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Sentencing Indigenous Offenders in Canada, Australia, and New Zealand

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Abstract and Keywords

In common law countries that have been colonized, the colonized peoples are overrepresented in criminal justice statistics and in rates of incarceration. Sentencing laws and court processes have, for some time, undergone changes to reduce or address the continuing rise of indigenous over-incarceration. This essay focuses on three colonized common law countries: Canada, Australia, and New Zealand, in examining what legal strategies have been used to transform judicial reasoning and practice to take into account the particular experiences and circumstances of indigenous offenders. Whether these changes have improved the situation in practice is explored in this essay. The essay concludes by examining what role and responsibilities judicial officers should have in administering justice for peoples who have been, and continue to be, dispossessed of their culture, laws, and language by the process of colonization, and suggests directions for future research.

Keywords: indigenous sentencing, indigenous offenders, indigenous overrepresentation, Canada, Australia, New Zealand, colonization

I. Introduction

The fact that indigenous peoples of Canada, Australia, and New Zealand are significantly overrepresented in the criminal justice system has been widely documented and has been a focus of government policy in all three countries for some time.[1] Particularly alarming are custodial rates of overrepresentation. Each country has its own system of calculating population and prison rates, which can make comparisons difficult. Nevertheless, reporting imprisonment percentage rates of each country does provide some basis for highlighting the extent of the disproportionality. In 2010–2011 Aboriginal Canadians made up 3 percent of the total adult population of Canada, and yet comprised 27 percent

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of adults in provincial and territorial custodial facilities, and 20 percent of those in federal custody (Dauvergne 2012). Similarly, in Australia, despite the fact that recent Australian Bureau of Statistics data indicate that Indigenous Australians comprise 3 percent of the total Australian population (Australian Bureau of Statistics 2013), their imprisonment rate on June 30, 2015, was 27 percent of the total Australian prisoner population (Australian Bureau of Statistics 2015). New Zealand's Māori population is the largest, comprising 15.6 percent of the total population (Statistics New Zealand 2015). On June 30, 2014, 50.8 percent of the adult prison population in New Zealand was Māori (Department of Corrections 2014). Over the past decades, the trend has been toward increasing overrepresentation of indigenous peoples in prisons across all three jurisdictions.

Despite the signing of treaties in two of the three countries under consideration, colonization had a devastating effect on the laws and customs of indigenous people in each country. Extant indigenous laws also have little bearing on the mainstream justice system. Accordingly, when an indigenous person appears in court, their laws, traditions, and cultural norms have little or no influence on the administration of justice. Customary law and indigenous justice mechanisms have been acknowledged and, to some extent, operate in all three countries but not without the constant threat of challenge by postcolonial legal institutions (Australian Law Reform Commission 1986; Law Reform Commission of Western Australia 2006). Legislation and case law structure sentencing discretion across Canada, Australia, and New Zealand. Having said that, in all jurisdictions legislation is the primary source of sentencing laws: in Canada sentencing principles are enshrined in sections 718.1 and 718.2 of the *Criminal Code*; in Australia sentencing provisions are provided for in state, territory and federal legislation (*Crimes Act 1914* (Cth), *Crimes (Sentencing) Act 2005* (ACT), *Crimes (Sentencing Procedure) Act 1999* (NSW), *Sentencing Act 1995* (NT), *Penalties and Sentences Act 1992* (Qld), *Criminal Law (Sentencing Act) 1988* (SA), *Sentencing Act 1997* (Tas), *Sentencing Act 1991* (Vic), *Sentencing Act 1994* (WA)); and in New Zealand, sentencing is governed by the *Sentencing Act 2002* (NZ). There are significant overlaps in the general approach to sentencing across these legislative instruments. The purposes of sentencing include deterrence, protection of the community, rehabilitation of the offender, accountability for the offender, denunciation, and recognition of the harm done to the victim and the community. Principles include proportionality, consideration of mitigating and aggravating factors, and allowance for judicial discretion in weighing competing purposes and considerations. Sentencing legislation in Australia and New Zealand specifies some sentencing considerations, including the maximum penalty for the offense; the nature of and harm caused by the offense; the identity and age of the victim; and the offender's criminal record, character, age, intellectual capacity, prospects of rehabilitation, and remorsefulness. In Canada, there is no mention of particular

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mitigating factors in the legislation, but there is accommodation for specific aggravating factors, including where the offense is motivated by prejudice, partner or child abuse, abuse of trust, or terrorism.

In Australia the common law principle of "individualized justice" requires courts to consider the individual factors relating to the offense and offender. At the same time, however, courts seek to treat similar offenses and offenders with similar sentences. This is provided for in Australian common law (e.g., *Munda v. Western Australia* (2014) 249 CLR 600). In some Australian jurisdictions, namely New South Wales, Victoria, Western Australia, and the Northern Territory, there also exists mandatory sentencing legislation for particular violent and property offenses. In Canada, New Zealand, and three Australian jurisdictions, legislation refers specifically to the offender's cultural background. In recognition of the overrepresentation of First Nations peoples in Canadian prisons and their unique postcolonial status, section 718.2(e) was introduced to provide that sanctions other than imprisonment should be considered "for all offenders, *with particular attention to the circumstances of aboriginal offenders*." In New Zealand, sections 8 and 27 of the *Sentencing Act 2002* (NZ) seek to address Māori over-incarceration. Section 8(i) requires courts to account for the offender's personal, family, whānau (extended family), community, and cultural background in imposing a sentence or otherwise dealing with the offender for a rehabilitative purpose. Section 27 provides that an offender may request a sentencing court to hear "any person or persons called by the offender to speak on the personal, family, whānau, community, and cultural background of the offender." This person can speak on the offender's background and the way background relates to the commission of the offense; any processes that have been tried or are available to resolve issues relating to the offense; and/or the positive effects that background may have in helping avoid further offending. Courts may also suggest to offenders that hearing such a person will assist the court.

Sentencing legislation in the Australian Capital Territory specifies that the court must consider whether the cultural background of the offender is relevant. Courts in Queensland, when sentencing an Aboriginal or Torres Strait Islander person, must have regard to submissions made by a representative of the community justice group in the offender's community, including "any cultural considerations" (*Penalties and Sentences Act 1992* (Qld) sec. 9(2)(p)). In the Northern Territory, a sentencing court may receive information about an aspect of Indigenous customary law, or the views of members of an Indigenous community (*Sentencing Act 1995* (NT) sec. 104A). However, there are major restrictions that limit the receipt of this information, including the fulfilment of certain procedural requirements (sec. 104A), and excluding any information relating to cultural background or customary law to mitigate or aggravate a sentence (*Crimes Act 1914* (Cth)

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secs. 16A-AA). The latter provision originally required the suspension of the *Racial Discrimination Act 1975* (Cth) to allow its passage.

