

Indigenous Reintegrative Shaming: A Comparison of Indigenous Legal Traditions of Canada and Braithwaite's Theory of Reintegrative Shaming

Emily Sinclair

Wilfrid Laurier University, sinc7700@mylaurier.ca

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Recommended Citation

Sinclair, Emily. . "Indigenous Reintegrative Shaming: A Comparison of Indigenous Legal Traditions of Canada and Braithwaite's Theory of Reintegrative Shaming." *Bridges: An Undergraduate Journal of Contemporary Connections* 5, (1). https://scholars.wlu.ca/bridges_contemporary_connections/vol5/iss1/5

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When considering the make-up of the Canadian legal system, Canada has a history of positive law and a belief in retribution and deterrence (Borrows 2010). This legal system, however, only dates back to the time when settlers first arrived in Canada and fails to consider the Indigenous legal traditions and systems that were already in place (Borrows 2010). In addition to positive law, the Canadian context has valued Western legal traditions over the customary modes of delivering the law that often accompany Indigenous legal systems (Borrows 2010). Positive law may also be highly associated with formal sanctions rather than informal sanctions due to its definitive nature and the belief that conviction rates play a significant role in general and specific deterrence of crime (Cullen, Agnew and Wilcox 2018).

Despite these beliefs, formal sanctions are not the only methods of general and specific deterrence in Canada, and informal sanctions can play a large part in community norms and socialization. Comparing Indigenous legal traditions and Braithwaite's theory of reintegrative shaming as a method of informal sanctions and social control, this paper will argue that indigenous legal traditions use reintegrative shaming practices regularly, indicating a sophistication in their community judicial system that settlers ignored. This paper will examine Indigenous modes of justice and community control pre-contact and their methods to prevent and reduce crime. Braithwaite's theory of reintegrative shaming concerns the methods by which a community responds to crime and offenders in their community either by shaming them in a way that stigmatizes their behavior or reintegrates them into society (Cullen, Agnew and Wilcox 2018). Furthermore, this theory claims that the informal sanctions of healthy shaming and restorative community justice are an effective method of reducing recidivism, increasing community and personal healing, and forming community social controls as this paper will argue. The similarities between Braithwaite's theory and Indigenous pre-contact legal traditions may indicate that allowing Indigenous people to utilize their traditional legal system and customs may benefit the whole community. As customary law has historically been at the bottom of the legal hierarchy (Borrows 2010), its role in socialization and community control may renew its sense of importance in Canada's modern legal system.

The History of Indigenous Legal Traditions

The legacy of Indigenous legal traditions may appear scarce in comparison to the modern Canadian legal system as a result of colonialism and the banning of practicing Indigenous customs. Upon settler arrival in Canada, it was commonly thought, and is still taught in some law schools today, that the Indigenous peoples of Canada did not have any legal systems or positive law (Monachalin 2017). This

is false, however, as Indigenous communities have unique customs and traditions that reflect their worldview and belief systems (Monachalin 2017). As discussed above, colonizers in Canada brought legal philosophies with them when they arrived, the most significant being positivism that scarcely overlapped in similarity with the oral traditions of Indigenous populations (Borrows 2010). This conflict set the stage for Indigenous legal traditions to be ignored and placed at the bottom of the legal hierarchy among customary law (Borrows 2010), the reasoning being that they contributed little to the legal makeup of the country.

Looking clearly at Indigenous legal traditions, however, points to many areas where customs framed the behavior of the community. Socialization and deterrence, rehabilitation, and community restoration all demonstrate the social control Indigenous communities hold over their members, with oral tradition playing an active role in facilitation. With these areas, as will be later examined, there are many similarities of reintegrative shaming and Indigenous legal traditions that demonstrate the importance of customary law in criminological theory and criminal deterrence. Overall, Indigenous legal traditions have value and should be recognized as distinct and necessary in Canada's legal pluralistic society, thus challenging the legal hierarchy founded on ideologies of positivism and colonialism plaguing the relationship between Canada's Indigenous population and the settlers.

Methods of Deterrence and Socialization

Socialization in Indigenous legal traditions is often related to Indigenous oral tradition in that norms were created through the telling of stories and the instilling of community morals (Monchalin 2017). Clan mothers and knowledge keepers who maintained community education and philosophy were often responsible for instilling community morals through customary stories of creation and Indigenous philosophy (Monchalin 2017). These stories helped shape young children and later adults to value the same beliefs of the community and to respect those beliefs. It may also be noted that community members taking on roles as educators and storytellers may be indicative of an interdependent society that fosters community knowledge and socialization.

