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Justice Procedures Implemented On The Blackfeet Reservation And Blood Reserve In Regards To Domestic Violence

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CARROLL COLLEGE

**JUSTICE PROCEDURES IMPLEMENTED ON THE BLACKFEET
RESERVATION AND BLOOD RESERVE IN REGARDS TO DOMESTIC
VIOLENCE**

A THESIS SUBMITTED TO THE DEPARTMENT OF INTERNATIONAL
RELATIONS IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE
DEGREE OF BACHELOR OF ARTS WITH HONORS

BY

SAPPHIRE CARTER

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SIGNATURE PAGE

This thesis for honors recognition has been approved for the Department of International Relations.

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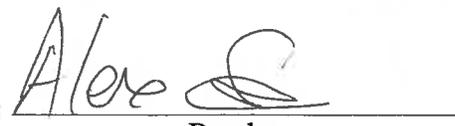
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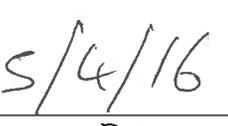
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ABSTRACT

Indigenous women disproportionately suffer from domestic violence more than any other race, in both Canada and the United States. Tribes residing in Canada and the United States are under differing legal systems. Due to this variation in legal systems, I studied the process by which decisions to prosecute are made and the process of those prosecutions, in order to assess whether these processes are likely to have relatively good outcomes for victims. Two tribal communities that are members of the Blackfoot Confederacy, the Bloods Reserve of Canada and the Blackfeet Reservation of Montana, served as my case studies because of their similar cultural background and the fact that they are under distinct federal authorities. I utilized literature on the restorative and retributive justice paradigms to categorize the procedures conducted on each side of the border. I conducted interviews with professionals, who work with indigenous victims on each side of the border, including advocates, tribal and federal prosecutors, and tribal police. I find that Canadian jurisdiction employs more restorative procedures, than the United States, although both sides utilize some aspects of both justice paradigms.

Keywords: restorative justice, retributive justice, indigenous victims, domestic violence

This thesis is dedicated to all indigenous grandmothers, mothers, & daughters.

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The Experience of Victims and Why Their Perspectives Matter

Earlier in my life, my mother owned a local convenience store. Since her business occupied most of her time, she needed someone to watch me. So, she recruited my brother's first wife as a babysitter during the summers, when I was not at school. My sister-in-law is of Hispanic and Apache descent. I spent my day playing with my niece and sometimes helping my sister-in-law with chores. She would also teach me Spanish words and phrases. When my brother would return home from work, he would often beat her. The beatings were for different reasons each time. Either she did not clean the house to his satisfaction or she did not cook a dinner and so forth. One time he beat her so badly that she had to get stitches in her cheek and braces in her mouth. On another hot dry summer day she escaped with us children out to the dirt canyon road. We walked the three-mile stretch to my mother's convenience store, with my baby nephew in her arms and me on her side holding hands with my niece. I was six years old at the time. Not being a tribal member, our tribe consequently ostracized her from the community and her ability to access resources to combat such abuse. She eventually divorced him and escaped for the last time. I know similar stories to her's, including my own experiences with my first boyfriend, who is a member of my tribe. I fortunately left the relationship before the situation escalated from verbal and emotional threats to physical trauma.

Indigenous women disproportionately suffer from domestic violence more than any other race, in both Canada and the United States.¹ There are several theories on why

¹ Douglas A. Brownridge, "Understanding the Elevated Risk of Partner Violence against Aboriginal Women: A Comparison of Two Nationally Representative Surveys of Canada," *Journal of Family Violence* 23 (2008): 353. Also see Jane Dickson-Gilmore, "Whither Restorativeness? Restorative Justice and the Challenge of Intimate Violence in Aboriginal Communities," *Canadian Journal of Criminology and Criminal Justice* 56, no. 4 (2014): 2, doi: 10.3138/cjccj.2014.S02.

these rates are so high. Burnette & Canon claim it is because violence is often a reoccurring cycle tolerated by tribal communities.² Although Dickson-Gilmore notes the contribution that familial and community violence plays in such rates, she disagrees with the idea that the community tolerates such behavior. Instead, she argues that tribal communities do not have the capacity to mitigate such concerns and need to focus their interests onto other more important issues.³ Brownridge suggests that there are several factors contributing to this epidemic including socio-economic status and substance abuse.⁴ Another prominent theory is that of colonization. Baker claims current violence can be attributed to the lasting impacts of historical trauma, which resulted in the loss of matriarchal systems within tribal communities.⁵

In both Canada and the United States, feminist movements in the 1970s and 1980s placed political pressure on the need for reforms in domestic violence litigation.⁶ As Johnson points out, “the inadequate legal responses to domestic violence incidents created the need for support and defense of women who were abused by intimate

² Catherine E. Burnette and Clare Cannon, “‘It will Always Continue Unless We Can Change Something’: Consequences of Intimate Partner Violence for Indigenous Women, Children, and Families,” *European Journal of Psychotraumatology* 5 (2014): 4, accessed November 23, 2015, doi: 10.3402/ejpt.v5.24585.

³ Jane Dickson-Gilmore, “Whither Restorativeness? Restorative Justice and the Challenge of Intimate Violence in Aboriginal Communities,” *Canadian Journal of Criminology and Criminal Justice* 56, no. 4 (2014): 6, doi: 10.3138/cjccj.2014.S02.

⁴ Douglas A. Brownridge, “Understanding the Elevated Risk of Partner Violence against Aboriginal Women: A Comparison of Two Nationally Representative Surveys of Canada,” 356.

⁵ Joanne Baker, “Gender, Sovereignty, Rights: Native Women’s Activism against Social Inequality and Violence in Canada,” *American Quarterly* 60 (Jun. 2008): 262. In this work, Baker acknowledges that many North American tribal societies were originally based on matriarchal hierarchies. For more on this subject also see Hilary N. Weaver, “The Colonial Context of Violence: Reflections on Violence in the Lives of Native American Women,” *Journal of Interpersonal Violence* 24 (2009): 1552-1563.

⁶ Kimberly D. Bailey, “Lost in Translation: Domestic Violence, ‘the Personal is Political,’ and the Criminal Justice System,” *The Journal of Criminal Law and Criminology* (2010): 4-5.

partners.”⁷ Feminist groups intended the new laws to focus on the voice of the victim, but their intentions fell short because the best available option at that time was to allow the state more control in the process than victims.⁸ This state control was manifested through the adoption of mandatory arrest policies.⁹ Although, these reforms were critical for laying the current foundation of domestic violence law, the lack of victims’ voices in the process is disconcerting. These factors are important to acknowledge in order to understand the general magnitude of the domestic violence problem among tribal communities within Canada and the United States.

Tribes residing in Canada and the United States are under differing legal systems. The Canadian judicial system, unlike the United States, is nationalized and tribes have historically been prohibited from establishing their own courts.¹⁰ Therefore, tribes are under the jurisdiction of Canadian courts. Tribes in Canada depend less on court actions than tribes in the United States, “Since 1982, the Canadian courts have played a central role in defining Aboriginal and treaty rights but have encouraged political solutions instead of legal actions.”¹¹ In the United States, tribes have their own courts. However, Brock warns that indigenous communities in Canada ought not to weigh the court system of the United States too highly, for two reasons: United States tribal jurisdiction only

⁷ Ida M. Johnson, “Victims’ Perceptions of Police Response to Domestic Violence Incidents,” *Journal of Criminal Justice* 35 (2007): 498.

⁸ Kimberly D. Bailey, “Lost in Translation: Domestic Violence, ‘the Personal is Political,’ and the Criminal Justice System,” *The Journal of Criminal Law and Criminology* (2010): 6.

⁹ Bailey, “Lost in Translation: Domestic Violence, ‘the Personal is Political,’ and the Criminal Justice System,” 6.

¹⁰ Kathy Brock, “Rhetoric, Reality, and Rights: Comparing Canadian and American Aboriginal Policy,” In *Indigenous Peoples of North America: A Concise Anthropological Overview*, edited by Robert J. Muckle, (University of Toronto Press 2012), 283. For more information on the Canadian judicial and political system also see, Malcolmson and Myers, *The Canadian Regime: An Introduction to Parliamentary Government in Canada*, (Toronto: University of Toronto Press, 2009).

¹¹ Brock, “Rhetoric, Reality, and Rights: Comparing Canadian and American Aboriginal Policy,” 282.

applies to indigenous peoples recognized by the federal government, and the United States court system has been gradually restricting tribal court jurisdiction.¹² Tribal jurisdiction in United States is more complex than in Canada.¹³

Disputes between tribal and state authority, in the United States, have resulted in judicial law regulating tribal sovereignty in court cases. As Washburn notes, “one key difference between serious offense in urban communities and felonies on Indian reservations is the government charged with addressing it.”¹⁴ United States tribes have jurisdiction over misdemeanor crimes.¹⁵ Thus, domestic violence cases, in the United States, are typically under tribal jurisdiction unless they fit the criteria of the Major Crimes Act, “... murder, manslaughter, rape, assault with intent to kill, arson, burglary and larceny.”¹⁶ Before the implementation of the reauthorization of VAWA, the Violence against Women Act, the United States also held control over criminal cases against women when the defendant was non-Indian.^{17 18}

¹² Brock, “Rhetoric, Reality, and Rights: Comparing Canadian and American Aboriginal Policy,” 283.