In light of this statutory and common law context, this essay examines whether legal strategies that have been used to transform judicial reasoning and practice to take into account the particular experiences and circumstances of indigenous offenders have, in practice, improved the situation for indigenous offenders appearing before a sentencing court. In the next section of this essay, the cultural factors judges take into account when sentencing indigenous offenders are outlined. These factors can either mitigate or aggravate a sentence; however, without proper consideration and understanding such cultural factors can be inadvertently used to further entrench the criminal identity of the indigenous other. Aside from judicial reasoning, court practices also have a determinate impact on sentencing outcomes, which is the topic of section III. Indigenous community involvement in sentencing practices exists in all three countries, with some going further than others. This section considers the impact such practices have on matters such as community building aims, perceptions of justice, and reoffending. Judicial determination is influenced by evidence presented at sentencing, which is predominately reflective of the Anglo-centric legal system and process. Culturally appropriate pre-sentence reports can change judicial knowledge and understandings, as outlined in section IV, where questions such as who should be responsible for preparing and presenting the reports are considered. Finally, section V moves our gaze to a topic that lies at the edges of sentencing court practices, but that, nonetheless, greatly influences the focus of future research. Debates surrounding whether sentencing decisions are responsible for the disproportionate numbers of indigenous people in custody are presented.

II. Legal Strategies Adopted by Mainstream Courts

A. Reasoning of Judicial Officers in Higher Courts

1. Canada

In 1999, the Supreme Court of Canada handed down its decision in *R v. Gladue* ([1999] 1 SCR 688), which clarified the status of the *Criminal Code's* provision for Aboriginal considerations in sentencing. The Supreme Court stated that the remedial purpose of section 718.2(e) is to “ameliorate the serious problem of overrepresentation of aboriginal people in prisons, and to encourage sentencing judges to have recourse to a restorative

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approach to sentencing" (*Gladue* at 737). The Court further described the scope of section 718.2(e) as placing "a new emphasis upon decreasing the use of incarceration" for Aboriginal offenders and requiring judges to consider the "unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts; and [t]he types of sentencing procedures and sanctions which may be appropriate" (at 737). The unique background factors include dislocation, discrimination, child removal, socioeconomic disadvantage, substance abuse, and community fragmentation (at 725). The Court recognized that the same collective experience offers the potential for innovation in sentencing processes and uniquely Aboriginal pathways for punishment, healing, and reform (at 725–8). Adding to this jurisprudence on Aboriginal sentencing considerations, in *R v. Ipeelee* ([2012] 1 SCR 433), the Supreme Court stated that in sentencing Aboriginal offenders courts "*must*" take judicial notice of

> the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples (at 469).

The Court determined that there is no need to establish a "direct causal link" between the offender's background factors and the offense, but merely a relevant link (at 469, 483), because these "interconnections are simply too complex" to have these factors taken into account for determining an "appropriate sentence" (at 483–4). Finally, the Court held that section 718.2(e) should not have a lessened effect when serious offending had occurred; to suspend its operation in cases of serious offending would be to "run afoul" of "the statutory obligation" (at 486). In applying the principles to the cases of two offenders, the Court noted that Aboriginal background must be given "tangible consideration" in a way that "will often impact the length and type of sentence imposed" (at 454).

2. Australia

The High Court of Australia and the Supreme Courts in states and territories have historically recognized that Indigenous people should have their background factors considered in sentencing. Grounding this jurisprudence, in the 1982 decision of *Neal v. The Queen* ((1982) 149 CLR 305), Justice Brennan of the High Court recognized that the same sentencing principles apply to everyone but "in imposing sentences courts are bound to take into account … all material facts including those facts which exist only by reason of the offender's membership of an ethnic or other group. So much is essential to the even administration of criminal justice" (at 326). In *R v. Fernando* ((1992) 76 A Crim R 58), the New South Wales Supreme Court held that the equal treatment of Indigenous

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offenders required, where relevant, consideration of their subjective circumstances, including their Indigenous background where it threw "light on the particular offence and the circumstances of the offender" (at 62). Wood J listed eight principles for sentencing Indigenous offenders, which included that where alcohol abuse reflected "the socio-economic circumstances and environment in which the offender has grown up" it should be taken into account as a mitigating factor (at 60). In addition, a sentence of imprisonment "may be 'unduly harsh' for an Indigenous person who is not familiar with non-Indigenous life or comes from a deprived background" (at 60). He emphasized the need to consider rehabilitation orders because recognition of the relationship between alcohol abuse and violence in Indigenous communities requires "more subtle remedies" than imprisonment (at 62–63). But he also stated that custodial sentences can be required to demonstrate to the Aboriginal community that violent offenses are regarded seriously (at 60). These principles were adopted in case law in a number of Australian states and territories.

Most recently, the High Court in the case of *Bugmy v. The Queen* ((2013) 249 CLR 571) recognized the importance of giving "full weight" to subjective factors in sentencing such as "profound childhood deprivation," and these factors do not diminish with the passage of time or with repeated offending (at 595). The Court confirmed that such disadvantage is relevant to mitigation because being "raised in a community surrounded by alcohol abuse and violence" is likely to mean moral culpability is lesser than for an offender whose formative years have not been so marred (at 594). At the same time, a deprived upbringing contributes to an offender's lack of impulse control that could aggravate a sentence due to the need for community protection (at 595). The High Court declined to make special provision for Indigenous offenders. It stated that it would be antithetical to individualized justice to consider systemic Indigenous disadvantage. By contrast, the Canadian Supreme Court in *Gladue* and *Ipeelee* (cited earlier) regarded indigenous peoples' colonial and postcolonial experiences as requiring special attention because these experiences uniquely apply to indigenous offenders. The High Court of Australia declined to follow Canadian jurisprudence due to the different statutory context.

3. New Zealand

In New Zealand, the High Court has provided ad hoc guidance on the relevance of Māori background factors in sentencing. In *R v. Rawiri* (Unreported, High Court of New Zealand, Simon France J, 14 August 2009) the fact that the offender committed manslaughter by drowning the victim pursuant to a belief that the victim was possessed by an evil spirit (*mākutu*) was a relevant "context" for sentencing mitigation (at 91–93). This is because the act had been informed by Māori culture rather than malice (at 88).

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Nishikata v. Police (Unreported, High Court of New Zealand, AP 126/99, Gendall J, 22 July 1999) provides some authority on the nexus between Māori heritage and culpability. This High Court decision involved a Māori offender who acted violently in defense of a Māori Elder. Gendall J stated that penalties "must reflect matters of mitigation arising from an offender's background and which recognises the structure and operation of the society within which he lives and in particular the degree to which the cultural or ethnic heritage predominates, in any problems of a cross-cultural nature" (at 8). More recently, in *R v. Mason* ([2012] NZHC 1849), the High Court refused to allow a Māori man, accused of murder, to be dealt with in accordance with tikanga Māori (a customary system that deals with alleged breaches of societal norms including "serious crime") in his trial and sentencing because there is "one law for all in New Zealand" (at 8). The Court nonetheless referred to tikanga Māori and cultural considerations appear throughout the judgment, including the important role of the victim impact statement (which approximates the issues on a marae—a communal meeting place to mediate collective interests) (at 5). The Court also noted the relevance of cultural considerations, although gave them "little weight" in the case (at 7). This decision was upheld by the New Zealand Court of Criminal Appeal (*Mason v. R* [2013] NZCA 310). In *Mika v. The Queen* (CA688/2013 [2013] NZCA 648), the Court of Appeal stated that while Māori people are overrepresented in prisons and many suffer economic, social, and cultural disadvantages, not all people of Māori heritage are sufficiently disadvantaged to warrant mitigation by virtue of their cultural background (at 12). In that case, submissions were made to the court on comparable Australian and Canadian case authorities, but the court rejected those on the grounds that they were decided in "very different statutory contexts" (at 12).

