Alternative Sentencing

Jonathan RUDIN[*] [**]

[*] Program Director, Aboriginal Legal Services, Toronto, Ontario.

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The beginning of this decade has seen increased interest in sentencing alternatives. This interest has come from a variety of sources and is motivated by a range of factors. On some occasions, these factors work together to spur on the development of alternatives, on other occasions these factors are in conflict and work against the development of certain types of alternatives.

In this presentation today, I will identify some of the factors that have led to the current interest in sentencing alternatives. I will also try to set out some theoretical constructs that will allow for the evaluation of particular alternatives. Finally, I will discuss two alternative sentencing approaches that seem to fall outside of the constructs I have proposed.

I. WHERE IS THE INTEREST IN ALTERNATIVE SENTENCING COMING FROM?

Sentencing alternatives, particularly those that do not involve the court, have been promoted quite aggressively in recent years by provincial Attorneys General and by Crown Attorneys. One of the major reasons for the support for alternatives among these players in the justice system is that courts in many provinces are facing increasing backlogs. As police lay more and more charges, and as acts that perhaps fifteen or twenty years ago might have been dealt with by non-criminal sanctions are now coming before the courts, there is concern that the system is unable to deal with the volume. There is a very real concern that in many jurisdictions we are returning to the days of *Askov*[1]. In such an environment, one in which there is great difficulty controlling the number of cases coming into the system, there is great interest in alternatives that can free-up court time.

On a completely other front, there are individuals and organizations who have become increasingly frustrated with the ability of the justice system to address the real needs of offenders, victims, and communities. This constituency is a very diverse group. It includes, among others, Aboriginal organizations, faith groups, victims rights groups and others who have concerns about the limitations of the justice system.

From this very cursory sketch of those interested in alternatives, it is clear that programs that might meet the needs of Crown Attorneys in busy urban centres might not be deemed acceptable by Aboriginal people concerned with addressing the root causes of criminal behaviour by members of their community, and vice versa. It is for this reason that it would be a mistake to view sentencing alternative programs as all being cut from the same cloth.

II. TWO PERSPECTIVES

I would suggest that sentencing alternatives can be looked at from at least two perspectives. The first, by seeing who has control over the creation of the alternative sentence; the second, by looking at whether the program is focussed on offences or on offenders and victims. While this suggests at least two ways of looking at alternative programs, it will be seen that there is great overlap between these perspectives.

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1. *R.* v. *Askov*, [1990] 2 R.C.S. 1199.

If we think of the issue of control over the development of alternatives as a continuum, at one end will be Crown-controlled programs. Crown-controlled programs are those where the Crown, after a review (however cursory) of the case, will recommend that charges against the accused be dropped if the accused perform some relatively simple task, that is make a donation to a charitable organization, write a letter of apology, attend a short class of some sort or another.

If we move along the continuum we come to programs that have been referred to as "brokered programs". In a brokered program, the Crown (in a post-charge system) or the police (in a pre-charge system) determine that the services of an outside agency are needed to construct an alternative sentence. In these cases, the accused is referred to a staff person or volunteer with the outside agency (usually a non-profit charitable agency) who will interview the accused and perhaps the victim, if there is one, and come up with a disposition for the matter. For example, the agency staff person may recommend that the accused perform a certain amount of community service hours or take anger management classes or any other appropriate action. If the accused successfully completes this disposition, then, in a post-charge model, a note is sent to the Crown who will drop the charges against the accused. In a pre-charge model the police are informed of the accused's successful completion and charges are not laid. One of the advantages of reliance on community-based agencies is that they are better able than Crown Attorneys to determine what might be in the best interests of the accused and the victim, and will also have the necessary contacts to assist the accused in meeting the terms of the disposition.

At the other end of the continuum are programs where the disposition is determined by members or representatives of the community where the offender, victim or both are from. In these programs it is not professionals who make determinations as to the alternative disposition. For example, in the program that I am involved with in Toronto, the Community Council, the disposition determined for the offender is arrived at by volunteers who are members of the Toronto Aboriginal community, in discussion with the offender and the victim (if the victim chooses to participate). The role of paid staff is to assist the offender in carrying out the disposition, but not to make the disposition itself.