¹³ For more information on how the two systems differ see Laura E. Evans, “Tribal-State Relations in the Anglosphere,” *Annual Review of Political Science* 17 (2014): 273-289.

¹⁴ Kevin K. Washburn, “Federal Criminal Law and Tribal Self-Determination,” *North Carolina Law Review* 84 (2006): 3.

¹⁵ Kevin K. Washburn, “Federal Criminal Law and Tribal Self-Determination,” *North Carolina Law Review* 84 (2006): 23.

¹⁶ Kevin K. Washburn, “Federal Criminal Law and Tribal Self-Determination,” *North Carolina Law Review* 84 (2006): 23.

¹⁷ Samuel D. Cardick, “Failure of the Tribal Law and Order Act to End the Rape of American Indian Women,” *Saint Louis University Public Law Review* 31 (2011): 553.

¹⁸ Note: As earlier stated VAWA now allows for crimes committed by non-Indians to be prosecuted by tribes. U.S. Department of Justice, Office of Tribal justice and Safety, *Violence against Women Act (VAWA) Reauthorization 2013*, (Washington, DC: Government Printing Office, 2013), <http://www.justice.gov/sites/default/files/tribal/legacy/2014/02/06/vawa-2013-tribal-jurisdiction-over-non-indian-perpetrators-domesticviolence.pdf>.

Thus, there is variation in the kind of legal system that will accommodate and prosecute domestic violence cases regarding indigenous women.¹⁹ Due to the variation in legal systems, I studied the process by which decisions to prosecute are made and the process of those prosecutions, in order to assess whether these processes are likely to have relatively good outcomes for victims. Two tribal communities that are members of the Blackfoot Confederacy, the Bloods Reserve of Canada and the Blackfeet Reservation of Montana, served as my case studies because of their similar cultural background and the fact that they are under distinct federal authorities.²⁰ I utilized literature on the restorative and retributive justice paradigms to categorize the procedures conducted on each side of the border. I conducted interviews with professionals, who work with indigenous victims on each side of the border, including advocates, tribal and federal prosecutors, and tribal police. Please see the appendices for my research methodology and interview questionnaire. I find that Canadian jurisdiction employs more restorative procedures than the United States, although both sides utilize some aspects of both justice paradigms.

This paper is split into three sections. First, I discuss the scholarly debates on the perceived benefits and problems of utilizing either retributive or restorative models of justice. Second, I compare the various domestic violence laws of the Blackfeet Reservation, Canadian, and American justice systems. Finally, I analyze interviews with

¹⁹ It is important to note that there are several term usages for North American tribes including: First Nations, First Peoples, Aborigines, Native Americans, American Indians, and so forth. This research will utilize the term indigenous to refer to the general population and the specific tribal name for each case study. Indigenous is preferred for the purposes of this study, because it is a term used within both national borders. The use of the specific tribal name is to ensure no confusion with each case. Canada and United States have different policies that establish criteria for what constitutes an indigenous person.

²⁰ Sharon O'Brien, "The Medicine Line: A Border Dividing Tribal Sovereignty, Economics and Families," *Fordham Law Review* 53, no. 2 (1984): 322.

tribal and district attorneys, advocates, and tribal police, in order to understand the processes within both systems. The framework for this analysis follows from the literature on restorative and retributive justice. Interviewees were recruited from professionals who have experience with domestic violence cases committed on the Blackfeet Reservation, with headquarters in Browning, Montana and on the Bloods Reserve in Southern Alberta, from the years 2010 onward. The year 2010 was chosen because it is three years before the United States' Reauthorization of VAWA, which brought new laws on tribal capacity to review and rule on domestic violence cases involving accused non-tribal members.²¹ Although there is no equivalent to VAWA in Canada, it is still relevant to look at the timeline before and after reauthorization because of this historic expansion of tribal jurisprudence.²²

Literature on Justice Paradigms

To better understand the various processes that a justice system may utilize it is necessary to identify the various debates regarding differing justice paradigms.²³ Debates often focus on the question of which procedures are best in providing victims justice. The literature finds two distinct paradigms of justice: restorative and retributive. Essentially,

²¹ U.S. Department of Justice, Office of Tribal justice and Safety, *Violence against Women Act (VAWA) Reauthorization 2013*, (Washington, DC: Government Printing Office, 2013), <http://www.justice.gov/sites/default/files/tribal/legacy/2014/02/06/vawa-2013-tribal-jurisdiction-over-non-indian-perpetrators-domesticviolence.pdf>. Note: Tribes have ability to prosecute effectively on the date of March 7, 2015, which means some cases utilized in this study will potentially include that of accused non-tribal members.

²² Note: Rather than expansion tribes have historically experienced abridgement of sovereignty. For more information on this subject see Kevin K. Washburn, "Federal Criminal Law and Tribal Self-Determination," *North Carolina Law Review* 84 (2006): 1-70.

²³ Note: This study will utilize female pronouns to describe the victim. Although, men also suffer from domestic violence, this study's focus is on domestic violence experienced by indigenous women. For more on indigenous men suffering from violence see Douglas A. Brownridge, "Intimate Partner Violence against Aboriginal Men in Canada," *Australian and New Zealand Journal of Criminology* 43, no. 2 (2010): 223-237.

as Gromet explains, these two paradigms are shaped by people's personal convictions on what justice entails:

whereas some people will consistently react to victims with feelings of sympathy and a belief that repairing the harm will provide the best way to make the victim feel better about what happened to them (a restorative justice approach), others will respond to victims with feelings of moral outrage about the harm caused to them and a belief that pursuing the punishment of the offender is the best means to restore victims (a retributive justice approach).²⁴

Retributive justice focuses on assuring that just punishment is served to perpetrators.²⁵ As Melton describes, "punishment is used to appease the victim, to satisfy society's desire for revenge, and to reconcile the offender to the community by paying a debt to society."²⁶ Gromet claims that people find revenge to be "psychologically satisfying,"²⁷ and for that reason some victims may prefer the retributive process. Another reason why victims may prefer punishment over reconciliation is the brief interval punishment provides. Victims want their families and themselves to be safe from violence and sending their abusers to jail may be the best way to make sure that happens.²⁸ However, criticism of the retributive approach suggests that it may lack victim voice:

Even though they are the ones who have been most directly harmed and wronged by the crimes, their concerns and needs receive little attention in the criminal justice system by design (as the state becomes the adversary against the offender). The procedures do not allow for victims to have a voice in their own justice

²⁴ Dena M. Gromet, "Restoring the Victim: Emotional Reactions, Justice Beliefs, and Support for Reparation and Punishment," *Critical Criminology* 20, no. 1 (2012): 17.

²⁵ Dena M. Gromet, "Restoring the Victim: Emotional Reactions, Justice Beliefs, and Support for Reparation and Punishment," *Critical Criminology* 20, no. 1 (2012): 14.

²⁶ Ada Pecos Melton, "Indigenous Justice Systems and Tribal Society," *Judicature* 79 (1995): 126.

²⁷ Dena M. Gromet, "Restoring the Victim: Emotional Reactions, Justice Beliefs, and Support for Reparation and Punishment," 11.

²⁸ Anne McGillivray and Brenda Comaskey, *Black eyes all of the time: Intimate Violence, Aboriginal Women, and the Justice System*, (Toronto: University of Toronto Press, 1999), 21.

proceedings, and the outcomes of these proceedings are evaluated with regard to offender and societal level concerns (e.g., recidivism).²⁹

Whereas retributive justice seeks to establish victim revenge, the restorative justice paradigm emphasizes reconciliation between victims and perpetrators: “Its distinctive feature is the promotion of restorative outcomes, such as reparation for harm, re-establishing relationships, healing of victims, and reintegration of offenders into the community.”³⁰ Gromet claims victims experience more satisfaction with this approach.³¹ Nancrow found that indigenous women in Australia perceived the restorative approach as more threatening to the perpetrator than the criminal justice approach because he would have to face the ridicule of the entire community.³² Melton suggests that this paradigm gives victims more autonomy over their cases:

The victim may speak on his or her own behalf, and the family may assist in conveying the victim’s issues. Extended family members often serve as spokespersons if the victim is very young or vulnerable. Similarly, a spokesperson may be designated to speak on behalf of the accused, especially if the accused is a juvenile or if other circumstances prevent the accused from speaking.³³

Although some may argue restorative justice offers victims more autonomy, there are several concerns regarding victims that this paradigm does not address. Balfour notes that studies have repeatedly found that women want to be safe, and perpetrators going to jail is the best way to assure that happens.³⁴ Therefore, safety may be a priority to victims

²⁹ Dena M. Gromet, “Restoring the Victim: Emotional Reactions, Justice Beliefs, and Support for Reparation and Punishment,” 9-10.