B. Applications of Indigenous Sentencing Principles to Particular Indigenous Contexts

Given that in Australia there are hundreds of Indigenous nations, each with their own culture, language, and colonial/postcolonial experiences, sentencing has variously accounted for these circumstances in the Supreme Courts. Unlike in Canada, where the broader reach of indigenous community pre-sentence reports (discussed later) and jurisprudence reflect a systemic approach, the sentencing jurisprudence in Australia has developed on a much more ad hoc basis. In New Zealand, the consideration of Māori circumstances tends to depend on evidence submitted under section 27 of the *Sentencing Act 2002* (NZ) (i.e., submitted by family, whānau, community, etc., as was the case in *Mika* [13] and *R v. Broderson* [2009] NZHC 557). New Zealand courts, however, have not made specific reference to the socioeconomic disadvantages faced by Māori offenders.

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In Australia, there has been a tendency to provide greater mitigation for Indigenous offenders from remote communities rather than urban offenders (see *R v. Ceissman* (2001) 119 A Crim R 53; *R v. Morgan* (2003) 57 NSWLR 533). The High Court in *Bugmy v. The Queen* (2013) accepted that Indigenous Australians, whether living in urban, rural, or remote environments may be subject to "grave social difficulties" and "social and economic disadvantage measured across a range of indices" (at 594). However, it is yet to be evaluated whether this has reduced sentences for urban Indigenous offenders. The South Australian Supreme Court has also taken exception to this distinction (see *Ingomar v. Police* [1998] SASC 6875 and *R v. Tjami* [2000] SASC 311). In *Police v. Abdulla* ((1999) 74 SASR 337), the South Australian Supreme Court held that the *Fernando* principles should receive "broad application" beyond "Aborigines living in the more remote communities" (at 34–35), and the Court of Criminal Appeal has noted that these principles were "not restricted to traditional aboriginals" (*R v. Smith* [2003] SASC 263). In some cases, the Supreme Court has distinguished between "full" and "part" Indigenous people, to exclude "part" Indigenous people from the benefit of leniency (e.g., *R v. Newman, R v. Simpson* (2004) 145 A Crim R 361). However, in other cases, such as *Smith*, the Supreme Court has pointed to anthropological evidence that "urban Aboriginal" people face a "social predicament" in which there are "complex rules of kinship which determine, govern and influence an individual's fundamental roles in their society" (at 53–54). Broadly, mitigation has been provided for three circumstances relating to Indigenous offenders:

- Indigenous disadvantage due to post-colonial conditions.
- The existence of Indigenous laws and cultural practices which explain the offender's motivation for committing the offense.
- The dispensation of punishment by community members pursuant to Indigenous laws.

1. Indigenous Disadvantage Due to Postcolonial Conditions

In addition to *Fernando*, courts across Australia have recognized that where the offender has been prone to alcohol abuse and that abuse reflects the offender's socioeconomic circumstances and environment, it may be relevant as a mitigating factor. A number of cases are frequently cited for this proposition, including *Juli v. R* ((1990) 50 A Crim R 31), *Rogers & Murray v. R* ((1989) 44 A Crim R 301), *R v. Yougie* ((1987) 33 A Crim R) 301, *R v. Friday* ((1984) 14 A Crim R 471), and *R v. Bulmer* ((1986) 25 A Crim R 155). However, cases, namely in Queensland, have stated that the mere fact that an Aboriginal offender comes from a disadvantaged community does not lead to a lower sentence; cases on this

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proposition include *R v. Daniel* ((1998) 1 Qld R 499) and *R v. KU*; ex parte *A-G* ((2008) QCA 154).

Some decisions of the Northern Territory courts focused on the despair arising from cultural breakdown that leads to alcohol abuse (*R v. Benny Lee* [1974] NTSC 221; *R v. Herbert & Ors* (1983) 23 NTR 22; *Robertson v. Flood* (1992) 111 FLR 177). Part of the judicial rationale was that in these circumstances, imprisonment was unlikely to be an effective deterrent (*R v. Davey* (1980) 2 A Crim R 254). However more recently, courts have placed greater emphasis on the adverse impact that a disadvantaged community has on victims of crime. This has meant that disadvantage is no longer relied on as a significant mitigating factor. Courts seek to send a deterrent message to the community and focus on the seriousness of the offense, especially in terms of its harm to the victim: *Amagula v. White* [1998] NTSC 61; *Wurramara v. R* ([1998] NTSC, Unreported, 7 January). The Northern Territory Supreme Court has noted, "generally speaking, penalties for violent crimes have increased since *Wurramara* was decided in 1999" (*R v. Bara* [2006] NTCCA 17 at 11). State removal of the offender as a child from his family has also attracted mitigation. Australian Indigenous children who have been removed from their families by government authorities are referred to as the "Stolen Generations." The Supreme Courts have taken into account disadvantages arising from membership in the Stolen Generations and the problems flowing from placement in institutional and foster care, including a fractured Indigenous identity and enduring abuse in care: *R v. Mustey* ([2001] VSC 68 at 13) and *R. v. Fuller-Cust* ((2002) 6 VR 496 at 520).

2. Cultural Contexts for Offending

Indigenous law and culture are relevant to a sentence where they explain an offender's motive: see, for example, the *Davey* case. Where an offender believed, based on "the old people's ways" that setting fire to a house was the only way to set a dead friend's spirit at peace, the South Australian Supreme Court showed leniency: *Goldsmith v. R* ((1995) 65 SASR 373). Similarly, in *R v. Shannon* ((1991) 56 A Crim R 56) the offender's fear of *kadaitcha* men explained some of his offending behavior, and the penalty was reduced on appeal. The New Zealand High Court took a similar approach in *Rawiri* where a Māori offender committed manslaughter because he believed the victim was possessed by spirits. In *Rawiri* the court viewed the "context" of the defendants' belief that the victim was cursed by *mākutu*—an evil spirit that Māori people had feared for centuries—as relevant to mitigation. The response of drowning the victim had been informed by Māori culture and concern for the victim rather than "warped ideology with no regard for others" (at 88). Nonetheless, the court cautioned against overemphasizing culture: "whilst the offenders' culture provided a context, it would [be] wrong for the offenders to hide behind it" (at 100). In a number of cases in the Northern Territory Court of Criminal

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Appeal involving statutory rape of the defendants' promised (or actual) wife in Indigenous law, the courts have considered submissions that the fact that the defendant was acting in accordance with Indigenous law is a relevant mitigating circumstance: *Hales v. Jamilmira* ((2003) 142 NTR 1); *R v. GJ* ((2005) 196 FLR 233). In these decisions the court held that while culture is relevant, the principles of deterrence and the protection of the victim are paramount.