If the focus shifts to whether the programs look at the nature of the offence or the nature of the offender and those affected by his or her actions, we will see the programs on a continuum similar to the one just described.

Crown-controlled programs are also offence-based programs. They are usually available to all offenders who meet the necessary criteria for admission to the program. Generally, those criteria are that the offence is of a minor nature and that the offender is a first offender. Shoplifting diversion programs are among the most prevalent of these kinds of projects. Over the years, the model, in various jurisdictions, has expanded to include a wider range of first minor offences. Given that the rationale for these programs is to free-up court time, this offence-based focus does not really concern itself with

whether or not the offender is likely to benefit from whatever alternative disposition is imposed.[2]

Essentially these programs are premised on the notion that a significant number of first offenders will never find themselves in trouble with the law again. Their offending is seen as an aberration, often the fact of arrest is sufficient to ensure that a recurrence of offending behaviour will not take place. As a result, the alternative sentence is not designed to respond to any particular need of the offender, it is simply imposed to illustrate that there are some consequences to breaking the law.

As noted earlier, the purpose of these programs is to free-up court time. Court time is freed up so that the system can put more of its emphasis on serious cases. Serious cases are thus defined as those where there is violence, the accused is a repeat offender, etc.

In brokered models, the initial focus is also on the offence rather than the offender. Thus Crown or police guidelines for admission to brokered programs will usually set out of a range of offences that are eligible. Since the range of offences is usually broader than those of Crown- controlled programs, there is the assumption that the staff of the broker agency will take the time to determine, in some fashion, what the needs of the offender are in terms of preventing re-offending. The broker agency may determine these needs in a number of ways : through one-to-one interviews; victim-offender reconciliations; or other processes. To the extent that these programs target first offenders however, the assumption remains that these individuals will likely not re-offend regardless of what the terms of the disposition are.

In community-controlled programs, the focus shifts almost totally from the offence to the offender, the victim and the community at large. As a result, serious offences and/or repeat offenders can be dealt with in these programs. These programs look at why the offender is engaged in criminal activity and what steps are required for the offender to stop this behaviour. In these programs, the nature of the offence is usually a secondary concern. Some individuals exhibit anti-social behaviour by stealing, others by hitting people. If the focus is on why the offender is doing what he or she is doing, then the manifestation of the behaviour is not as important as determining why the behaviour is occurring.

Where victims are involved, the focus of these programs expands to include meeting the needs of the victim. This is done by giving the victim a voice and an opportunity to face the offender. In addition, the program may also look at how the victim can be assisted in addressing the consequences of the criminal act.

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2. The resources of the Ministry of the Solicitor General & Correctional Services (MSG & CS) should be reserved for those offenders most in need of rehabilitation; diversion is not a form of rehabilitation, it is a process for identifying offenders who do not need the type of rehabilitative measures for which the MSG & CS must devote the majority of its resources […] Ministry of the Solicitor General & Correctional Services, *Briefing Note Adult Diversion* (Ottawa : Ministry of the Attorney General, 1993) Appendix II at 3.

Simply put, community-controlled programs generally focus on healing — healing the hurt of the offence, healing the offender. Unlike Crown-controlled programs, the purpose of these programs is to restore some balance and harmony to the community, and ultimately, through the intervention of the community, prevent the recurrence of criminal acts.

All three models, Crown-controlled, brokered, and community-based, have their advantages. My purpose in setting out the various ways in which these programs can be viewed is not to proclaim one approach better than another. However, since programs may have very different aims, it is important to be aware of these differences in assessing what programs might serve what needs and in not deeming programs to be failures because they are unable to address concerns that they were never established to address.

As I mentioned at the outset, two types of alternative sentencing programs appear to fall outside of the models I have sketched out — sentencing circles and family group conferencing. I would like to spend some time now looking at these two models to see what they can reveal about the strengths and weaknesses of alternative approaches.