³⁰ Hema Hargovan, “Restorative Justice and Domestic Violence: Some Exploratory Thoughts,” *Agenda: Empowering Women for Gender Equity* 19, no. 66 (2005): 48.

³¹ Dena M. Gromet, “Restoring the Victim: Emotional Reactions, Justice Beliefs, and Support for Reparation and Punishment,” 10-11.

³² Heather Nancrow, “In Search of Justice for Domestic and Family Violence: Indigenous and Non-Indigenous Australian Women’s Perspectives,” *Theoretical Criminology* 10 (2006): 100.

³³ Ada Pecos Melton, “Indigenous Justice Systems and Tribal Society,” *Judicature* 79 (1995): 129.

³⁴ Gillian Balfour, “Falling Between the Cracks of Retributive and Restorative Justice the Victimization and Punishment of Aboriginal Women.” *Feminist Criminology* 3 (2008): 104.

rather than the benefits of possible reconciliation with perpetrators. Adding to the concerns, Dickson-Gilmore acknowledges how hard it is for victims to truly forgive accusers in the case of domestic abuse, since "...the nature of this crime, which is epidemic in Aboriginal communities, renders it uniquely resistant to restorative processes that rely on trust, apology, and meaningful communication."³⁵ The restorative justice approach has the potential to pressure victims into appeasing perpetrators way too soon.³⁶

Stubbs concludes that the current framework of restorative justice is not enough to appease gendered violence.³⁷ In fact to be most effective both restorative and criminal justice systems would need to be mixed and offer victims alternative support, rather than mere reconciliation.³⁸ Indeed, Nancrow's study comparing the perspectives of indigenous and non-indigenous Australian women showed that indigenous victims often perceived restorative justice as a possible solution to crime, except in the cases of "domestic homicide, serious assaults, and sexual abuse of children by adults," due to their sensitive nature.³⁹

Canada and the United States have both implemented mandatory arrest policies that requires arrest by police officers whenever there is an allegation of domestic abuse.⁴⁰

³⁵ Jane Dickson-Gilmore, "Whither Restorativeness? Restorative Justice and the Challenge of Intimate Violence in Aboriginal Communities," 1, doi: 10.3138/cjccj.2014.S02.

³⁶ Jane Dickson-Gilmore, "Whither Restorativeness? Restorative Justice and the Challenge of Intimate Violence in Aboriginal Communities," 1, doi: 10.3138/cjccj.2014.S02.

³⁷ Julie Stubbs, "Relations of Domination and Subordination: Challenges for Restorative Justice in Responding to Domestic Violence," *University of New South Wales Law Journal* 33 (2010): 985-986.

³⁸ Stubbs, "Relations of Domination and Subordination," 985-986.

³⁹ Heather Nancrow, "In Search of Justice for Domestic and Family Violence: Indigenous and Non-Indigenous Australian Women's Perspectives," *Theoretical Criminology* 10 (2006): 96.

⁴⁰ For information on mandatory arrest policies, see: Gillian Balfour, "Falling Between the Cracks of Retributive and Restorative Justice the Victimization and Punishment of Aboriginal Women." *Feminist Criminology* 3 (2008): 105-110 and Anne McGillivray and Brenda Comaskey, *Black eyes all of the time: Intimate Violence, Aboriginal Women, and the Justice System*, (Toronto: University of Toronto Press, 1999): 89-92.

These laws were created mainly on account of the original lack of response by police; “The surge of ‘civil’ action lawsuits arguing that the legal intervention approach used by police officers failed to provide women with equal protection of the law led to the implementation of mandatory and pro-arrest policies.”⁴¹ However, victims are less likely to report cases of abuse because of such policies.⁴² One reason victims may not report abuse is that perpetrators are often the main source of family income, so when they are punished for their violent actions, the family suffers.⁴³ As Bailey notes, “a domestic violence victim faces a fifty percent chance that her standard of living will drop below the poverty line when she chooses to leave her batterer.”⁴⁴

Other concerns arise with the implementation of mandatory arrest policies, where victims may consider not calling because of fear that their partner may be arrested.⁴⁵ Indeed, Johnson notes in her study that half of victims would call police if the response guaranteed no arrest and a stop to the violence.⁴⁶ Indigenous women may even be less likely to call the police. As Johnson describes, “Some women of color resist mandatory arrest policies because of their perception that such arrests would lead to an expansion of

⁴¹ Ida M. Johnson, “Victims’ Perceptions of Police Response to Domestic Violence Incidents,” *Journal of Criminal Justice* 35 (2007): 499.

⁴² Enrique Gracia, “Unreported Cases of Domestic Violence against Women: Towards an Epidemiology of Social Science, Tolerance, and Inhibition,” *Journal of Epidemiology and Community Health* 58, no. 7 (2004): 536.

⁴³ Kimberly D. Bailey, “Lost in Translation: Domestic Violence, ‘the Personal is Political,’ and the Criminal Justice System,” *The Journal of Criminal Law and Criminology* (2010): 8. See also, Enrique Gracia, “Unreported Cases of Domestic Violence against Women: Towards an Epidemiology of Social Science, Tolerance, and Inhibition,” 536.

⁴⁴ Kimberly D. Bailey, “Lost in Translation: Domestic Violence, ‘the Personal is Political,’ and the Criminal Justice System,” 11.

⁴⁵ Ida M. Johnson, “Victims’ Perceptions of Police Response to Domestic Violence Incidents,” *Journal of Criminal Justice* 35 (2007): 507.

⁴⁶ Ida M. Johnson, “Victims’ Perceptions of Police Response to Domestic Violence Incidents,” 505.

state control of minority males and poor people.”⁴⁷ Nancrow also observes in her study that indigenous Australian women perceived state control as having a negative effect to indigenous communities through the splitting of families and escalation of violence.⁴⁸

Although each justice paradigm comes with its own weaknesses and strengths, what may really matter is how victims respond to the process. Anderson and Otto found in their research in the United States and the Netherlands that people showed a clear preference for their justice systems.⁴⁹ Gromet also concluded that “whether people favor a restorative or retributive approach (or both) to dealing with victim concerns is likely to be determined by whether these approaches reflect their beliefs about how justice can be achieved.”⁵⁰ Thus, these studies suggest that the personal beliefs and feelings held by victims during and after the process dictate which justice approach victims will prefer.

In sum, there are clear benefits and problems with each justice paradigm. The retributive approach may satisfy feelings of vengeance and concerns for safety by victims, but it also does not offer an avenue for victim voice to be heard throughout the court process. Whether that victim voice includes charges being dropped or harsh sentences when the victim asks, it is unclear whether any system can fully account for the preferences of victims. The restorative justice approach, on the other hand, focuses on reconciling what happened by providing a forum for the victim and perpetrator to address each other on the issue. However, victims may not be ready to participate in restorative

⁴⁷ Ida M. Johnson, “Victims’ Perceptions of Police Response to Domestic Violence Incidents,” 500.

⁴⁸ Heather Nancrow, “In Search of Justice for Domestic and Family Violence: Indigenous and Non-Indigenous Australian Women’s Perspectives,” *Theoretical Criminology* 10 (2006): 97.

⁴⁹ Rebecca A. Anderson, and Amy L. Otto, “Perceptions of Fairness in the Justice System: A Cross-Cultural Comparison,” *Social Behavior and Personality* 31 (2003): 557.

⁵⁰ Dena M. Gromet, “Restoring the Victim: Emotional Reactions, Justice Beliefs, and Support for Reparation and Punishment,” 14.

procedures, because of the severe nature of the crime and the fact that such a process requires some forgiveness of the perpetrator. The following section focuses on the specific justice structures implemented in the United States and Canada regarding tribal communities.

Tribal Involvement in Justice Systems

Canada

The Canadian government has sole jurisdiction over the prosecution of crimes committed within tribal communities.⁵¹ Therefore, tribal communities have little say in the criminal process. The Canadian justice system, as in the United States, is adversarial and traditionally does not have restorative justice procedures.⁵² These circumstances have a tendency to lead to certain consequences for indigenous communities. Since they are unable to try their own cases, they are also unable to provide culturally sensitive sentences to offenders. However, the Canadian court system has recognized this concern and has tried to alleviate it with the option that judges can now offer alternative procedures like sentencing circles.⁵³ Rashmi Goel describes sentencing circles as a contemporary form of healing circles, where members from the accused and victim's community participate by offering advice towards sentencing and all are supposedly

⁵¹ Kathy Brock, "Rhetoric, Reality, and Rights: Comparing Canadian and American Aboriginal Policy," In *Indigenous Peoples of North America: A Concise Anthropological Overview*, edited by Robert J. Muckle, (University of Toronto Press 2012), 283.

⁵² Rebecca A. Anderson and Amy L. Otto, "Perceptions of Fairness in the Justice System: A Cross-Cultural Comparison," *Social Behavior and Personality* 31 (2003): 558.