As noted earlier, the Australian Parliament has legislated to prevent the courts from taking into account customary law or cultural practice as a reason for excusing criminal behavior or lessening or aggravating the seriousness of criminal behavior in relation to Federal and Northern Territory offenses (*Crimes Act 1914* sections 16A-16AA). In the case of *R v. Wunungmurra* ([2009] NTSC 24), where the defendant sought to introduce evidence about cultural law and practice, the Northern Territory Supreme Court held that evidence could not be introduced for the purpose of establishing the objective seriousness of the crimes committed by the defendant. However no objection was raised by the prosecution to hearing cultural evidence for the purposes of providing a context and explanation for the crimes, to establish that the offender did not have a predisposition to engage in domestic violence and was unlikely to reoffend, to establish the offender had good prospects of being rehabilitated, and to establish the defendant's character.

3. Indigenous Law Punishment as a Factor

For most of the 1980s and 1990s, Australian courts regarded the dispensation, or prospective dispensation, of punishment under Indigenous law as a mitigating factor. Courts discounted sentences on the basis of double jeopardy, the function of traditional punishment in restoring communities and offenders, and because traditional punishment was a material fact of the defendant's community circumstances: *R v. Mamarika* ((1982) 5 A Crim R 354); *Jadurin v. R* ((1982) 7 Crim R 182); *R v. Minor* ((1992) 105 FLR 180); *R v. Miyatatawuy* ((1996) 87 A Crim R 574); *R v. Poulson* ((2001) 122 A Crim R 388). Courts have equally stressed that "the views, wishes and needs of the community … cannot prevail over what is a proper sentence" (*Munugurr v. R* (1994) 4 NTLR 63 at 71). In some cases, courts structure sentences to facilitate traditional punishment. This includes exiling offenders as a sentencing option that also meets the needs of traditional punishment (e.g., *Mamarika*; *Munugurr*; *R v Yakayaka and Djambuy* (Unreported, Supreme Court of Northern Territory, Riley CJ, 17 December 2012)) or directing Elders to integrate young offenders into Indigenous practices (*Jabaltjari v. Hammersley* (1977) 15 ALR 94). Courts have also made attending a meeting between clans a condition of a bond (*Munugurr v. R*) and asked corrections officers to report to the court on whether traditional punishment occurred (*R v. Walker* [1994] 46 NTSC 1).

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In New Zealand, there has not been equivalent recognition of Māori community punishment. However, New Zealand courts have imposed noncustodial sentences where the offender's community would invoke the offender's Māori culture and enforce "a more stable and more responsible lifestyle" (*R v. Nathan* (1989) 4 CRNZ 369). In *R v. Huata & Huata* (Unreported CD Auckland District Court, CRI-2003-041-5606, 30 September 2005) the Auckland District Court noted that the defendant "will suffer under the Māori criminal institution of whakamaa or shame, and will have to carry that for the rest of her life" (at 138).

III. Innovative Sentencing Court Strategies

A. Evolution of Innovative Sentencing Practices

The idea of involving indigenous community members in legal processes and courts is not new. The need to increase indigenous participation in the criminal justice system was raised in the recommendations made by the Australian Royal Commission into Aboriginal Deaths in Custody (Australia 1991), which also emphasized that culturally sensitive practices needed to be incorporated into the mainstream criminal and legal justice system. Similarly, acknowledging the work of Elders in prisons and community programs, the Canadian Royal Commission on Aboriginal Peoples called for policy makers to consider "other suitable avenues for Elders' participation and collaboration" (Royal Commission on Aboriginal Peoples 1996, p. 130). Critical legal scholars (such as postcolonial and Indigenous whiteness theorists, and critical race and feminist legal scholars) have also been drawing attention to the limitations of the Anglo-centric nature of the justice system when dealing with First Nations Peoples (see for e.g., Monture-Okanee and Turpel 1992; Delgado 1995; Pratt 1999; Coker 2006; and Blagg 2008).

It is assumed that community input and participation will make a court or justice process more suitable, meaningful, and relevant for the offender, which will in turn ultimately assist in changing offending behavior and result in the implementation of more just and equitable outcomes. Indeed, even scholars who contend that sentencing is a fair process recognize the value of community involvement. For instance, Snowball and Weatherburn (2007) (who have mostly promoted the benefits of crime prevention policies, stating that there is no evidence of racial bias in sentencing, but evidence of higher conviction rates for violent crimes and higher rates of reoffending for explaining Australian Indigenous overrepresentation in custody) have acknowledged that there are benefits in also relying on informal social controls such as the reprimand of offending behavior by family and

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community members. Following is a summary of the various indigenous-focused sentencing court-related practices that exist in each of the three countries.

1. Canada

Leaving aside the use of Gladue Reports, which can include Aboriginal community input about the offender's local community and rehabilitation needs (and which are described in more detail later), there are other Indigenous-focused, court-related programs operating in Canada that include some form of Aboriginal participation. Some of these initiatives operate as a measure to divert the matter away from the sentencing court process, while others operate within the sentencing court system. We classify processes that continue to involve a judicial officer in the indigenous-focused justice procedure as court-based practices and classify other processes as diversionary. Court-based initiatives include the Saskatchewan Cree Circuit Court, the Alberta Tsuu T'ina Peacemaking Court (which are sometimes captured under the umbrella term of First Nations Courts; Johnson 2014) or Aboriginal Courts (Whonnock 2008), and Circle Sentencing (which are sometimes called Peacemaking Circles; National Criminal Justice Reference Service 2001). First Nations Courts and sentencing circles reflect the culture of the Aboriginal community, so that they are each unique (Johnson 2014). Nonetheless, one commonality is that the Aboriginal participant must enter a plea of guilty in order to appear before one of the courts or the sentencing circles. First Nations Courts (which can be convened for matters other than criminal matters, such as family, child safety, or civil disputes) use traditional forms of dispute resolution, such as "smudging with sweet grass or sage, or … eagle feathers or eagle down," to infuse the sentencing process with culturally appropriate practices that can promote "balance and healing" (Whonnock 2008, p. 1). The Tsuu T'ina Peacemaking Court was the first Aboriginal Court in Canada, established in October 2000, and like the Saskatchewan Cree Court operates as a hybrid court straddling both traditional provincial and peacemaking sentencing court processes. Tsuu T'ina Court hearings are held in rooms that allow people to sit in a circle, reflecting traditional practices, and Cree Circuit Court hearings are held in community centers (Johnson 2014). Aboriginal Courts tend to involve First Nations judges, prosecutors, court clerks, probation officers, and peacemakers in the sentence hearing. Matters appearing before Cree Circuit Courts can also be heard in the Cree language (Whonnock 2008). The purpose of these courts is to "take diverse Indigenous problem solving and therapeutic jurisprudence approaches, including Elders and spirituality, to focus attention on Indigenous healing plans for individuals, families, communities, and nations" to address complex justice issues that have arisen due to the harmful effects of colonization (Johnson 2014, p. 11).