III. SENTENCING CIRCLES

Sentencing circles, as they have come to be known through the work of Judges Heino Lillies and Barry Stuart of the Yukon, do not easily fit into either of the continuums I sketched out earlier. While the ultimate sentencing disposition is arrived at by a judge, this only occurs after what may be a great amount of community input and involvement during the circle itself.[3] The decision of whether or not to hold a circle is made by the judge, not the Crown, and generally, circles are amenable to a wide variety of offences.

Sadly perhaps, the fact that sentencing circles invite a significant amount of community input into a relatively unstructured setting and with regard to a wide variety of offences, is one of the drawbacks of this approach. From the perspective of those concerned with addressing court backlogs, sentencing circles are part of the problem, not the solution. For a judge, a sentencing that might take fifteen to twenty minutes maximum in terms of court time, if done through the traditional method of submission from counsel, might take hours when done in a circle. While this might make for a meaningful process for all involved, it also takes up a great deal of court time. In particular, where circles are held for offences for which a minimal custodial sentence might be applied in any event, this can be seen as problematic from a cost-benefit point of view in terms of the needs of the court to process offenders.

One of the strengths of circles is that they draw upon a wide range of community members. Since the circle is a court process however, the determination of who will sit in the circle is ultimately one that is made by the judge. Where the judge may not be familiar with the dynamics of a particular community, this can prove problematic. Legitimate concerns have been raised, primarily by Aboriginal women's organizations, regarding the

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3. Not all circle sentencing need to involve judges. The Kwanlin Dun project in Whitehorse uses circles in many situations, some as part of the court process, some totally outside of the court.

conducting of circles in small Aboriginal communities, particularly for offences of violence against women. If the judge is not aware of the political and cultural dynamics at play in the community, and judges are often unaware of such things in communities they may visit only once a month or less, then the selection of those who are to sit in the circle and the process itself can cause real harm to the victim of the offence and leave them worse off than if resort had been made to the traditional court process.

While circle sentences do involve a significantly larger number of people in the sentencing process than do many other alternative programs, they ultimately, as part of the court process, remain under the control and jurisdiction of the judiciary. This has led to various attempts by judges to set some guidelines regarding the circumstances under which it is or is not appropriate to hold a circle. The setting of such guidelines is, I would suggest, a very difficult endeavour because judges can easily end up establishing criteria that appear to be "common-sense", but which might well exclude those who need access to alternative sentencing programs the most.

With the greatest respect to the judges involved, this is the situation that, if it has not yet occurred, is in danger of occurring in Saskatchewan. In some ways this is cruelly ironic since the Saskatchewan courts, it would appear, use sentencing circles more than any other province.[4] It is likely because more resort is made to circles in that province, that judges have felt compelled to develop guidelines.

In the case of *R*. v. *Joseyounen*,[5] Judge Fafard set out seven criteria to be used in determining whether or not a sentencing circle was appropriate. The reasoning in *Joseyounen* has been approved of in a number of other cases, and it appears that it received tacit, if not explicit approval from the Saskatchewan Court of Appeal in the case of *R*. v. *Morin*.[6]

My concern today is with the second criterion outlined in the case. That criterion states that : the accused must have deep roots in the community in which the circle is held and from which the participants are drawn.

As mentioned above, this requirement would appear to be simply common-sense. If a person does not have roots in their community then how can it be expected that the response of the community to their actions will have any significant impact? If the person is not grounded in the community there will be little or no pressure for the person to accept the support of those in the circle because there will be few consequences if the person drifts away from a community that he or she is not part of. Finally, there may well be a concern regarding the willingness or the ability of the community to respond to the needs of a person who is not a member.

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4. Although I do not believe that precise figures are kept on the holding of sentencing circles, it is likely that the jurisdiction that uses circles the most is the Yukon.

5. *R*. v. *Joseyounen*, [1995] 6 W.W.R. 438 (Sask. Q.B.).

6. *R*. v. *Morin* (1996), 101 C.C.C. (3d) 124 (Sask. C.A.).