⁵³ Joanne Belknap and Courtney McDonald, "Judges' Attitudes about Experiences with Sentencing Circles in Intimate-Partner Abuse Cases," *Canadian Journal of Criminology and Criminal Justice* (2010): 371.

equal in power status while sitting in a circle format.⁵⁴ In addition, the Peacemakers Program on the Blood Reserve was implemented in 2008 by the Canadian government in order to form alternative justice procedures that focus on reconciliation between perpetrators and community. This program also offers perpetrators and victims counseling services.⁵⁵

Sentencing circles are now a viable alternative to traditional Canadian sentencing hearings. Feminist scholars, reported in this study, have several criticisms of the use of sentencing circles concerning victim voice and autonomy. Indeed, most would agree that sentencing circles disregard victims' concerns. They acknowledge, though, that the current sentencing framework is also ineffective and in need of reform in order to decrease indigenous incarceration rates.⁵⁶ It must be noted that judges have the ultimate decision over sentencing regardless of what the participants within the circle request, and that victims are supposed to be willing participants.⁵⁷ However, in Crnkovich's observations of a sentencing circle conducted in the Nunavik Region of Quebec, she noticed that the victim did not want to attend the circle and was unaware of how the process would go.⁵⁸ She also repeatedly stressed that the community seemed unprepared to conduct such a circle. The victim also did not voice her concerns as much or equally to the perpetrator and Crnkovich perceived that the victim was afraid.⁵⁹

⁵⁴ Rashmi Goel, "No Women at the Center: The Use of the Canadian Sentencing Circle in Domestic Violence Cases," *Wisconsin Women's Law Journal* 15 (2000): 295 & 314.

⁵⁵ Department of Justice Canada, *Archived-Kainai Peacemaking Program*, (Ottawa, Canada: Government of Canada, 2015), <http://news.gc.ca/web/article-en.do?nid=943669>.

⁵⁶ Belknap and MacDonald, "Judges' Attitudes about Experiences with Sentencing Circles in Intimate-Partner Abuse Cases," 373.

⁵⁷ Rashmi Goel, "No Women at the Center: The Use of the Canadian Sentencing Circle in Domestic Violence Cases," *Wisconsin Women's Law Journal* 15 (2000): 317 & 319.

⁵⁸ Mary Crnkovich, "A Sentencing Circle," *Journal of Legal Pluralism* 36 (1996): 165.

⁵⁹ Mary Crnkovich, "A Sentencing Circle," *Journal of Legal Pluralism* 36 (1996): 168.

There are other criticisms in regards to the practice of sentencing circles. Rashmi Goel suggests that sentencing circles do not recognize the historical trauma inflicted upon indigenous victims and that the idea that current sentencing circles are a traditional method of healing is inaccurate because they are still under the Canadian justice system.⁶⁰ Angela Cameron identifies several issues involving victim participation in sentencing circles. First, that victim safety should be a primary concern and that in the few cases presented in the study “abusers had violated no contact orders ... casting serious doubt on their willingness or ability to refrain from harassing or abusing their estranged partners...”.⁶¹ Second, Cameron believes victims must be willing participants and their voices must be represented by someone regardless of whether the victim is willing to participate.⁶² And lastly, communities need to provide adequate resources like counseling to victims as well as perpetrators.⁶³ Cunliffe and Cameron question whether judges’ personal views, through their written publications, influence their decisions to use sentencing circles and in effect disregard what is best for the victim.⁶⁴ They summarize their concerns as being:

The chief problem with which we are concerned is therefore not so much that we cannot see what was actually performed, embodied, or understood by the women participants but, rather, that judges are claiming to write an authentic and complete account of the circle when, in fact, this account clearly omits these women’s experience.⁶⁵

⁶⁰ Rashmi Goel, “No Women at the Center: The Use of the Canadian Sentencing Circle in Domestic Violence Cases,” *Wisconsin Women’s Law Journal* 15 (2000): 316.

⁶¹ Angela Cameron, “Sentencing Circles and Intimate Violence: A Canadian Feminist Perspective,” *Canadian Journal of Women and the Law* 18 (2006): 502.

⁶² Cameron, “Sentencing Circles and Intimate Violence,” 503.

⁶³ Cameron, “Sentencing Circles and Intimate Violence,” 508.

⁶⁴ Emma Cunliffe and Angela Cameroon, “Writing the Circle: Judicially Convened Sentencing Circles and the Textual Organization of Criminal Justice,” *Canadian Journal of Women and the Law* 19 (2007): 8.

⁶⁵ Emma Cunliffe and Angela Cameroon, “Writing the Circle,” *Canadian Journal of Women and the Law* 19 (2007): 15.

There are some cited benefits to sentencing circles. Belknap and McDonald find in their study of 27 Canadian judges that judges' views and concerns seem similar to those of feminist scholars in regards to restorative justice procedures.⁶⁶ When inquiring about the benefits judges perceived from sentencing circles, they found two responses: community involvement/public awareness and defendant responsibility.⁶⁷ Apparently, judges see value in community members becoming responsible for watching out for abuse, and in offenders admitting to the crime, which seems to help offenders own up to their own behaviors and actions and in turn helps the community and the victims heal.⁶⁸

United States

Tribal jurisdiction within the United States is much more of a give and take, compared to Canada. The federal government gives tribal communities authority over misdemeanor cases involving indigenous victims and offenders. But due to the Major Crimes Act, the federal government takes away tribal authority over major crimes and cases involving non-Indian offenders.⁶⁹ Thus, domestic violence cases usually fall under tribal jurisdiction until they meet the criteria of the Major Crimes Act.

Tribal courts follow the American system. Melton states "modern tribal courts mirror American courts," and "they are presided over by law-trained judges and often

⁶⁶ Joanne Belknap and Courtney McDonald, "Judges' Attitudes about and Experience with Sentencing Circles in Intimate-Partner Abuse Cases," *Canadian Journal of Criminology and Criminal Justice* (2010): 372.

⁶⁷ Belknap and McDonald, "Judges' Attitudes about and Experiences with Sentencing Circles in Intimate-Partner Abuse Cases," 378.

⁶⁸ Belknap and McDonald, "Judges' Attitudes about and Experiences with Sentencing Circles in Intimate-Partner Abuse Cases," 378 & 381.

⁶⁹ Kevin K. Washburn, "Federal Criminal Law and Tribal Self-Determination," *North Carolina Law Review* 84 (2006): 23.

exist in tribal communities that have a constitutional government.”⁷⁰ The Blackfeet Tribal Law and Order code also reflects the American court system. Ordinance No. 82, known as the Domestic Law, establishes three tiers of offences. The first two tiers require the guilty to spend between 10 to 180 days in jail with a fine of up to \$500. The third tier demands a higher payment of up to \$2000 and requires counseling up to 365 days.⁷¹

There are several issues dealing with tribal jurisdiction over cases regarding non-Indian members. Studies have reported that indigenous victims are often assaulted or violated by non-Indian offenders.⁷² Thus, it would seem a critical issue that tribes do not have jurisdiction to try cases when the perpetrator is of non-Indian status. Before the reauthorization of VAWA, the United States held control over criminal cases against women when the defendant was non-Indian.⁷³ This has changed with VAWA, but only a few tribes have implemented VAWA throughout the United States, Fort Peck being the only tribe in Montana, under a pilot project with the Department of Justice.⁷⁴

Some arguments against tribes having jurisdiction over such cases are that it would be unfair to the non-Indian offender. Nesper writes that the United States court system is unique in its fundamental beliefs of the necessity of a trial’s incorporation of a

⁷⁰ Ada Pecos Melton, “Indigenous Justice Systems and Tribal Society,” *Judicature* 79 (1995): 130.

⁷¹ Marvin D. Weatherwax, *Blackfeet Tribal Law and Order Code: Ordinance No. 82 Domestic Abuse Law Ordinance*, Browning: Blackfeet Tribal Business Council, 1999, From Montana Indian Law Portal, Tribal Codes. Web, <http://indianlaw.mt.gov/blackfeet/codes/default.mcp> (accessed November 9, 2015).

⁷² See Samuel D. Cardick, “Failure of the Tribal Law and Order Act to End the Rape of American Indian Women,” *Saint Louis University Public Law Review* 31 (2011): 543-544 for statistics on assaults involving American Indian women.

⁷³ Samuel D. Cardick, “Failure of the Tribal Law and Order Act to End the Rape of American Indian Women,” *Saint Louis University Public Law Review* 31 (2011): 553.

⁷⁴ U.S. Department of Justice, U.S. Attorney’s Office District of Montana, “Montana Tribes Selected as Pilot Project for Prosecuting Domestic Violence Crimes.” (Montana: Government Printing Office, 2015), <https://www.justice.gov/usao-mt/pr/montana-tribes-selected-pilot-project-prosecuting-domestic-violence-crimes>.

jury filled with peers of the accused.⁷⁵ This fundamental belief could be problematic in the context of tribal courts, where defendants may be related to jury members or where non-tribal citizens have no representation of themselves in the public.⁷⁶

In sum, the Canadian and American justice systems, although both adversarial, have differing jurisdictional procedures in regards to indigenous communities. The alternative sentencing means implemented by the Canadian system seems in alignment with the restorative approach. As previously stated, there are some problems and benefits regarding the use of sentencing circles, though. One good thing is that indigenous communities now have more of a say in the process than before. However, there are serious concerns that victims may be re-victimized through the process if certain conditions are not met. These conditions include that victims are willing participants and their voices are sufficiently recognized throughout the process.⁷⁷ On the other side of the border, tribal communities have much more autonomy over cases. But the tribes have implemented similar procedures as the federal government so there is not much variation between the two. The Blackfeet Reservation legal system seems to use more of the retributive justice approach through punitive prosecution measures. However, the third tier offense, in Ordinance 83, requires counseling for repeat offenders which is more in alignment with the restorative justice approach. A deeper investigation is justified in order to clarify the processes undertaken in these multiple jurisdictions. The following section analyzes interviews conducted with experts on domestic violence cases within the

⁷⁵ Larry Nesper, "Ordering Legal Plurality: Allocating Jurisdiction in State and Tribal Courts in Wisconsin," *Political and Legal Anthropology Review* 38 (2015): 37.