On the other hand, sentencing circles are based on restorative justice principles whereby the offender offers some form of restitution, makes amends to the victim, and is offered

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the opportunity to obtain rehabilitation; thus the community is empowered to resolve its own issues (LaPrairie 1995). Some sentencing circles are diversionary, but others, such as the first one established by Judge Barry Stuart in 1999 for the case of *R v. Moses* ([1992] 71 CCC (d) 347; Yukon Territorial Court), are located within the mainstream criminal justice system. Unlike the Aboriginal Courts, Circle Sentencing is predominantly used for "serious cases meaning that the offense is serious or the circumstances of the offender are such as to justify a significant intervention" because the hearings are lengthy and they require a great deal of commitment from everyone present (Lilles 2002, p. 2). Participants sit in either an inner or outer circle; the inner circle comprising those who are most involved in the discussions, such as the judge, community members, offender, victim, support people, and lawyers, and the outer circle is reserved for observers. During the hearing, discussion centers on the extent to which such crimes are committed in the community, why the offense occurred, how it impacted on the victim(s), and what should be contained in the sentencing plan (LaPrairie 1995). An offender may be monitored during the sentencing plan, encouraging them to implement the plan and move toward healing their relationship with the victim and the community (Lilles 2002).

2. Australia

Indigenous involvement in the introduced court system has been happening in Australia for some time. For example, from the late 1970s onward, Councils of Aboriginal communities could make bylaws governing certain behaviors on community or Council lands in Western Australia and Queensland, breaches of which could then be heard by one or two Indigenous people who were appointed as judicial officers or justices of the peace. Judicial officers have also informally involved Elders in their sentencing decisions when traveling on circuit to convene courts in remote communities. However, such practices have never been as far reaching nor had the formal recognition and support of governments, as is the case with Australian Indigenous sentencing courts. At present these courts are operating in every jurisdiction in some form or another, apart from Tasmania and the Northern Territory (although they used to operate in the Northern Territory as Community Courts) (see Anthony and Crawford 2014). They typically operate at a Magistrates' (or Local) Court level in cities or regional towns, although in South Australia and Victoria, the Indigenous court processes are also used in higher court levels. These courts are not a separate system of justice, nor are they using customary or traditional forms of punishment. These courts are using Australian criminal laws and procedures when sentencing Indigenous people, but they allow Indigenous Elders or community representatives to participate in the process, thereby creating a more culturally appropriate forum for sentencing Indigenous offenders. They were first established in Port Adelaide, South Australia, by a magistrate called Chris Vass in June 1999 who realized "Aboriginal people were getting a pretty raw deal from the justice system as a whole and they mistrusted the system" (Daly and Marchetti 2012, p. 467). He

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therefore decided to change the way he ran his sentencing court hearings when dealing with Indigenous offenders. The practices and processes vary among and between jurisdictions. Some limit the types of offenses that can come before the courts (e.g., breaches of family violence protection orders are excluded in Victoria but associated charges of assault can be brought before the Victorian courts; sexual offenses are excluded in all jurisdictions apart from Queensland and South Australia; and certain drug offenses and offenders who are addicted to illicit drugs are excluded in New South Wales and the Australian Capital Territory). Some have specific legislation or specific provisions in criminal court procedure and sentencing Acts that governs the courts (e.g., Victoria, New South Wales and South Australia), whereas in other jurisdictions the courts were established under general provisions of the various sentencing Acts. There are two main models: the Circle Court and Nunga Court models. The Circle Court is used in New South Wales and the ACT, and the Nunga Court model is used in Queensland, South Australia, and Victoria. Western Australia and the former courts in the Northern Territory use a model that is a mixture of a Nunga and Circle Court. Circle Courts are usually convened in a room other than a courtroom or in a building that bears some form of cultural significance for the local community. There are usually four Elders or community representatives sitting on a Circle Court and it is more likely that victims participate in the process. Usually one to two Elders or community representatives sit with a magistrate in the Nunga Court model and it is usually convened in a courtroom built for the purpose and contains oval tables and Indigenous paintings and symbols. The degree of involvement of the Elders or community representatives varies between courts, but in all courts they will speak frankly with the offender.

3. New Zealand

New Zealand court-based initiatives mainly exist at a youth court level, although recent developments have emerged whereby Māori cultural practices are included when convening an Alcohol and Other Drug Treatment Court (AODT Court). Rangatahi Youth Courts (Ngā Kooti Rangatahi) have been in operation since 2008 and there are now two Pasifika Youth Courts operating in Auckland, which commenced in 2010 and which mirror the principles and practices of the Rangatahi Court, for Pacific Islander youth (New Zealand Ministry of Justice 2010). As with other Youth Courts, Rangatahi and Pasifika Courts are closed courts. Rangatahi Courts are, in fact, available for all youth offenders, not just Māori youth. There are currently 14 Rangatahi Youth Courts in operation throughout the country (New Zealand Ministry of Justice undated). These Courts monitor Family Group Conference Plans at a marae “by encouraging strong cultural links and meaningfully [*sic*] involvement of whānau [extended family], hapū [subtribe] and iwi [Māori peoples or tribe] in the youth justice process” (Davies, Whaanga, and Kaipuke Ltd. 2012, p. 14). Their purpose is to reduce Māori youth reoffending by providing more appropriate rehabilitative sentencing options. The Family

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Group Conference Plan, which outlines how to best support an offender to lead a law-abiding life, is compiled at a Family Group Conference that is convened by the presiding judge of the Youth Court in which the offender initially appeared. A youth advocate or social worker, the offender, their family, the victim(s), Māori Elders, and other agencies such as the police are present at the Family Group Conference. A Rangatahi Youth Court only monitors Family Group Conference Plans when a victim supports the referral and the presiding judge considers it appropriate. The procedure adopted by the Rangatahi Youth Court will depend on the protocols and cultural values of the local community, but it generally begins by calling visitors onto the marae, followed by speeches and morning tea (Davies et al. 2012). Once this is complete, those present will discuss the progress of an offender against the agreed Family Group Conference Plan and will make recommendations related to bail conditions. At the conclusion of the discussion, the Elders will address the offender, after which the offender, their family, and their support people will perform a tradition called "hongi," which involves pressing their noses in greeting. The Elders will close the court with a prayer.

A recent New Zealand court innovation is the AODT Court, which is based on the North American Drug Court model, but which also includes culturally appropriate components when dealing with Māori participants. The purpose of this specialist court, which sits at a District Court level and commenced in November 2012, is to allow defendants who are facing a term of imprisonment of three years or more to undergo an alcohol and drug treatment program before being sentenced. The defendant is assessed for eligibility for the program by the judge and by the AODT Court team; however, the judge makes the final determination as to whether the defendant is admitted to the program. The program usually lasts between 12 and 18 months and has three phases: an initial compliance with the treatment plan phase; a middle phase focusing on vocational and personal goals; and a final phase geared toward acknowledging compliance and achievements, while participating in a restorative justice process (Gregg and Chetwin 2014). As of December 16, 2013, the majority of people accepted to the AODT Court (44 percent) were Māori (Gregg and Chetwin 2014, p. 40, Table 5).

