Comparing Indigenous Criminal Justice Initiatives in Canada and Australia

Emma Gill-Alderson

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Indigenous peoples in Canada and Australia have long faced discrimination and over-representation in the criminal justice system. Governments, courts, and community-based agencies began to respond to this trend in the 1990s by organizing initiatives aimed at addressing Indigenous disadvantage in the courts. This paper compares specialized courts and community justice programs in Canada and Australia through the lens of autonomy and decision-making. It probes the degree to which concepts related to self-determination have been operationalized in Indigenous criminal justice initiatives in the two countries, and aims to determine whether these initiatives go beyond simple recognition by the state by taking meaningful steps towards decolonizing the justice system. I argue that community sentencing programs in Canada allow greater opportunities for Indigenous autonomy and participation than those in Australia, while specialized courts in both countries allow very limited opportunities. This work suggests that Australia's more institutionalized framework may not be the model to follow for community justice initiatives if Indigenous autonomy and participation is the goal, and more broadly, that challenging measures of program success can bring to light important policy considerations.

A comparative analysis of the policies and stakeholders that govern the initiatives demonstrates the degree to which Indigenous actors are invited to participate in and have autonomy over the programs that affect their communities. Because detailed information about individual programs is often unavailable, I analyze the policy frameworks of Indigenous justice initiatives in both countries to point to likely power dynamics. I suggest that autonomy and participation can be present when Indigenous communities have opportunities for control over the conceptualization, creation, or administration of initiatives. My work responds to the growing importance of Indigenous self-determination in political science by evaluating whether policies and programs aimed at Indigenous populations reflect important concepts found in self-determination understandings (autonomy and participation), or whether they perpetuate paternalistic and cost-cutting state agendas. Autonomy and participation do not make up a comprehensive understanding of self-determination; there are a number of additional barriers that may limit the realization of Indigenous self-determination. My conclusions, therefore, do not make claims about the realization of Indigenous self-determination. It is also important to note that my work does not come from an Indigenous perspective, and for this reason I leave it to Indigenous peoples to decide whether and how they realize self-determination.

Canada and Australia share a number of similarities that make them ideal candidates for such a comparison. They share similar colonial histories that have resulted in Indigenous peoples having similar positions of marginalization in both countries. Additionally, similar strategies of addressing Indigenous disadvantage in both justice systems allows for a relatively balanced comparison of those initiatives. My work is somewhat limited because Indigenous justice initiatives are a fairly new concept, meaning that there is little research on processes and outcomes. I am also limited by the relatively few detailed reports and evaluations of small, community-led justice initiatives, making it difficult in some cases to determine how they are organized. These limitations are acknowledged and accounted for to the extent possible throughout my analysis.

I begin by defining and discussing my analytic and theoretical framework and providing historical context of the topic. I then conduct a comparative analysis of Indigenous justice initiatives in Canada and Australia to evaluate the degree to which they reflect opportunities for Indigenous autonomy over and participation in program running. I conclude with a discussion of how autonomy and participation relate to self-determination, and how additional considerations, such as that community programs often do not take adequate consideration of female victims of

crimes such as domestic violence, are necessary for a more comprehensive understanding of self-determination.

Analytic and Theoretical Framework

For the purpose of this paper, I use the term "Indigenous justice initiatives" to describe any program that is associated with the criminal justice system that is designed and implemented to reduce the discrimination and over-incarceration of Indigenous people in the criminal justice system or to reflect Indigenous conceptions of justice (Anand, 2000). These include such programs as specialized Indigenous persons courts and community justice initiatives including sentencing circles, restorative justice programs, Community Council programs, healing programs, and others (Marchetti and Daly 2004, 3). I have not limited my research to a strict definition of "restorative justice" initiatives (which is a form of justice in which the offender, victim, and community representatives are all involved in sentencing agreements) because there does not exist a strict definition of what restorative justice means or what a restorative justice initiative should encompass, making it inappropriate to include a strict definition in my study (Larsen 2014, 2). This broad definition includes all initiatives that aim to address Indigenous disadvantage in justice systems with the goal to present an accurate image of the status quo. I have also divided the concepts into two categories of study: specialized courts and community initiatives. These categories are outlined and analyzed in more detail below, but broadly speaking, specialized courts are courts and associated programming within the mainstream system, while community initiatives are sentencing, healing, or reintegrating programs outside the mainstream system.