⁷⁶ Nesper, "Ordering Legal Plurality: Allocating Jurisdiction in State and Tribal Courts in Wisconsin," 38.

⁷⁷ Rashmi Goel, "No Women at the Center: The Use of the Canadian Sentencing Circle in Domestic Violence Cases," *Wisconsin Women's Law Journal* 15 (2000): 329.

Blackfeet and Blood tribal communities, and categorizes the various procedures taken as restorative and/or retributive measures.

Findings & Discussion

Eight interviews were conducted among the tribal communities of the Blackfeet Reservation and the Blood Reserve, four on each side of the border. All four participants on the United States side had prosecuting experience. Half were current prosecutors and the other half were advocates for victims. One had experience as a judge, cop, public defender, and prosecutor. All of these participants were also either an enrolled member of the Blackfeet tribe or a descendant, thus having close ties to the community. On the Canadian side, four interviews were conducted as well. One participant was a police officer on the Blood Reserve, who identified as indigenous, but not of the Blood tribal community. The three other participants were advocates and all members of the Blood Reserve. Of the three advocates one was a tribal elder who participated in healing/talking circles before.⁷⁸ The other two participants were victim specialists. One had experience as a former police officer and the other had previous experience with social work. The majority of participants in the study in the United States were women, whereas in Canada the gender breakdown was the opposite.

This study found several themes regarding the process taken by the differing legal systems. These themes include preventing recidivism, victim concerns with sentencing, and community involvement. The two countries used different methods in dealing with victims and perpetrators. However, the findings indicate that the Canadian system utilizes

⁷⁸ All four interviewees within the Blood community used the terms healing and talking circles rather than sentencing circles.

more restorative justice procedures than the American system does. Even though the United States system focuses more on punitive measures, participants within the Blackfeet tribe acknowledged that rehabilitative services like courses on domestic violence, parenting, and drug and alcohol abuse, served as the best deterrents to perpetrator recidivism. Hence, the tribe has established some forms of restorative justice procedures. The Canadian side implements similar punitive measures as the American side does but there are more options to use alternate means of sentencing than the traditional punitive system. Victim services on the Blood Reserve also focused on culturally sensitive approaches in order to heal victims, thus, including another form of restorative justice procedure.

Preventing Recidivism

Consistent with the restorative approach, rehabilitation in the form of drug and alcohol counseling, and parenting, domestic violence abuse and anger management courses were most often named by United States participants as the best deterrent for recidivism. However, one participant identified harsher sentencing by the court system rather than “a slap on the wrist,” as a deterrent, indicating a slight preference for the retributive model. The Blackfeet tribe requires that victims attend counseling services as well. It seems to be used as a method to break the cycle of domestic abuse so that victims will understand the situation that they are in, which might make it easier for them to leave. Many of the participants saw benefits from counseling services, including that perpetrators and victims both recognized the harm that was occurring. Victims can use methods learned from counseling to mitigate situations that could have led to domestic violence.

Prosecutor 2: *“When I was a judge I had five or six cases, this is back in 2004-2006, where both the spouses were charged with it at the same time. I ordered both spouses to go through a domestic abuse class. And all those five or six cases every one of them came back to me within six months of completing that and thanked me. Because that domestic abuse course gave them the tools to realize what was happening when it was happening. And they all pretty much said the same thing was that when we get into arguments now and it starts getting into a heavy argument I leave or she leaves. When it’s settled down they - we go back together and we talk and it’s actually helped our lives. And it don’t happen anymore. They claimed at that time. They don’t abuse their spouses anymore because she realizes what she’s doing and he realizes what he’s doing.”*

In Canada one participant claimed that the few healing circles that were administered during his tenure did deter the perpetrator for a while longer than the traditional punitive system, but the domestic violence abuse eventually reoccurred and victims began to call the police again. This observation does not necessarily mean that the participant believed that punitive measures are an effective means of deterrence either. Rather his observations were critical of the healing circles’ effectiveness, which is a similar criticism brought up by feminist scholars regarding such measures. Three of the other participants showed some skepticism towards healing circles, but also acknowledged the importance these circles have in healing and reconnecting the perpetrators and victims to the community. They also all suggested that it is up to the perpetrator to change his behavior. If he is willing to participate in such activities it must be for the effort to reconcile with the victim, victim’s family, and the community and not in order for perpetrator to get a “get out of jail free card.” Their views are in alignment with the restorative justice model that participants should be willingly engaged and the main goal of such a procedure should be to include perpetrators’ rapprochement with both victims, victims’ families, and the community.

Victim Concerns with Sentencing

Calls for Leniency

A majority of participants on the United States side said that victims often want more lenient sentences due to the fact that victims frequently return to the perpetrators. There are several reasons that victims may return including because the perpetrator is the main source of income, often babysits children so the victim can go to work, and/or because victims perceive that they are in love with the perpetrator. Victims may have low self-worth and thus feel they deserve what is happening to them. Indeed, all participants suggested that such acts of violence may be considered “normalized” behavior. All participants alluded to the domestic violence wheel/cycle, where victims turn in perpetrators in order to protect themselves and children. Then, they often regret their actions and thus recant previous statements. All participants indicated that when this situation arises they have made hostile witnesses out of victims. In these cases it is usually due to the fact that such victims have been re-victimized countless of times and prosecutors and advocates are concerned with the issue of justice. Also victims with children want to ensure that the children are protected and thus ask that perpetrators are required to attend some form of counseling classes, especially treatment for drug and alcohol. One participant suggested that when children are victimized people often seek harsher sentencing, but adult victims often do not seek such sentencing for themselves. This discrepancy may be due to victims’ low self-esteem. These findings line up with the literature on mandatory arrest policies where victims may request more lenient sentences due to economic and familial concerns.

Prosecutor 1: “I think the biggest reason is that they have no place to go and they may be protecting children and it very well can have been normalized. They really don’t have

self-worth. They don't think they deserve to be respected more than that and so it's just part of what they expect. Which is really super sad."

Advocate 1: "They'll say I don't want him around my kids unless he does this. So like behavior health, which would be talk to a psychologist or counselor or anything like that. Parenting classes so he knows what to expect and also most of the time drugs and alcohol are involved so they want him to do a drug and alcohol assessment which would need him to do treatment. So a lot of times they're like I don't want nothing to do with him I'll just go. Or they'll get him help but I don't want him around my kids until he gets help because they have seen him go through all those phases when he's sober, when he's drunk, when he's [in the] honey moon stage. It's the cycle they've lived through and don't want their kids to live through it."

Advocate 2: "But when it's against themselves, when they're the direct victim, like say domestic violence, of course the domestic violence they're still going through that cycle, we're really having to work with that victim to get them to testify against this person. Because they're still stuck in that cycling of wanting to forgive that person and get back together with the person. We're struggling with them on trying to keep the story to what it was from the beginning. So yeah I mean but when it comes to their children because we work a lot with child sexual abuse I think people really want harsher sentences and you know that's the main ones I see."

The majority of participants on the Canadian side also acknowledged that the crime of domestic violence tends to reoccur. One participant suggested that this is resultant of the economic pressures on the reservation. This observation reflects the literature regarding why victims may not prefer mandatory sentencing policies. He described the isolation of victims on the Blood Reserve, where when domestic abuse is committed such victims cannot just go across to their neighbors for help. Many homes on the reserve have multiple families living in them and need to deal with their own problems. This type of situation exacerbates abuse because problems "keep festering and building," without any escape for the parties involved. Two participants also brought up the strong kinship ties within the reservation. They suggested that these ties fostered respect and strong relationships between community members. This environment would suggest that victims would want more lenient sentences because of the possibility of immense pressure for both the victims and perpetrators to reconcile abuse due to the

strong community ties. Indeed, one participant reiterated the importance of reconciliation between perpetrator and the whole community, especially with the victim and the victim's family. The use of cultural means like ceremonies were a common approach to victim reconciliation. It seems that these methods are strongly associated with the restorative justice paradigm.

Do Victims Perceive Plea Bargains as Justice Served?

