to as the 'two-for-one' credit – but rather courts should consider a number of factors with respect to determining credit for pre-sentencing custody. The Court noted that often pre-sentencing incarceration is served in harsher circumstances than the sentence may ultimately call for – such as without access to education. In sum, the Court held that sentences must be interpreted in a manner consistent with the full context of the sentencing scheme and be interpreted broadly. The *Truth in Sentencing Act* subsequently limited a broad interpretation of the *Criminal Code* with respect to sentencing and minimums, as set out by the Court in *Wust*.

¹²⁰ Office of the Parliamentary Budget Officer, *The Funding Requirement and Impact of the "Truth in Sentencing Act" on the Correctional System in Canada*, Office of the Parliamentary Budget Officer (Ottawa: Office of the Parliamentary Budget Officer, 2010) online: <www.pbo-dpb.gc.ca/files/files/Publications/TISA_C-25.pdf>.

Though Gladue Reports are personal histories meant to be considered by the courts upon sentencing of Indigenous offenders, the Reports alone are not enough¹²¹ to achieve the goals of restorative justice. Unless the courts become braver and consider their own contribution to ongoing colonialism – which is the underpinning of *Gladue* in the first instance – restorative justice may well be limited to the confines of criminal law conventions.¹²² Gladue Reports are only presented within the boundaries of a particular criminal matter and only then upon sentencing. They do not tell the whole story. Thus, the courts only consider the contents of the Report at a limited moment of the offender's life. Like *Coyote's Gets A Name*, Gladue Reports are also stories – stories about people's lives. Stories are found in the heart of criminal justice and judgment requires a story upon which to reflect and find meaning. In other words, without doubt stories are for listening but in the context of criminal justice and restoration, stories are used very differently – for determining proportional sentences, and for healing, respectively. The kinds of stories we are all prepared to listen to, what we might take from them and how we are prepared to engage ourselves with them matter fundamentally. The criminal justice system considers only a moment in an offender's life. In order to heal, restorative justice considers the whole of the life of someone who has caused harm.

There is a lot that remains to be done. The Crown must consistently and diligently fulfill its onus to ensure a *Gladue* analysis occurs and the court must exercise its positive duty to consider not only the history of the Indigenous offender but also the “systemic discrimination in the criminal justice system.”¹²³ We must ask ourselves: what are we really doing? The indicators might tell us, but not much. Like Coyote, when he fell asleep at the fire making him late, we should not need to be reminded again that it is time to wake up and see Biidaaban (dawn rising).

XI. SOME REFLECTIONS

We are not autonomous, self-sufficient beings as European mythology teaches... We are rooted, just like the trees. But our roots come out of our nose and mouth like an umbilical cord, forever connected with the rest of the world. Our roots also extend from our skin and from our body cavities... Nothing that we do, do we do by ourselves... That what the tree exhales, I inhale. That which I exhale, the trees inhale. Together we form a circle.¹²⁴

If we accept that everything we do is interconnected, it increases both our individual and collective responsibilities. For example, ignoring Fox led Coyote down a path of initial disappointment. By declaring to the others what he would be named without

¹²¹ L Whikak, “Quiet Contributions: Re-Examining the Benefits of a Restorative Approach to Sentencing in The Aboriginal Context” (2008) 26 Windsor YB Access Just 53.

¹²² Stephens, *supra* note 25.

¹²³ *Gladue*, *supra* note 103.

¹²⁴ Jack D Forbes, *Columbus and Other Cannibals: The Wetiko Disease of Exploitation, Imperialism and Terrorism* (New York: Seven Stories Press, 2008) at 146.

any discussion or consideration for anyone but himself earned him the name Fool. In the same way, it is essential to clearly identify, openly discuss, and rigorously debate indicators – such as those relating to the evaluation of restorative justice models – in order to promote awareness of agendas, knowledge of each other and ourselves. It is important we learn to listen. Otherwise, Canada runs the risk of simply appropriating Indigenous legal traditions and using them to recolonize¹²⁵ by determining what supports will be offered, what programs will be engaged, and which initiatives will be deemed successful and thereby more fully pursued. The so-called “Indian problem” identified by Campbell Scott is persistent in that Indigenous Peoples have been damaged but refuse to succumb to the ongoing violence of colonialism. Opportunity toward resolution rises in the effective implementation of the objective of restorative justice and Coyote’s other gift – reinvention.

As Braithwaite notes, restorative justice is about “holistic change in the way we do justice in the world.”¹²⁶ Are we brave enough to imagine a different way to do justice in the way Coyote imagined a world for us? This is not an unbounded process. We must be cautious in thinking there is room within the criminal system to make restoration work. What restorative justice is intended to do is nothing less than reinvent. This cannot be done through the parameters of the criminal justice system by relying on theories of retribution and proportionality any more than non-Indigenous actors may legitimately create an Indigenous-based restorative justice model.