B. Effect of New Practices

Notwithstanding the fact that the Canadian Aboriginal processes have been in operation for longer than the Australian Indigenous court practices, and that the New Zealand Rangatahi Youth Courts have been in operation for at least as long as some of the Indigenous courts in some Australian jurisdictions, the Australian Indigenous sentencing courts have been evaluated to a much greater extent than the innovative court practices in the other two countries. What makes research that evaluates the impact of innovative court processes particularly difficult is that they are usually aligned with an assessment

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of whether the aims of the courts have been achieved, which according to Stobbs and MacKenzie are "fairly broad" and "may appear aspirational and ambitious," often including claims relating to a reduction in reoffending or imprisonment rates (2009, p. 94). They also often use comparative groups drawn from mainstream court databases without adequately explaining how the specific characteristics of an offender selected for participation in an innovative court process might compare with those of offenders from the mainstream cohort. Offenders are matched on the basis of indigenous status, age, gender, offense type, court date, prior proven court appearances, and time spent in custody, without due consideration of other contextual factors such social and economic differences between court sites or other important influences that might motivate an offender to change (Daly and Proietti-Scifoni 2009). Despite these limitations, particularly the one relating to jurisdiction specificity, they are still often cited and used as evidence of impact.

Currently there have been 10 published evaluations of Australian Indigenous sentencing courts: three in New South Wales (Potas et al. 2003; Cultural & Indigenous Research Centre Australia 2008; Fitzgerald 2008), one in Queensland (Morgan and Louis 2010), three in Victoria (Harris 2006; Borowski 2010; Dawkins et al. 2011), two in Western Australia (Aquilina et al. 2009, Research and Analysis Branch Department of the Attorney General Western Australia 2014), and one that was commissioned by the federal government to assess the South Australian and Northern Territory courts (Cultural & Indigenous Research Centre Australia 2013). Other research on the courts is sometimes referred to as evaluations; however, in our opinion, they are more appropriately grouped as "impact studies" since they have not been commissioned to determine the merit, effect, or worth of a program in order to influence policy and/or resource allocation (examples of impact studies include Tomaino 2004; Parker and Pathe 2006; and Daly and Proietti-Scifoni 2009; Suggit 2012). Many evaluations of the Australian Indigenous sentencing courts have used quantitative studies of reoffending, finding little or no impact on recidivism as a result of the introduction of such courts despite there being some evidence that they have had an impact on strengthening informal social controls within Indigenous communities (Beranger, Weatherburn, and Moffatt 2010; Borowski 2010, 2011; Fitzgerald 2008; and Morgan and Louis 2010). One study that found the courts were achieving positive criminal justice outcomes was by Daly and Proietti-Scifoni (2009), which used a desistence analysis to assess the impact on reoffending of all cases (apart from partner violence matters) that had appeared before one of the New South Wales Circle Courts. The methodology used consisted of interviews of offenders and an assessment of detailed criminal histories pre- and post-Circle Court appearances. Different conclusions were reached from what a statistical analysis, which simply codes reoffending as the number of proved offenses before and after a legal intervention, would

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find. Daly and Proietti-Sciofoni found that by examining offending trajectories and the particularities of offense types, they were able to conclude that a “positive Circle experience may be associated with complete desistance, partial desistance, or persistence in offending after Circle,” and that the processes that were most helpful for an offender to desist from criminal behavior were those that included access to effective alcohol and drug rehabilitation programs and Elder support of the offender (p. 107).

Moreover, other studies have indicated positive impacts for victims in partner violence matters that are dealt with by Indigenous sentencing courts. In particular, it has been found that power imbalances are managed by the presence of Elders and community representatives who have the ability to hold an offender accountable for their actions and who encourage a safe environment for a victim of intimate partner violence to have a voice (Marchetti 2010: 268).

The Canadian sentencing circles have been critiqued from both procedural and feminist perspectives, rather than being assessed according to whether they have an impact on recidivism. Lack of procedural guidelines and inadequate infrastructure to support sentencing decisions, evidence of sentencing disparity, and concerns about the degree to which communities are adequately represented have all been raised in critiques of sentencing circles (LaPrairie 1995). Furthermore, feminist scholars have focused on the limitations of the circles in addressing partner violence offending. For example, in an intersectional race and gender analysis of a number of judicially convened sentencing circles for spousal assault, Cameron (2006) found that “circumstances before, during or after the circle proceedings left women in situations that were dangerous. These circumstances not only left women open to being physically abused but they also created a dynamic that may have silenced them in the circle itself” (Cameron 2006, p. 500). She also found that there was little evidence of meaningful participation and inclusion of the survivor of the violence, and of adequate survivor support and advocacy present during the sentencing circle hearing.

Evaluations of the Aboriginal Courts are subsumed within evaluations conducted by the Canadian Department of Justice of the Aboriginal Justice Strategy program. The most recent final report was released in November 2011 (Evaluation Division Office of Strategic Planning and Performance Management 2011). Findings related to the Aboriginal Court are discussed as “community-based justice programs.” Many of the participants interviewed for the evaluation (which included program managers and staff, police workers, Elders, prosecutors, legal aid officers, and other court staff) identified community-based justice programs as the cornerstone of the Aboriginal Justice Strategy for improving access to justice for Aboriginal offenders. The programs provided “a culturally relevant alternative to the mainstream system for Aboriginal persons” although the extent to which this occurred was unclear (Evaluation Division Office of Strategic

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Planning and Performance Management 2011, p. 30). Interview participants reported that programs focused on “healing and addressing the root causes underlying an offence, and not simply on the offence itself” (p. 31). A Cox regression analysis was used to determine the effect Aboriginal Justice Strategy funded programs had on recidivism and found that, despite methodological limitations, they were “associated with the intended long-term outcomes of reducing crime” (p. 35).

Both of the New Zealand court programs have recently been evaluated to determine how the operation of the programs could be strengthened and improved, rather than assessing their impact on recidivism. The Rangatahi Youth Court was evaluated to determine:

- Overall, to what extent are Ngā Kooti Rangatahi meeting offending related needs?
- How are Ngā Kooti Rangatahi being implemented in practice; and how effectively?
- How are Ngā Kooti Rangatahi being perceived and experienced by rangatahi and local level stakeholders (including marae members and whānau)?
- What are the early observable outcomes—intended and unintended?
- What barriers or challenges exist and can be addressed to maximize the potential of Ngā Kooti Rangatahi?
- What, if any, are good practice examples and/or potential design and implementation improvements to Ngā Kooti Rangatahi? (Davies et al. 2012, p. 15).

A multimethod approach that involved reviewing documentation, interviews with key stakeholders, and site visits was adopted. The Rangatahi Youth Courts were found to establish a strengths-based process, which encouraged a stronger sense of cultural identity and self-identity amongst participants. The participants reported feeling more engaged with the court process and left with a more positive attitude and a greater sense of responsibility (Davies et al. 2012, p. 10).

Similarly, the AODT evaluation used a mixed-methods approach that included site visits and observations of the court, interviews with court stakeholders and providers, and analysis of AODT Court administrative data, to assess “how the AODT Court was implemented, what was working well, what was not working well and identifying any improvements that could be made” (Gregg and Chetwin 2014, p. 13). Although the AODT Court is not Māori specific, the report identified how the inclusion and participation of Māori and Pasifika communities created different justice outcomes. Engaging a Māori advisor in October 2013 to ensure that Māori cultural practices, traditions, and values were reflected in the court process, reaffirmed the importance of cultural appropriateness and meaningfulness for Māori participants. Stakeholder responses

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confirmed that Māori participants were reconnecting with their culture and felt more comfortable in the AODT Court than in a mainstream process, although that depended on how familiar the participant was with Māori culture prior to their court appearance. Future plans for the court included remodeling the court space and considering relocating some hearings to a marae. Accessing culturally appropriate treatment facilities was difficult since there was only one Māori-focused facility in South Auckland with a limited number of beds, none of which were dedicated to the AODT Court program.