Plea bargains were an issue that arose in the United States. Due to time constraints a similar question regarding whether plea bargains were something that Canadian courts often utilized was not asked. All four participants in the United States, however, suggested that victims often do not want to face the offender. Hence, victims may be happy that plea bargains offer the option of avoiding a confrontation. One participant however, acknowledged that she often tells the victims that they will find facing the offender an empowering experience once they do it. According to the interviews victims seem to be most upset with plea bargains when perpetrators serve time for something other than the domestic violence crime they committed. Prosecutors, however, may take the plea bargains anyway, because the crime perpetrators admit to may have a harsher sentence than the domestic violence assault. However, this does not acknowledge what happened to victims therefore possibly causing more stress.

Advocate 2: "I think again it depends on the crime. Domestic violence victims are so vulnerable and they're so afraid of the defendant that a lot of times they're just totally really – and you find that a lot with sexual assault victims – they don't want to have to face the accuser. But actually when they do it's really empowering for them and I try to always explain that to them. But still they have this intense fear of having to go in front of him and say it in front of him. So I don't really think they're that upset when there is a plea agreement. But if the plea agreement doesn't say – I have had cases where the plea may have plead to something else that the defendant did at the time. Maybe some other

offense like weapons, drugs but it doesn't say they're convicted of the specific crime against the victim. Victims get really upset about that."

Are sentencing circles a viable alternative to traditional Canadian courts?

All of the Canadian participants indicated that sentencing circles were not usually administered on the Blood Reserve to deal with cases of domestic violence. Only one participant could recall the use of such measures and he indicated it being merely three times. The Peacemaker's Program was brought up by two participants who suggested that when perpetrators have been charged they have the opportunity to utilize the program in order to resolve the situation with alternative measures. Only first time offenders are admitted and offenders committing major crimes including serious bodily harm and aggravated assault are omitted from participation. Perpetrators are reportedly required to participate in domestic violence and alcohol and drug treatment courses. Elders also sit on the program committee as counselors to help with rehabilitation. One of the participants in the study suggested that perpetrators involved in the program need to be genuinely sorry for it to work. The Peacemaker's Program is a clear effort to implement restorative justice procedures on reserves by the Canadian government.

Community Involvement in Legal Procedures

In the United States, three of the participants noted that cases are often treated as offender against the victim. These three participants also acknowledged that cases should not be treated in such a matter, rather they should be treated as cases of the people versus the defendant. These statements suggest that community involvement is important to

ensure that victims' voices are acknowledged, so that victims will not feel re-traumatized by their experiences. Community involvement on the United States side is often a mix between the restorative and retributive justice literature. The Blackfeet community is believed by the participants to be affected by such crimes just as much as victims. Thus, echoing the restorative justice approach. On the other hand, community is also going against the perpetrator through punitive means rather than to establish reconciliation.

Advocate 2: "I really think they need to be more – like treat a victim how you would a homicide victim. They can't tell you anything. You're not going to rely on them to tell their homicide case so why can't domestic be like that anyway because we know this victim is in a special circumstance where she probably won't be able to say. So we need to prove it without her voice but that's not what happens usually because it's a lack of training and understanding about domestic. And it's something that I think is improving but it's something that can really be improved more. Like how we treat – not putting the whole burden on the victim to be the one to cooperate and all that kind of stuff. It should be the officers in that system to help protect her. And it should be looked at as a crime – it's the Blackfeet tribe versus this person."

In Canada, all four of the participants acknowledged the importance of community involvement. One participant reiterated that community education on the subject of domestic violence is essential to deterrence as well as making sure the victim is not re-victimized. The three other participants repeatedly stated the benefits of involving the victim in cultural ceremonies and having community members involved in the process. One participant spoke on how when he helps victims he speaks his native language to them fostering compassion towards the victim, because the victim is being addressed in her own language it heals her within. Speaking the language essentially breaks down the barrier between the advocate and the victim. This participant also described how this particular department tries to provide victims with culturally relevant services that promote healing practices. He used as examples several cases of sexual assault where victims were asked to participate in a red face painting ceremony that was

administered by tribal elders. These elders then talked to the victims and acknowledged their traumatic experiences. The advocate stated that out of the seven participants only one of the victims became unreachable. The victim had moved to Lethbridge then suffered from a nervous breakdown. The advocate seemed distressed by this outcome and wished that he could have been able to help the victim.

Do Victims Want Tribes to Handle Their Cases?

All of the U.S. participants claim that victims often want the federal government to handle their cases because of the harsher sentencing and the fact that it provides more resources. Three participants suggested, however, that victims should want tribal government to handle their cases because of the more lenient sentencing for perpetrators and the history of federal encroachment on to tribal jurisdiction. All participants claimed that the tribal courts are also not fully equipped to handle cases due to various issues like case overload and not enough resources to rehabilitate perpetrators.

Prosecutor 1: *“I thought that they would really want to hold on to this and be like it’s our land it’s our people we want to do more. The truth is they don’t have the resources the Feds do. So they are often begging me please take this case, please make it federal? Because that is the only way sometimes that people have like what I like to call the come to Jesus moment where they’re like okay I get it I have to stop being an asshole.”*

Only one participant on the Canadian side seemed concerned with Canadian jurisdiction over court cases. This participant however focused more on the trauma that the Canadian government inflicted on to tribal communities rather than the benefits that tribal jurisdiction may hold for victims. However, he acknowledged that the Canadian system does not have the same traditional values held by the Blood people, suggesting that values are important in this context. Two other participants reiterated the importance of community members being involved with the victims’ healing process but did not

suggest that tribal authority over court cases is the best means of achieving this. These participants rather noted the importance of having community members a part of the initial investigation and afterwards. Cultural support to the victim was seen as a necessary component for the victim and victim's family to reconcile with the crime. These observations are comparable to the restorative justice literature where community participation is encouraged.

Advocate 1: "Government has been in control for too long and dominant over everything. Their values are different from ours. They imposed boarding schools on to us destroying people's lives and that can't be replaced."

Non-Indian Crime Committed Against Indigenous Victims a Rarity

Non-Indian crime committed against indigenous victims is not as big of a problem on the Blackfeet Reservation, as the national statistics regarding abuse of indigenous victims in Canada and the United States suggests. Due to time constraints this study was unable to interview Canadian participants on this subject. The Blood Reserve may experience a different scenario due to the fact that they are fairly close to bigger cities and towns like Lethbridge. But this is only speculation and further inquiry is needed to see if this holds true. However, it is still interesting to note that the general statistics do not hold up in the case of the Blackfeet reservation. Prosecutor 1 suggested that this may be the case because tribes in Montana are more homogenous and tribes that are typically quoted in statistics are often not. Prosecutor 2 perceived this to be the case because the Blackfeet Reservation does not have any white town or city within its borders whereas Fort Peck does. Therefore it would make sense that the Fort Peck tribe would want to adopt VAWA, so that the tribe would also be able to prosecute non-tribal offenders.

It also seems that jurisdictional issues often arise in the United States when there is uncertainty about whether the victim or defendant is indigenous or not. The Federal Government has jurisdiction if the defendant is non-Indian and the victim is indigenous. Both the Federal Government and the tribe have jurisdiction if both are indigenous. If the victim or the defendant is a descendant of a tribe then it has to be proven that he or she is considered indigenous.

Prosecutor 2 on proving indigenous status: *“you live on the reservation, you use the hospital – you’re a descendant. You live on the reservation, you used the hospital, you put yourself out there as Indian and people look at you as an Indian then for all purposes of jurisdiction for the federal court you are an Indian.”*

Conclusion

This study finds that both the Blackfeet tribal justice procedures and the Blood Reserve utilized restorative and retributive justice measures. However, the Blood Reserve does have more procedures set up regarding the restorative model. This may be due to the fact that they do not have as much authority as the Blackfeet reservation. Thus, the Blood Reserve may be making up for lost authority, through cultural and community involvement. The study also finds that tribal communities in the United States, or at least in the Blackfeet Reservation, greatly mirror the prosecutorial process of the federal government. Indeed, as stated by Prosecutor 2, “we are under the Western system [of governance].” Experts within the United States shared similar perceptions on prosecutorial procedures, no matter if they were advocates or prosecutors for the Blackfeet tribe or the federal government. These procedures were a mix between retributive and restorative approaches.

On the Canadian side of the border, the participants identified cultural and community involvement as the best deterrents and methods to help the victims heal. Only

one participant acknowledged the jurisdictional aspect as a problem. The procedural approaches of the Blood Reserve appear closer to the restorative justice paradigm. One of the participants claimed that healing circles were utilized only three times from his recollection since arriving in the community. Two participants, however, also brought up that the Peacemaker's Program on the Blood Reserve, implemented by the Canadian government, which uses similar methods to healing circles when working with victims and perpetrators. Moreover, the mention of cultural practices such as red face painting, reflect a comparatively greater role for communal values.