Specialized Indigenous courts and Indigenous community justice initiatives have been subject to relatively few detailed evaluations, but when these evaluations do take place, one measure of success almost always dominates: the reduction of recidivism (La Prairie 1999, 142). Most studies of any kind of Indigenous justice initiative aims to determine if it reduces recidivism as the principle measure of success. In Canada especially, the reduction of recidivism is assumed to be the primary goal of all Indigenous justice initiatives because of the Royal Commission and Section 718.2 (e) of the Criminal Code that highlight the over-incarceration of Indigenous offenders specifically (R. v Gladue, 1999). In Australia as well, recommendations from the Royal Commission centred on over-incarceration. But more broadly, in Canada and Australia, over-incarceration has been the most visible and widely accepted form of disadvantage that Indigenous people face in the justice system, and has therefore been the focus of most political debate (Dickson-Gilmore and La Prairie 2005, 94).

Not only is over-incarceration very concrete and visible, but it also is very expensive for governments. Reducing Indigenous incarceration through lowering rates of recidivism, while clearly being an important goal in addressing Indigenous over-incarceration, would also mean important cost savings for governments responsible for incarceration (La Prairie 1999, 139). This has likely played a role in putting the reduction of Indigenous incarceration ahead of such other goals as addressing police treatment of Indigenous peoples, addressing judicial bias against Indigenous offenders, or addressing broader issues such as cycles of poverty, substance abuse, and violence against women in Indigenous communities.

An important dilemma of recidivism being the principle goal of Indigenous justice initiatives from the state level, especially for community initiatives that draw on concepts of restorative justice, is that the measure of rates of recidivism does not fit very well into restorative models of justice. This is because recidivism rates are offender focused, while most restorative

justice models look at the balance of the community as a whole (Rudin 2005, 63). Many communities stress that community programs should focus on offenders making amends and repairing community and family ties. This highlights the potential for problems with many community initiatives: if a program focuses on goals other than the reduction of recidivism, it might seem unsuccessful in government evaluations, which likely puts pressure on community initiatives to focus on recidivism rates rather than other measures of success in order to maintain government support and funding (Rudin 2005, 62). Community initiatives likely model their programs in ways that will bring in the necessary funding, which hinders their ability to model programs that reflect their community culture and needs.

Evaluating Indigenous justice initiatives through a lens of Western justice can function to keep decision-making power from Indigenous communities and in the hands of the state by measuring success under the state's terms. My study emerges out of this critique, and broadens it to examine the meaningfulness with which Indigenous voices have been included in decision-making processes related to Indigenous criminal justice more broadly. My work challenges definitions of success that might see institutionalized justice programs that reduce recidivism as successful according to Western definitions, while some Indigenous communities might find that these initiatives do not meet their measures for success. I suggest that, as recidivism-focus evaluations often do not meaningfully consider Indigenous voices, Indigenous justice initiatives themselves may reflect a system that marginalizes Indigenous participation and autonomy.

While my analytic framework is focused on challenging measures of success for Indigenous justice initiatives, my conceptual framework of autonomy and participation come from concepts of self-determination. The concept of self-determination encompasses a wide variety of definitions, ranging from formal acts of succession and decolonization to a broad and nuanced array of acts of self-recognition, decolonization and political autonomy (Anaya 1993). In the context of this work, I draw from concepts of self-determination to discuss political autonomy and participation. I examine both political autonomy to define justice practices as well as avenues to participate in the conceptualization, creation, and administration of justice programs. While I acknowledge that decision-making and autonomy are not necessarily the only components of self-determination, I use this limited framework to challenge the assumption that Indigenous justice initiatives meaningfully reflect Indigenous voices.

My work assumes that Indigenous self-determination is an important consideration because Indigenous peoples have long been excluded from the development of policies aimed at addressing their marginalization, which can be seen as a form of ongoing colonization of imposed policies and institutions. Therefore, policies that aim to address Indigenous marginalization in the justice system should include Indigenous voices and actors to be considered legitimate – a consideration that is often ignored in policy formation. It is with this limited conception of self-determination that I aim to evaluate existing Indigenous justice initiatives in Canada and Australia, as well as discuss important critiques of these initiatives.

The Emergence of Indigenous Justice Initiatives

The colonial foundations of Canada and Australia have resulted in generations of Indigenous populations facing marginalization and disadvantage. Assimilationist policies and practices enacted by colonial institutions such as the government and the church have not only perpetuated Indigenous disadvantage and disenfranchisement, but have caused lasting problems that continue to marginalize Indigenous communities. For example, although residential schools

have not existed for approximately three decades, they have resulted in patterns of poverty, substance abuse, and family violence that have extended effects through generations (Rudin 2005, 26). Also, Indigenous children continue to be taken from their homes at alarming rates and put into the foster care system because their parents are deemed unfit, further harming Indigenous family ties and limiting cultural preservation (Rudin 25, 1).