IV. Indigenous Community Pre-sentence Reports

In Canadian sentencing, First Nations pre-sentence reports, known as Gladue Reports following the Supreme Court's decision, provide case-specific information about the Aboriginal offender and her/his community. The reports are mostly produced by Aboriginal Legal Services and are "tailored to the specific circumstances of Aboriginal offenders" (*Ipeelee* at 469). The Supreme Court described these reports as "indispensable to a judge in fulfilling his [or her] duties under section 718.2(e) of the *Criminal Code*" to account for the particular circumstances of Aboriginal offenders (*Ipeelee* at 469). Gladue Reports are written by Aboriginal caseworkers, with some exceptions, who share the same collective experience as the offender. They are distinct from pre-sentence reports produced by corrective services in that their fundamental purpose is to identify material facts, which exist only by reason of the offender's Aboriginality. Gladue Reports are not available for all Aboriginal offenders or across all provinces, preventing a significant proportion of Aboriginal offenders from having relevant information on their Nation's circumstances and background presented to sentencing courts.

The Gladue Reports consider the systemic and background factors at play in the life of the offender, together with available culturally relevant sentencing options (Hannah-Moffat and Maurutto 2010, p. 266). They explain offending behavior within the collective history of Aboriginal Canadians, highlighting the link between the individual and collective experience. This includes the negative impact of prior government policies such as assimilation and segregation (April and Orsi 2013, p. 11; Jeffries and Stenning 2014, p. 256). The reports also discuss the offender's knowledge of culture and the history of his/her community and language and the offender's relationships with community, as well as educational opportunities and the degree of racism and socioeconomic metrics in the offender's community (April and Orsi 2013, p. 11). Furthermore, they explore avenues for the offender's healing and reform within his or her community that can be relevant to sentencing options.

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In Australia, Indigenous community pre-sentence reports exist in Queensland and the Northern Territory. In Queensland, cultural reports are presented to Murri Courts (Indigenous sentencing courts). The reports relate to the Indigenous defendant's background and are produced based on structured questionnaires that seek to acquire information on personal, family and community information, including as it relates to the offender's experiences of discrimination and government interventions, access to services and connections to culture. Cultural reports can recommend that the offender is linked to services, including rehabilitation, reunion with family, counselling, entry into Aboriginal and Torres Strait Islander Community Health Services, and other programs such as those relating to family violence or suicide. They can also recommend mentoring by an Indigenous person in the offender's community.

In addition, Community Justice Groups (CJGs) in Queensland are able to make sentencing submissions to all courts that address the offender's relationship to the community, cultural considerations or programs and services for offenders in which the CJC participates, as provided for in the *Penalties and Sentencing Act 1992* (Qld) sec. 9(2)(p) and the *Youth Justice Act 1992* (Qld) sec. 150(1)(g). These submissions can be oral or in writing and are not constrained by any prescribed format. Therefore, they can provide a deeper narrative in relation to the offender's background than the questionnaire-based cultural reports.

In the Northern Territory, Law and Justice Groups (LJGs) provide presentencing advice to the magistrate based on an evaluation of the offense (in terms of its significance to the community) and the offender (including his or her risk to the community and capacity to rehabilitate and reintegrate into the community). There are currently four Law and Justice-styled Groups involved in presentencing in the Northern Territory: Lajamanu's "Kurdiji" Law and Justice Group (established in 1998 and reconstituted in 2009); the Yuendumu Mediation and Justice Group (established in 2006) in Warlpiri communities in Central Australia; Wurrumiyanga's Ponki Mediators in the Tiwi Islands (established in 2009); and Maningrida's Bunawarra Dispute Resolution Elders in the Top End (established in 2012). The process of writing the reports in Lajamanu, Wurrumiyanga, and Maningrida involves the North Australian Aboriginal Justice Agency's community legal educator informing the LJG of the court list, offenders' charges, the summary of agreed facts, and prior offending. The LJG then decides the cases for which they are prepared to write a letter of support and writes references outlining the group's knowledge of the offender's background (including their behavior in the community), views about the offending, the offender's character, and ideas for the offender's rehabilitation and punishment. The letters are provided to the defendant's lawyer before being submitted to the magistrate during sentencing submissions. The group members make themselves available for cross-examination if requested. In addition to this function,

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the group is involved in dispute resolution to resolve conflicts before they escalate and can play an important role in individual's rehabilitation (see Anthony and Crawford 2014).

V. Is Sentencing Fair?

As noted, across Canada, New Zealand and Australia, indigenous people are incarcerated at a higher rate than non-indigenous people. However, at least in Australia, there is contention over whether sentencing is responsible for this differentiation. Some criminologists assert that Australian Indigenous people are sentenced with roughly the same impartial standards as non-Indigenous people; it is the frequency and seriousness of their offending that explains the greater likelihood of courts to hand down prison sentences. For example, a study by Snowball and Weatherburn (2007) on sentencing Indigenous offenders in New South Wales, found that there was "some residual effect of race on sentencing," which meant that "racial bias may influence the sentencing process even if its effects are only small" (p. 286). Jeffries and Bond's (2009) study of sentencing in South Australia from 2005 to 2006 reveals that, after controlling for offender, case, and court-processing characteristics, Indigenous people were much *less* likely to receive prison sentences. However, those who were sentenced to prison were likely to receive *longer* sentences than non-Indigenous people. Supplementing their analyses on the judicial decision to imprison, Bond, Jeffries and Weatherburn (2011) subsequently sought to identify the *length* of prison sentences imposed on Indigenous versus non-Indigenous defendants in New South Wales. They found "little evidence to support the claim that Indigeneity directly influences the length of imprisonment orders in the New South Wales courts for comparable offenders" (p. 286). In the higher courts, Indigenous and non-Indigenous offenders are sentenced to similar prison terms when plea and current and past criminality are taken into account, and in the lower courts Indigenous offenders receive shorter prison terms after adjusting for controls (p. 286).

These scholars regard Indigenous sentencing outcomes as proportionate to the seriousness of their offense and other aggravating factors (e.g., offending history). They do not consider subjective factors that are relevant to culpability, including mental well-being, impact of child removal policies, prejudicial exclusion from health and housing services, limited educational or employment opportunities, socioeconomic background, or victimization. Consideration of these factors as they are relevant to individual defendants would provide a fuller picture of sentencing proportionality. Researchers who focus on aggravating factors as the only relevant variables, have also undertaken studies that suggest indigenous programs and sentencing jurisprudence in Canada, New Zealand, and Australia have had negligible effect on sentencing outcomes or offending patterns

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(Jeffries and Stenning 2014), based on an analysis that centers on prison and recidivism rates rather than behavioral changes (discussed later).