When it comes to deterrence, shame and ridicule have been noted as large markers of punishment and prevention. In many Indigenous communities, public perception is important and highly valued, requiring that one's behavior does not jeopardize their reputation (Monchalin 2017). Reputation is especially important in Indigenous communities due to the legacy of their oral traditions, which designate word of mouth as the strongest form of communication, meaning that word of immoral or poor behavior may spread effectively (Monchalin 2017). Furthermore,

there is a history of many Indigenous communities using shaming practices and ridicule in their punishment styles (Monchalin 2017). These consequences and subsequent deterrence measures are most often decided upon democratically, and most members participate in the active shaming (Monchalin 2017). One may suggest that the nature of public perception and the invaluable use of shaming and ridicule may indicate that many people avoid certain behaviors in fear of social ramifications and their reputation. Overall, Indigenous communities use a combination of socialization and deterrence skills to maintain community controls.

Rehabilitation

Following an offence to the community, rehabilitation of an offender is also important to reduce recidivism. One of the main ways Indigenous communities rehabilitate their offenders is through education; following an offence, it is important that the offender be educated about the consequences of their actions against the victim and the community to have the best understanding of why their actions were wrong (Monchalin 2017). This practice is accompanied by the value of healing rather than punishment, as many Indigenous communities see the healing of the victim, community, and the offender as more important than punishment for the crime (Monchalin 2017). It may be noted, however, that not all crimes and criminals were treated the same and required differential treatment based on the safety of the community.

Another common consequence of immoral behavior often required an offender to heal on their own away from the group and banishment was often used for more serious crimes (Monchalin 2017). Despite banishment being seen as an exclusionary practice, it would not occur forever, and the community allowed individuals to return without recompense when they are ready to receive them (Monchalin 2017; Napoleon and Friedland 2014). The use of banishment in Indigenous legal traditions in this way might suggest that it was a healing tool for both the offender who is mentally unable to understand their actions and the community that needs temporary separation. The return of someone from banishment often meant that they were ready to understand their actions and consequences and to not repeat the same behavior (Napoleon and Friedland 2014). Either way, it was important for an offender to be rehabilitated and to become a useful member of the community again.

Community Healing and Restoration

One last crucial aspect of Indigenous communities and legal traditions is their philosophy surrounding community well-being. This could be demonstrated

through communal decision making about how to address crime in the community (Monchalin 2017; Napoleon and Friedland 2014). While Indigenous communities varied in their exact methods for deciding criminal consequences, most included the victim and the wider harmed group for the purposes of including all voices and addressing all harms (Monchalin 2017). As explained above, it was more important for the community to heal from the trauma than to enact punishment on the offender. These restorative practices are directly opposite from Western norms of retribution when it comes to punishing offenders (Monchalin 2017), which is partly why Indigenous legal traditions have been excluded for so long.

Another method of community healing and restoration from Inuit traditions concerns the amount of trauma a community can take at one time. Their belief is that the process of healing and the punishment given to the offender should not hurt the society any more than the original crime did (Monchalin 2017). What this may entail is ideas surrounding the offender's role in the community and whether they would be able to complete the role while facing consequences. This may be indicative of an interdependent society that values everyone's position in the community as crucial to their success. This belief reflects both the rehabilitative nature of Indigenous legal traditions but also the restorative justice and community healing aspect that plans to protect from further harm.

Braithwaite's Theory of Reintegrative Shaming

Before analyzing the conditions of Braithwaite's reintegrative shaming, it is important to note the type of community that thrives best under these conditions. Braithwaite describes communitarianism as a necessary variable in any successful reintegrative shaming as it prioritizes interdependence, trust and collaboration in a community (Cullen, Agnew and Wilcox 2018). Furthermore, in communitarianism, the health and well-being of the community is more important than the individual as the community feeds and nurtures the collective group and cannot do so if unwell (Cullen, Agnew and Wilcox 2018). Communitarianism also challenges the idea that relying on others is inherently weak by arguing that an interdependent community is stronger and more successful together (Cullen, Agnew and Wilcox 2018). One may note from these characteristics that a successfully reintegrative community is more focused on restoring their collective wellbeing in addition to the individual wellbeing of victims and offenders; these societies value all individuals as indispensable to the collective group regardless of criminal behavior. In addition to communitarianism, however, there are other necessary conditions of effective shaming and crime control.

Reintegration versus Stigmatization

Whether a community is communitarian or not, the type of shaming and informal sanctions they participate in are crucial to crime control and community socialization. Braithwaite describes these two distinct types of shaming that have been utilized for the purposes of social control: stigmatizing and reintegrative. Stigmatizing has been described as the exclusion of an offender following their criminal behavior that designates them as deviant to the rest of the community (Cullen, Agnew and Wilcox 2018). It may be argued that the current legal climate of Canada is a stigmatizing force against offenders through incarceration, the legacy of criminal records and, the lack of support integrating back into the community. Not only does this function as exclusionary practices, but they also make an offender unable to work normally in the community as they did previously; with a criminal record, it is much more difficult to find a job and support a community as is common in a communitarian society.