We are all in this together. Contributions from both Indigenous and non-Indigenous actors must be made meaningfully, thoughtfully and with respect – for we will each sometimes be invited into rooms the other may not. Though imperfect, restoration offers more attention to and access for victims than the criminal justice system and promotes healing of the offender, victim, and community through addressing deep underlying issues – such as ongoing colonization and the intergenerational effects of Indian Residential Schools. Amending the *Criminal Code* to take the history of Indigenous offenders into consideration upon sentencing seems to accept the continuous flow of Indigenous offenders into the system versus taking measures to prevent entry into the system in the first instance. In *Gladue*, this legislative premise is challenged, though the epidemic remains in spite of law obligating us to achieve restorative justice.

Still, we are so slow and reluctant to implement. *Ipeelee* and *Ladue* were necessary to remind us of what was already decided in *Gladue*. Courts too often continue to sentence without the benefit of Gladue Reports and without following s.718.2(e) of the *Criminal Code*. What if instead courts refuse to sentence without full background statements on Indigenous offenders? How quickly then might Gladue Reports become widely available?¹²⁷ Those stories matter. The *Truth in*

¹²⁵ E Elliott & RM Gordon, eds, *New Directions in Restorative Justice: Issues, Practice, Evaluation* (Portland: Willan, 2005).

¹²⁶ Braithwaite, “Principles”, *supra* note 14.

¹²⁷ It is important to acknowledge the individuals committed to writing Gladue Reports both in and outside of Toronto. There are not enough good people in this world, but they are among them. Their work is

Sentencing Act prioritizes retribution and hampers reflection, while *Gladue* directs the courts to emphasize the goals of restorative justice and rely less on retribution. Retribution is not actually changing anything except, as we have seen, to increase the costs of incarceration. So, why are the courts not demanding access to Indigenous restorative justice models to give effect to the growing body of cases affirming such an imperative? To be clear, restorative justice is not a panacea but neither, as Basil Johnston illustrates, is truth.

Debwewin. Crime. Punishment. Indicators. Retribution. Proportionality. Restoration. In the end, names matter. Coyote's story demonstrates this – as well the importance of knowing where to look. We cannot continue to see the criminal justice system itself as a means to stem the flow of Indigenous offenders. It is not working. About twenty-five years ago, we began looking to Indigenous communities for resolution. Yet, as evidenced by both Crown funding priorities and the inconsistent implementation of *Gladue*, we seem to have given up not only on the law, but also in trying our experimental and creative best. Are we drifting to sleep at the fire while trying to stay awake until dawn? Coyote prompts us to remember the importance of imagination and trying even when we know we are arriving late. We still have much more to consider if we are going to get this right. If we envision well enough and remember how to be good, we too might learn from Coyote's other gift of regeneration and make room for the revitalization of Indigenous legal orders that include punishment not as a means of retribution but reciprocity – though stories about Coyote's regeneration are for another day.

If we want to measure anything through indicators, it should be our bravery and *Debwewin*. We should measure how well we practice using our gifts to dream about Indigenous models of justice and ensure that the resources required are permanently endowed to give restoration a long life.¹²⁸ This is about the reinvention of a system that is not working. We have counted the numbers and they are not good. Are we ready to measure our success at stopping the ravages of colonization? Knowing we are living in a place dreamed for us, it is up to us – all of us – to do justice in our world. As Johnston sets out, if we are prepared to listen well, we all know *Debwewin* when we hear it.

Together we form a circle.

challenging, difficult and extraordinarily intimate. The process of report writing is shamefully underfunded and that has to change, permanently. There are also Crown lawyers who diligently fulfil their duty to get the court's reports and judges, such as Justice Nakatasuru in Toronto's *Gladue* Court, who carefully consider each offender appearing before them. For an example see: *R v Armitage*, 2015 ONCJ 64, [2015] OJ No 701. Though the Supreme Court has rendered a series of decisions setting out the importance of restorative justice and the systemic discrimination faced by Aboriginal Peoples, we continue to allow it to happen. Courts should not sentence without a *Gladue* Report. Better yet, they should not sentence without requiring a culturally relevant restorative justice program – one that would promote healing between the offender and those harmed. Indeed, it was a long-standing practice of *Biidaaban* that the Crown and the Court itself were invited as participants because no one is immune from colonization and the need for healing.

¹²⁸ B Tomporowski et al, "Reflections on the Past, Present and Future of Restorative Justice in Canada," (2011) 48:4 *Alta L Rev* 815.