This study does not suggest that one form of justice is better than another for victims. I initially sought out to find what types of procedures, whether they be restorative or retributive, are utilized within the different tribal jurisdictions. Specifically, whether tribes do something differently when they lack authority over cases occurring on their lands compared to tribes with more authority. In this case, at least, the Blood Reserve, which lacks jurisdictional authority compared to the Blackfeet Reservation, turns to more restorative means to help victims. These means include alternative sentencing, rehabilitation, reconciliation and traditional cultural practices. Further research is necessary to see if this finding is specific to this case or more generalizable across all Canadian tribal communities that lack jurisdiction compared to their American counterparts. It must be noted that this finding may also be due to sampling variation among the cross-border participants; U.S. side was primarily prosecutors or former prosecutors, whereas the majority of Canadian participants were advocates. Research conducted by Gromet and Anderson and Otto found that victims often perceive justice best served depending on their own belief structures. Indeed, participants in this study

may also follow such a pattern, where the judicial procedures that they are most familiar with dictate what they perceive to be the best procedures to utilize in their work with victims.

It seems also from the conducted interviews that victims may have varying opinions on how they want their cases to be handled. This again echoes the studies of Gromet and Anderson and Otto on victim perceptions. The findings of my study confirm the literature that victims with financial concerns may often support leniency. Johnson's findings on victims' desires to not expand state control over minorities is also applicable to this study. Further research directly asking victims what services they would prefer, from culturally sensitive procedures like red face painting and the use of tribal language to more punitive measures, is needed. Other research should focus on whether victims find plea bargains a just sentence, especially in scenarios where perpetrators plea to crimes unrelated to domestic violence.

Bibliography

- Anderson, Rebecca A. and Amy L. Otto. "Perceptions of Fairness in the Justice System: A Cross-Cultural Comparison." *Social Behavior and Personality* 31 (2003): 557-564.
- Armstrong, Jac. "Factors Contributing to Victims' Satisfaction with Restorative Justice Practice: A Qualitative Examination." *British Journal of Community Justice* 10 (2012): 39-54.
- Bailey, Kimberly D. "Lost in Translation: Domestic Violence, 'the Personal is Political,' and the Criminal Justice System." *The Journal of Criminal Law and Criminology* (2010): 1255-1300.
- Baker, Joanne. "Gender, Sovereignty, Rights: Native Women's Activism against Social Inequality and Violence in Canada." *American Quarterly* 60 (Jun. 2008): 259-266.
- Balfour, Gillian. "Falling Between the Cracks of Retributive and Restorative Justice the Victimization and Punishment of Aboriginal Women." *Feminist Criminology* 3 (2008): 101-120.
- Belknap, Joanne and Courtney McDonald. "Judges' Attitudes about and Experiences with Sentencing Circles in Intimate- Partner Abuse Cases." *Canadian Journal of Criminology and Criminal Justice* (2010): 369-395. doi: 10.31381/cjccj.52.4.369.
- Bell, Margret E., Sadie E. Larsen, Lisa A. Goodman, and Mary Ann Dutton. "Comparison of Victims' Reports and Court Records of Intimate Partner Violence Perpetrators' Criminal Case Outcomes." *Journal of Interpersonal Violence* 28, no. 14 (2013): 2966-2977.
- Brock, Kathy. "Rhetoric, Reality, and Rights: Comparing Canadian and American Aboriginal Policy." In *Indigenous Peoples of North America: A Concise Anthropological Overview*, edited by Robert J. Muckle, 271-290. University of Toronto Press, 2012.
- Brownridge, Douglas A. "Understanding the Elevated Risk of Partner Violence against Aboriginal Women: A Comparison of Two Nationally Representative Surveys of Canada." *Journal of Family Violence* 23 (2008): 353-367.
- Burnette, Catherine E., and Clare Cannon. "'It will Always Continue Unless We Can Change Something': Consequences of Intimate Partner Violence for Indigenous Women, Children, and Families." *European Journal of Psychotraumatology* 5 (2014). Accessed November 23, 2015. doi: 10.3402/ejpt.v5.24585.
- Cameron, Angela. "Sentencing Circles and Intimate Violence: A Canadian Feminist Perspective." *Canadian Journal of Women & the Law* 18 (2006): 471-512. doi: 10.3138/cjwl.18.2.479.

- Cardick, Samuel D. "Failure of the Tribal Law and Order Act to End the Rape of American Indian Women," *Saint Louis University Public Law Review* 31 (2011): 539-578.
- Crnkovich, Mary. "A Sentencing Circle." *Journal of Legal Pluralism* 36 (1996): 159-181.
- Cunliffe, Emma and Angela Cameron. "Writing the Circle: Judicially Convened Sentencing Circles and the Textual Organization of Criminal Justice." *Canadian Journal of Women and the Law* 19 (2007): 1-35. doi: 10.3138/cjwl.19.1.1
- Department of Justice Canada. *Archived-Kainai Peacemaking Program*. Ottawa, Canada: Government of Canada, 2015. <http://news.gc.ca/web/article-en.do?nid=943669>.
- Dickson-Gilmore, Jane. "Whither Restorativeness? Restorative Justice and the Challenge of Intimate Violence in Aboriginal Communities." *Canadian Journal of Criminology and Criminal Justice* 56, no. 4 (2014): 417-446. doi: 10.3138/cjccj.2014.S02.
- Goel, Rashmi. "No Women at the Center: The Use of the Canadian Sentencing Circle in Domestic Violence Cases." *Wisconsin Women's Law Journal* 15 (2000): 293-334.
- Gracia, Enrique. "Unreported Cases of Domestic Violence against Women: Towards an Epidemiology of Social Science, Tolerance, and Inhibition." *Journal of Epidemiology and Community Health* 58, no. 7 (2004): 536-537.
- Gromet, Dena M. "Restoring the Victim: Emotional Reactions, Justice Beliefs, and Support for Reparation and Punishment." *Critical Criminology* 20, no. 1 (2012): 9-23.
- Hargovan, Hema. "Restorative Justice and Domestic Violence: Some Exploratory Thoughts." *Agenda: Empowering Women for Gender Equity* 19, no. 66 (2005): 48-56.
- Johnson, Ida M. "Victims' Perceptions of Police Response to Domestic Violence Incidents." *Journal of Criminal Justice* 35 (2007): 498-510.
- Laximinarayan, Malini, Jens Henrichs, and Antony Pemberton. "Procedural and Interactional Justice: A Comparative Study of Victims in the Netherlands and New South Wales." *European Journal of Criminology* 9 (2012): 260-275.
- Malcolmson, Patrick and Richard Myers. *The Canadian Regime: An Introduction to Parliamentary Government in Canada*, 4th ed. (Toronto: University of Toronto Press, 2009).
- Melton, Ada Pecos. "Indigenous Justice Systems and Tribal Society." *Judicature* 79 (1995): 126-133.

- McGillivray, Anne, and Brenda Comaskey. *Black eyes all of the time: Intimate Violence, Aboriginal Women, and the Justice System*. (Toronto: University of Toronto Press, 1999).
- Nancrow, Heather. "In Search of Justice for Domestic and Family Violence: Indigenous and Non-Indigenous Australian Women's Perspectives." *Theoretical Criminology* 10 (2006): 87-106.
- Nesper, Larry. "Ordering Legal Plurality: Allocating Jurisdiction in State and Tribal Courts in Wisconsin." *Political and Legal Anthropology Review* 38 (2015): 30-52.
- O'Brien, Sharon. "The Medicine Line: A Border Diving Tribal Sovereignty, Economics, and Families." *Fordham Law Review* 53, no. 2 (1984): 315-350.
- Stubbs, Julie. "Relations of Domination and Subordination: Challenges for Restorative Justice in Responding to Domestic Violence." *University of New South Wales Law Journal* 33 (2010): 970-986.
- U.S. Department of Justice. Office of Tribal justice and Safety. *Violence against Women Act (VAWA) Reauthorization 2013*. Washington, DC: Government Printing Office, 2013.
<http://www.justice.gov/sites/default/files/tribal/legacy/2014/02/06/vawa-2013-tribal-jurisdiction-overnon-indian-perpetrators-domesticviolence.pdf>.
- Varcoe, Colleen and Sheila Dick. "The Intersecting Risks of Violence and HIV for Rural Aboriginal Women in a Neo-colonial Canadian Context." *Journal de la Santé Autochtone* (2008): 42-52.
- Washburn, Kevin K. "Federal Criminal Law and Tribal Self-Determination." *North Carolina Law Review* 84 (2006): 1-70.
- Weatherwax, Marvin D. *Blackfeet Tribal Law and Order Code: Ordinance No. 82 Domestic Abuse Law Ordinance*. Browning: Blackfeet Tribal Business Council. 1999. From Montana Indian Law Portal. Tribal Codes. Web.
<http://indianlaw.mt.gov/blackfeet/codes/default.mcp>. (accessed November 9, 2015).
- Weaver, Hilary N. "The Colonial Context of Violence: Reflections on Violence in the Lives of Native American Women." *Journal of Interpersonal Violence* 24 (2009): 1552-1563.

APPENDIX 1. METHODOLOGY

Participant Recruitment and Interview Structure

This study utilized interviews with tribal and state experts involving domestic violence litigation and services to victims within the tribal communities of the Blackfeet Reservation and Bloods Reserve. The tribal communities within this study are fairly small and contact was made with departments that offered various services to victims. Tribal and district attorneys, tribal police, and domestic violence advocates who worked on cases within each community were the participants of this study. Participants were identified through the investigation of online tribal and state directories. Participants were also asked whether they could provide names of further potential participants. Contact was established either through email or phone call provided what information was made publicly available on directory sites. The study included overall eight participants with four being from each side of the border. On the United States side two were advocates and two were prosecutors. However, all had prosecuting experience. On the Canadian side, one participant was a police officer and the other three participants were advocates.