In addition to the exclusionary practices of stigmatizing shaming, similarities to differential association and labelling theory have suggested that criminal subcultures may also develop as a result (Cullen, Agnew and Wilcox 2018; Losoncz and Tyson 2007). As people are excluded from their community and labelled as deviant, they may begin to turn to other offenders who they can relate and find comfort with (Cullen, Agnew and Wilcox 2018). Losoncz and Tyson (2007) analyze the behaviors of adolescent delinquency and parental shaming and, note that the presence of other delinquent peers encouraged recidivism and parental stigmatization pushed adolescents towards their delinquent peers more often. On a more positive note, Losoncz and Tyson (2007) also state that reintegrative shaming from both parents and the community had positive effects on adolescent delinquency.

In regard to reintegrative shaming in delinquent adolescents, it also has positive effects on adults as well. As examined by Braithwaite, reintegrative shaming encourages productivity, community healing and most of all, repentance and rehabilitation (Cullen, Agnew and Wilcox 2018). In addition, it decreases the crime rates and recidivism rates while simultaneously teaching and reinforcing social morals (Cullen, Agnew and Wilcox 2018). Reintegrative shaming, in partnership with communitarianism, makes space for a community to heal through the offender's apology and recompense while also making the offender feel poorly for their behavior without exclusionary practices. Reintegrative shaming, for the purposes of this paper, argues for the inclusion of Indigenous legal traditions, as they are critical to lower crime rates and build community socialization.

Specific and General Deterrence

As reintegrative shaming demonstrates a drop in predatory crime and recidivism (Cullen, Agnew and Wilcox 2018), one may wonder how it accomplishes these goals. One of the main ways that reintegrative shaming works is through anticipated shaming, meaning that individuals are less likely to commit crime because they fear the reaction and shaming from other people (Rebellion, Piquero, Piquero, and Tibbetts 2010). In Braithwaite's fifteen methods of preventing crime with reintegrative shaming he cites general and specific deterrence as main reasons that people do not carry out criminal activity (Cullen, Agnew, and Wilcox 2018). His first method suggests that specific deterrence occurs through fear of shame rather than fear of punishment (Cullen, Agnew and Wilcox 2018). What this may suggest is that informal sanctions, such as reintegrative shaming, may have a more effective mode of deterring crime than formal sanctions such as punishment. Not only does specific deterrence work to discourage an individual to not enter crime, studies on recidivism and reintegrative shaming may also indicate that it works to prevent someone from committing crime more than once (Cullen, Agnew and Wilcox 2018). The prevention of recidivism may be indicative to community justice and restoration as societies attempt to prevent continual crime.

When it comes to general deterrence, reintegrative shame also works to deter the general population from committing crimes and being forced to face informal sanctions (Cullen, Agnew and Wilcox 2018). Additionally, the study of anticipated shaming indicates the fear of being shamed is stronger than the fear accumulating in the process of being shamed (Rebellion et al. 2010). Furthermore, both specific and general deterrence work best in interdependent and communitarian societies because offenders and delinquents are more concerned with their public perception when they have strong attachments and social bonds to their community. Regarding indigenous modes of traditional justice, similarities between fear of anticipated shaming may curb some deviant behaviors in their societies also.

Community Socialization

One last important aspect of Braithwaite's theory of reintegrative shaming in comparison to Indigenous legal traditions is community socialization. Reintegrative shaming not only fosters community norms and morals by shaming behavior that falls outside of those expectations, but it also reinforces these morals after offending (Cullen, Agnew and Wilcox 2018). Shaming is a method of socialization that links certain acts to incomprehensible behaviors (Cullen, Agnew

and Wilcox 2018). This may include concepts such as to not kill or hurt someone. Naming certain acts as not simply criminal but unspeakable can denote a type of disappointment from others someone would face if they committed such an act. Shaming also can replace a conscience should someone not have one by discouraging them from experiencing negative familial consequences.

In addition to individual moral building and conscience building, shaming also forms a backbone in community socialization. Shaming practices build a community conscience, at least in a communitarian environment, which carries on the cycle of shaming through generations (Cullen, Agnew and Wilcox 2018). While the term shaming may appear negative, reintegrative shaming is seen as bigger than the individual and normalizes ideas of repentance and guilt as important when it comes to informal consequences and sanctions. Cullen, Agnew, and Wilcox (2018) note that shaming an offender and repentance are more important to the community than one-sided morality that is often seen in stigmatized shaming. This may be crucial to discussions about community healing, forgiveness, and rehabilitation when it comes to the investigation of Indigenous legal traditions.