Our experience in Toronto counters these assumptions. At least 40% of those people participating in the Community Council project have been adopted or were in foster care. Over 70% of those participating in the program have virtually no contact with the Aboriginal community in Toronto, and indeed for many of them, no contact with Aboriginal communities anywhere.

It is precisely these individuals who most need to develop links with the Aboriginal community. Without these links, many, if not most, of these people will commit more offences and be subject to greater and greater punishment. The Royal Commission on Aboriginal Peoples reported that a study in the Prince Albert Penitentiary in Prince Albert, Saskatchewan, revealed that 95% of Aboriginal inmates had been adopted or were in foster homes.[7] It is those individuals who have become estranged, or were never part of, the Aboriginal community, that most need access to alternatives that allow them to connect with their community. Establishing barriers to those who perhaps have the greatest need for access to such alternatives is almost writing them a one-way ticket to the penitentiary.

IV. FAMILY GROUP CONFERENCING

Another sentencing alternative program that does not obviously fit within the theoretical constructs developed earlier is family group conferencing. The term family group conferencing can refer to a wide range of activities. I am using the term here in the way that it has come to be known in Canada, as based on a model developed in Australia, in particular New South Wales. This model is what is referred to as a police-driven model. Police are responsible for the holding of the conferences and are essentially the ones who run them.

There has been a great deal of interest in family group conferencing in Canada. Much of that interest has been manifested by individuals taking training in how to deliver the Australian model. There is nothing magic in family group conferencing. Programs like it have been in place in Canada for years. Many of these innovative alternative sentencing programs have been developed in communities where the police, often the RCMP, have worked hand in hand with community members to look at new ways of meaningfully addressing the root causes of criminal behaviour.

Alternative sentencing programs that focus on the needs of offenders and victims can take many forms. Not only can they take many forms, they should take many forms. This variation in approaches is necessary to address the variety of needs within communities and among offenders and victims. What concerns me about what appears to be a rush to embrace the Australian family group conferencing model is that it may lead to the imposition of a one-size-fits-all approach to sentencing alternatives. I am concerned that some police forces in Canada are training their officers to deliver this program without spending the time necessary to determine if it is really what is needed in the communities they serve.

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7. Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide* (Ottawa : Ministry of Supply and Services, 1995) at 129.

There is nothing inherently wrong with a police-driven model, as long as it is understood that in some cases, the presence of a police officer running the conference may cause offenders with a distrust of the police, warranted or unwarranted, to be unwilling participants There is nothing inherently wrong with having the family participating in the conference, as long as it is understood that the presence of an abusive parent in the same room as their child, the offender, will not lead to any frank discussion of the problems causing the criminal behaviour. Alternative sentencing programs that wish to look at the causes of offending behaviour must always keep in mind that it is not the form, but the content of the program that will make it a success.

An insistence that a program must "look" a certain way, or must include certain people by virtue of their status relationship in particular roles will ultimately not be able to respond to the needs of a community. No matter how well-meaning, police officers, or anyone else for that matter, cannot come into a community and say, "now you have input, but your input is on how best to implement this model that we are bringing in". If a program is truly to address community needs it must take the time to determine what those needs are and how the community wishes them addressed.

The extent to which family group conferencing has had an impact on reducing reliance on incarceration in Australia and New Zealand has, I think, mistakenly led people to believe that it is the family group conferencing process itself that is chiefly responsible for these changes. It is not the program that is somehow special, it is the fact that government, Crowns, police and the community have agreed that alternatives must be looked at. It is the fact that resources have been put into these programs and away from a focus on incarceration. If we had similar commitments in Canada, we would have similar results. Without those commitments we will not have those results. There are many exciting, innovative alternative sentencing programs in Canada. Many of them are on the verge of closing because there is no commitment to support them on an on-going basis. We must steer away from thinking that alternative sentencing programs are just a question of importing the right process from somewhere else. Without real institutional commitment and support — support at both the political and community level — alternative sentencing programs will fail. They will be seen to be a "flavour of the week", an historical anomaly, and that would be a real tragedy.