Other criminologists have found that for the same offending patterns, Indigenous Australians are more likely to be imprisoned and receive longer sentences (Lockwood, Hart and Stewart 2015). Lockwood Hart and Stewart (2015) draw on a broader data set to assess the main effect of Indigenous status on the decision to imprison. They employed a conjunctive analysis of case configurations, which controls for the interactive role of *legal* factors (seriousness of offense, guilty plea, prior offenses, imprisonment, breach of court order) and *extralegal* factors (gender, age, urban/regional/remote community residency, socioeconomic status). They found that Indigenous status had a statistically significant impact on sentencing outcomes. Furthermore, Fitzgerald (2009) identified that between 2001 and 2008 the Australian Indigenous prison population increased by 56.4 percent while conviction rates slightly reduced (Fitzgerald 2009). The author attributed the growth to an increase in the proportion of Indigenous offenders given a prison sentence and the length of the prison terms imposed. She concluded that tougher sentences have had a "greater impact on the Indigenous prison population than on the non-Indigenous prison population" (p. 5). Among scholars who identify uneven sentencing practices, they attribute responsibility to postcolonial systemic bias that links risk to indigenous populations (Blagg et al. 2005; Baldry and Cunneen 2014), even when courts attempt to be sympathetic in their sentencing remarks (see Anthony 2013).

As discussed, the tendency of the courts in New Zealand and Australia has been to resist sentencing reform that favors indigenous decarceration because of the lack of statutory backing. Although the Canadian principle is supported by the common law, its approach has been narrowly interpreted as linked to statute (*Bugmy v. The Queen* (2013) at 592; *R v. Mika* at 12). Indeed, Australian case law itself supports the proposition that individualized justice requires countenancing difference. This point was expressed by Eames J in *R v. Fuller-Cust* who cautioned against "a simplistic assumption that equal treatment of offenders means that differences in their individual circumstances related to their race should be ignored" (at 80). He stated that to ignore factors personal to the applicant, and his history, in which his Aboriginality was a factor, and to ignore his perception of the impact on his life of his Aboriginality, would be to sentence him as someone other than him or herself (at 520).

The concern presented by the High Court in Australia is that adopting the Canadian approach will result in a racial discount. The High Court does not consider that Indigenous colonial dispossession and disadvantage are taken into account only when they are relevant to the offender. The Canadian courts, like the Australian courts, must determine whether indigenous sentencing considerations apply to the *individual*

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indigenous offender, and how these considerations will affect the penalty (see *R v. Daniel, R v. KU, Bugmy v. The Queen, R v. Gladue*, and *R v. Ipeelee*). Courts have acknowledged that indigenous people are not homogenous and the individual characteristics of each offender must always be considered: *R v. Woodley, Boogna & Charles* ((1994) 76 A Crim R 302); *Russell v. R* ((1995) 84 A Crim R 386). Nevertheless, the High Court was unable to delink Canadian jurisprudence from its Criminal Code (*Bugmy v. The Queen* (2013) at 592). Similarly in New Zealand, the Court of Appeal has refrained from adopting the position in *Bugmy v. The Queen* in relation to Māori offenders because the decision is perceived as a creature of statute—although the relevant jurisdiction of New South Wales does not have statutory provisions giving special regard for sentencing Indigenous offenders (*R v. Mika* at 12).

VI. Conclusion

This essay has detailed a range of sentencing initiatives both within mainstream and indigenous courts to accommodate indigenous backgrounds. There remain, however, important gaps and limitations. Both sentencing research and sentencing practices themselves have been blind to the effects of intersectional marginalization on indigenous offenders, except in so far as it intersects with socioeconomic disadvantage. However, in Australia the recent High Court decision of *Bugmy v. The Queen* (2013) has watered down this intersection, stating that socioeconomic disadvantage is to be applied to all offenders and without consideration of Indigenous systemic disadvantage stemming from colonization (also see *Bugmy* (No 2) [2014] NSWCCA 322). This evidences a single-axis approach to identity in sentencing. Sentencing courts exhibit an additional blindness to other aspects of indigenous identities. Across Canada, New Zealand and Australia there is a lack of sentencing jurisprudence and sentencing options that accommodate indigenous background *and* gender *and/or* mental, cognitive, or physical impairment. For example, in Australia the focus of sentencing courts on offenders' childhood deprivation (see *Bugmy v. The Queen* (2013)) precludes an understanding of Indigenous women's circumstances of ongoing victimization to family violence into adulthood and the effects of removal of Indigenous women's own children (see Sherwood and Kendall 2013). Further texturing Indigenous women's intersectional disadvantage, Baldry et al. (2009, 2015) identify the significant overrepresentation of Indigenous women in prison with "complex needs" where a cognitive disability coexists with a mental health and/or alcohol and other drug disorder. In relation to Canada, Williams (2007, 2009) has pointed out that sentencing is blind to intersectionality for Aboriginal women except where the multiple axes of disadvantage underline the woman's risk and need for penality. In both

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jurisdictions, imprisonment for indigenous women has significantly increased in the past decade (Sherwood and Kendall 2013; Williams 2009).

If sentencing is to promote individualized justice, sentencing courts and administrators, as well as governments responsible for criminal justice and social planning, will need to be sensitive to the specific circumstances and needs of individual indigenous persons before sentencing courts. Developing a rigorous jurisprudence that promotes non-prison alternatives and empowers indigenous communities in sentencing indigenous offenders is one important avenue, and as discussed in this essay, notable developments have occurred. However, there is considerable room for these approaches and initiatives to be expanded. For example, many Indigenous sentencing courts in Australia continue to operate at the margins of the court system and there is insufficient information on Indigenous background submitted in mainstream courts. There is equally a need for mainstream courts to further promote non-prison alternatives to remedy the historical and contemporary over-imprisonment of indigenous people. Sentencing leniency has tended to be watered down by a judicial and government focus on the nature of offending and/or offending history, with the judiciary's "risk" focus on repeat offending resulting in minor offenders cycling in and out of prisons. Improved sentencing processes need to be matched with tailored programs and services for indigenous people in remote and urban communities to address their multiple and varying needs both pre- and post-sentencing. Furthermore, additional research is needed to investigate the extent to which judicial officers and other key stakeholders understand indigenous cultural complexities, and the extent to which sentencing courts can be transformed into spaces that are culturally safe for indigenous individuals appearing before such courts and their communities.

1. The term "indigenous" is used to collectively describe the First Peoples of different countries. In this context, "indigenous" is not capitalized. It is capitalized when being used to collectively refer to Australian Aboriginal and Torres Strait Islander people. For Native Canadians we use the term "Aboriginal" as including First Nations (Dene), Inuit, and Métis people of Canada, which is consistent with the terminology used by Statistics Canada. In doing so, we acknowledge that the various groups are culturally and linguistically diverse and have experienced the enduring impact of colonization in differing ways.

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Notes:

([1]) The term “indigenous” is used to collectively describe the First Peoples of different countries. In this context, “indigenous” is not capitalized. It is capitalized when being used to collectively refer to Australian Aboriginal and Torres Strait Islander people. For Native Canadians we use the term “Aboriginal” as including First Nations (Dene), Inuit, and Métis people of Canada, which is consistent with the terminology used by Statistics Canada. In doing so, we acknowledge that the various groups are culturally and linguistically diverse and have experienced the enduring impact of colonization in differing ways.

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