Indigenous Forms of Reintegrative Shaming

When considering the intersections between Indigenous legal traditions, Indigenous governance, and Braithwaite's theory of reintegrative shaming, it is important to note both commonalities and differences. Where Indigenous philosophy valued and strived for community wellbeing and health, Braithwaite's communitarian societies were mainly concerned with lowering criminal activity and building strong relationships. Despite some slight differences however, the similarities are overwhelming. Looking at communitarianism, it may be noted that Indigenous philosophy and governance indicate a strong and interdependent relationship. In addition, Indigenous communities participate heavily in the aspect of shaming to govern their communities. Lastly, Indigenous focus on community health and rehabilitation note that their shaming is not stigmatizing but integrative in nature. All these key features shine a light on Indigenous forms of justice and support the idea that customary law should have a larger role in Canadian society.

Communitarian and Interdependent Society

When comparing the communitarian societies that Braithwaite discusses with Indigenous societies, one of the key points is the concept of interdependence. Communitarian societies value working with others and do not see dependence as a weakness (Cullen, Agnew and Wilcox 2018). Similarly, Indigenous communities regularly rely on their communal governance for decision making, education and,

healing (Monchalin 2017; Napoleon and Friedland 2014). Additionally, focusing on Indigenous beliefs of community safety and wellbeing partners well with Braithwaite's belief that communitarian societies value the communal more than the individual (Cullen, Agnew, and Wilcox 2018).

Another similarity between Braithwaite's communitarian societies and Indigenous communities is the socialization and education responsibility. Community involvement is important in the act of shaming and Braithwaite discusses the roles teachers and parents should play in the raising and socialization of children (Cullen, Agnew and Wilcox 2018). Likewise, Indigenous communities socialize their children through their oral tradition often taught by clan mothers and knowledge keepers (Monchalin 2017). These community education and socialization behaviors indicate similarities between Braithwaite's communities and Indigenous communities. It is clear from Indigenous modes of governance, community wellbeing and, socialization that interdependence is key to their societies, thus making them communitarian as well.

Indigenous Modes of Reintegrative Shaming

As discussed previously, Indigenous communities also thrive when they use socialization and punishment with shaming and avoidance. These behaviors may seem to contradict their beliefs on rehabilitation and community wellbeing; however, they play a larger role in socialization and deterrence. Reintegrative shaming, according to Braithwaite, requires communication, repentance, and most of all is not one-sided moralizing (Cullen, Agnew, and Wilcox 2018). In indigenous communities, shaming is used because public perception and reputation are valuable aspects in a person's life (Monchalin 2017). As discussed by Rebellon, Piquero, Piquero and Tibbetts (2010), people are often more concerned and afraid of anticipated shame than when it occurs. This may also be the case in Indigenous communities because of their oral tradition and Braithwaite's notion that gossip is helpful in deterring deviance (Cullen, Agnew and Wilcox 2018). Shaming in Indigenous communities not only scares people into behaving in appropriate ways, when used appropriately, it can make relationships and kinship invaluable.

Community Wellbeing and Rehabilitation

Regarding how Indigenous shaming methods are reintegrative rather than stigmatizing, it is important to understand Indigenous philosophy. Monchalin (2017) states that Indigenous communities valued healing and kinship as more important than punishment, indicating that any shaming that occurred was not meant to damage the interdependence of the community. As Braithwaite argues that

the most important part of reintegrative shaming is repentance (Cullen, Agnew and Wilcox 2018), Indigenous communities accomplish this in a variety of ways. It is important to note that Indigenous forms of shaming could exist simply by having the community discuss the offence and the consequences of the offence with everyone as a form of repentance and informed community decision making (Monchalin 2017). Additionally, more severe types of shaming and avoidance like banishment were only used when an offender is dangerous to the communal health of the society or if they were unable to understand their actions and be rehabilitated (Monchalin 2017; Napoleon and Friedland 2014). Lastly, Inuit practices surrounding consequences not causing more difficulty than the original crime indicate an interdependence also on the offender as an important member of society rather than a dispensable figure. Overall, Indigenous methods of community health and wellness make their shaming methods reintegrative as they value kinship and healing more than punishment and stigmatization.

Conclusion

In conclusion, Indigenous legal traditions pre-contact hold many similarities to Braithwaite's theory of reintegrative shaming. As this theory has demonstrated significant effect on recidivism and the lowering of the crime rate, it may suggest that informal sanctions and community socialization plays a large part in deterrence and criminological theory. Through these similarities, it may be clear how Indigenous legal traditions play an important role in community socialization and should be included more through self-governance. As Canada is already a legal pluralism, it has experience collaborating with different Western views, it now needs to put aside the colonial ideas that prevent them from accepting Indigenous customary law as important to the make-up of Canada.

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