This study focuses on the process that each jurisdiction utilizes in their work with victims. Therefore, it is essential to interview the experts that administer and make decisions about the process. Attorneys, advocates and police are the best indicator other than the victims themselves on victims' perceptions. Each of the research subjects bring their own expertise on domestic violence litigation. Attorneys and advocates play a significant role in victims' domestic abuse cases whether as legal representatives or confidants. Police produce perspective on cases that do not go to trial and how that consequence affects victims.

Also, given the sensitive nature of the crime and my own status as an undergraduate researcher it is more appropriate that I interview experts rather than the victims themselves. With my limited experience in research I am not fully equipped to conduct interviews with such a vulnerable population as victims. Thus, it was unclear exactly how to be suitably sensitive in studying this issue without the possibility of breaching cultural taboos or offending victims. Interviewing experts somewhat alleviated my concerns of re-victimizing the victims. Also due to that concern, this study focused on not exposing more specific information of cases and rather opted to include the experts more general perceptions of the process.

Semi-structured interviews were conducted with attorneys, police, and advocates. A core set of questions were administered to the research subjects in a varied order focusing on the issues of: victim voice and perception, procedure of case and investigation, and perpetrator recidivism.^{79 80} Follow up questions were also administered if needed to clarify previous statements or gain new insights to something that participant had said that was not a part of the questionnaire. All interviews were conducted face to face. Interviews were conducted after a signed consent form or verbal consent had been received and recorded. The primary data retrieved from the interviews was recorded and

⁷⁹ Victim voice and perception measurements were derived from these studies: Rebecca A. Anderson and Amy L. Otto, "Perceptions of Fairness in the Justice System: A Cross-cultural Comparison," *Social Behavior and Personality* 31 (2003): 559. Jac Armstrong, "Factors Contributing to Victims' Satisfaction with Restorative Justice Practice: A Qualitative Examination," *British Journal of Community Justice* 10 (2012): 43-44.

⁸⁰ Procedural measurements were derived from these studies: Malini Laximinarayan, Jens Henrichs, and Antony Pemberton, "Procedural and Interactional Justice: A Comparative Study of Victims in the Netherlands and New South Wales," *European Journal of Criminology* 9 (2012): 267-268. Jac Armstrong, "Factors Contributing to Victims' Satisfaction with Restorative Justice Practice: A Qualitative Examination," *British Journal of Community Justice* 10 (2012): 44-48. Ida M. Johnson, "Victims' Perceptions of Police Response to Domestic Violence Incidents," *Journal of Criminal Justice* 35 (2007): 505.

transcribed into text, which was then analyzed for important themes and revealing quotations. Although the interviews in the United States were primarily conducted with the questionnaire, only one Canadian utilized the questionnaire during the interview due to personal time constraints among the other three participants. These participants provided general comments on the work they do with victims and the participants' perceptions of domestic violence litigation procedures within the Canadian justice system.

The cases of most interest for this research fall under the time period of 2010 to the present. The year 2010 is three years before the United States' Reauthorization of the Violence against Women Act (VAWA), which put forth new laws allowing tribal authority to expand their capacity to review and rule on cases involving accused non-tribal members.⁸¹ Even though, the Blackfeet Reservation has not adopted the VAWA laws and Canada has not established their own VAWA, it is still important for the broader picture of understanding how jurisdiction and process affects case outcomes due to the historic expansion of tribal jurisprudence.⁸²

⁸¹ U.S. Department of Justice, Office of Tribal justice and Safety, *Violence against Women Act (VAWA) Reauthorization 2013*, (Washington, DC: Government Printing Office, 2013), <http://www.justice.gov/sites/default/files/tribal/legacy/2014/02/06/vawa-2013-tribal-jurisdiction-overnon-indian-perpetrators-domesticviolence.pdf>.

⁸² U.S. Department of Justice, U.S. Attorney's Office District of Montana, "Montana Tribes Selected as Pilot Project for Prosecuting Domestic Violence Crimes." (Montana: Government Printing Office, 2015), <https://www.justice.gov/usao-mt/pr/montana-tribes-selected-pilot-project-prosecuting-domestic-violence-crimes>.

APPENDIX 2. INTERVIEW QUESTIONNAIRE ADMINSTERED TO RESEARCH SUBJECTS

Attorney Questionnaire

1. Can you estimate how many cases of domestic violence you have been involved in and what were your primary roles in these cases?
2. In your professional opinion, do victims prefer a system of justice that involves more of the retributive or restorative approach? Why do you believe this to be true?
3. (If Prosecuting Attorney) To what extent did the defense counsel ask the victim improper questions that may have caused stress in victim?
4. (If Public Defender) To what extent do you feel hindered in any way when cross examining victims or presenting your case? Please explain.
5. In what circumstances do victims ask for harsher or more lenient sentences?
6. Do victims usually want their voice heard in court? Under what circumstances do you perceive that victims want their voices heard?
7. Between just punishment and reconciliation, from your expertise what do you perceive to be the best deterrent of perpetrators committing domestic violence again?
8. What system would you identify as the most efficient for giving due process to perpetrators? Follow up question: Under this system, do victims seem to be satisfied with the outcome of their cases or not? Please explain.
9. (In the US) What are the broader implications of the Reauthorization of VAWA 2013 and the expansion of tribal jurisdiction over cases involving accused non-tribal members? Has this expansion had any impact on victims' perceived satisfaction with legal systems? If so, can you please explain these implications?

10. (In the US) Do you know of cases where there was uncertainty over whether the federal or tribal authorities would have jurisdiction? Can you please elaborate?
11. (In Canada) What advantages and disadvantages do you see of the Crown prosecutors having jurisdiction over crimes involving domestic abuse? Do you think there would be advantages to the tribe having jurisdiction? Would it be feasible for both kinds of government to have jurisdiction in such cases?
12. (In Canada) Are sentencing circles an available option for victims and perpetrators to use in regards to domestic abuse cases that occur on the Bloods Reserve? If so, how are they administered by the Canadian and or tribal government? Do victims seem to prefer this system or the traditional Canadian court system and why do you believe this to be true?
13. What reasons do you see in terms of procedural, lack of evidence, or something else, that leads to acquittal of cases?
14. In your professional opinion, why do some cases go to trial and others do not?

Advocate Questionnaire

1. How long have you worked as an advocate and can you please explain the various roles you have played? Can you estimate how many cases of domestic violence you have been a part of?
2. In your professional opinion, is it more important to victims that they are avenged for the wrong doing committed against them by perpetrators through the serving of time or that perpetrators receive adequate rehabilitation services?
3. From your perception, do victims seek out forgiveness for perpetrators willingly or do they feel social or familial pressure to do so? In what circumstances do victims seem to ask for harsher or more lenient sentences? Please explain why you believe this to be true.
4. (In the US) Do you know of cases where there was uncertainty over whether the federal or tribal authorities would have jurisdiction? If so, what kind of effects did that have?

5. (In Canada) What advantages and disadvantages do you see of the Crown prosecutors having jurisdiction over many crimes involving domestic abuse? Do you think there would be advantages to the tribe having jurisdiction? Would it be feasible for both kinds of government to have jurisdiction in such cases?
6. What reasons would you identify that lead a case to acquittal?
7. Do victims usually want their voice heard in court? Under what circumstances do you perceive that victims want their voices heard?
8. In your professional opinion, why do some cases go to trial and others do not?
9. In your experience, what emotions do victims display toward their offender? Does it change in the course of the process? How?
10. Under what circumstances would you identify where offenders recommit domestic violence crime?

Police Questionnaire

1. How long have you served as a police officer and can you estimate how many cases of domestic violence that you have been involved in?
2. Can you please describe how you generally conduct domestic violence investigations?
3. To what extent were victims' views considered during the investigative process? When do you usually ask for the victims input?
4. To what extent do you keep victims informed throughout the case? Do you ever explain the general process to victims, especially what will happen after arrest? (If yes) Can you please describe how you explain this to victims? (If no) What are your reasons for not explaining the process to victims?
5. Have you offered victims other contacts of support? Who or what do you offer to victims?
6. How often do you receive recurring calls from victims?

7. How often do you arrest the perpetrators? Under what conditions do you arrest versus when you do not arrest?
8. How often are these cases acts of single violence versus recurring? And from your professional opinion, under what circumstances do perpetrators commit domestic violence again?
9. Are other family members or friends often present during domestic violence situations? What roles do these people play and how do you work with them while conducting your investigations?
10. (In the US) Do you know of cases where there was uncertainty over whether the federal or tribal authorities would have jurisdiction? How did this have an effect on those cases?
11. In your professional opinion, why do some cases go to trial and others do not?
12. Between just punishment and reconciliation, from your expertise what do you perceive to be the best deterrent of perpetrators committing domestic violence again?