As is the case with many marginalized populations, especially those affected by extreme poverty, mental health, and substance abuse issues, Indigenous people in Canada and Australia have very high levels of involvement with the criminal justice system. In Canada, Indigenous people represented 26% of admissions to provincial and territorial correctional services despite only representing 3% of the national population in 2015 (Clark 2016, 13). Similarly, Indigenous offenders represent 27% of the total Australian prison population, while only making up 2% of the national population over 18 years of age (Australian Bureau of Statistics 2016).

Rates of incarceration are a very visible aspect of Indigenous involvement in criminal justice systems; however, there are a number of more nuanced ways in which Indigenous people face disadvantage. Indigenous offenders often expand their charges through numerous failure to appear to court and breach of probation charges that are largely the result of poverty, substance abuse, unstable family and living conditions, and such issues as a lack of transportation (Clark 2016, 34). Additionally, Indigenous offenders are much more likely to be denied bail because of a lack of family and community resources and histories of failing to appear to court, which raises the likelihood that they will receive prison time as a part of their sentence (Clark 2016, 18). These problems, among others, contribute to and exacerbate the overrepresentation of Indigenous people in Canadian and Australian criminal justice systems.

The longstanding overrepresentation and general disadvantage in criminal justice systems have incited the development of numerous responses in law and policy through work by legal officials, government bodies, and non-governmental organizations. Because of the similarities between the Canadian and Australian justice systems and the countries' shared history of colonialism, responses in both countries have been comparable, and have even shared a number of program and policy frameworks. In addition to being modeled after one another, international pressures such as from The United Nations Declaration on the Rights of Indigenous Peoples established in 2007 have caused states to take additional steps to improve the status of Indigenous peoples (United Nations 2008). These factors make the two countries viable for comparison of Indigenous justice approaches. Nonetheless, there are still notable differences that are important to identify in comparing responses to Indigenous discrimination in Canadian and Australian justice systems.

Canada's most notable responses to Indigenous over-incarceration are a result of federal legislation and supreme court decisions. This is not to say that communities played a limited role in these changes; governments only began to take these steps after years of public pressure and research. Although the over-incarceration of Indigenous people began to be widely recognized in the 1980s, the final report for the Royal Commission on Aboriginal Peoples that was completed in 1996 marked the beginning of a series of important legislative changes with the goal to reduce the incarceration of Indigenous people (Indigenous and Northern Affairs Canada 1996). In the same year of the release of the Royal Commission, the Criminal Code of Canada was amended in the hopes of limiting incarceration. The amendment urges judges to consider all possible alternatives to incarceration, and in 718.2(e) notes that this is especially important for Indigenous offenders given their history of abuse and marginalization (Rudin 2005, 43).

Over the next several years, the Supreme Court clarified this amendment somewhat in the Gladue and Ipeelee decisions. The Gladue decision clarified that section 718.2(e) applies to all Aboriginal people in Canada on or off reserve, and the Ipeelee decision clarified that it applies in all contexts, including the sentencing of long-term offenders (R. v. Gladue, 1999; R. v. Ipeelee 2012). However, this still left an important dilemma in the amendment: judges were not told how they should get the information necessary to understand the factors that led to an Indigenous offender's crime. With most courts' limited resources, the amendment can often be overlooked unless there are specific programs in place to collect and present this information (Rudin 2005, 43). As a response to this problem, many provinces now have the specialized Indigenous persons courts that dedicate a certain number of days or hours each week to sentencing Indigenous offenders with judges who are knowledgeable about Indigenous history and struggles and who will place importance on considering alternatives to incarceration.

Governments and NGOs have organized several funding programs to support both resources for specialized courts and community justice initiatives such as restorative justice programs. For example, since the 1970s, federal and provincial governments have funded the Aboriginal court worker program that employs court workers to explain the justice process to Indigenous victims, accused, and families, assist accused in finding counsel, and explain relevant Indigenous issues to council and judges (Rudin 2005, 22). Also, since the 1990s, the federal government's Indigenous Justice Program (entitled the Aboriginal Justice Strategy until April 2017) has provided funding to a number of different community justice initiatives both on and off reserves, often in partnership with provincial governments and NGOs (Rudin 205, 44). Some community sentencing programs can incorporate elements of common law and Indigenous law in sentencing, while others use more informal agreements in creating a sentence or healing plan. These programs, as well as the legislative changes, show that serious steps have been taken to limit Indigenous incarceration in Canada, and that the most influential changes have often begun from federal level decisions. Because of the process of emergence and the organization of funding, specialized Indigenous persons' courts in Canada have are very centralized and uniform, while community initiatives can often have more variation in practices and goals.

While Australia's initiatives can be very similar to those in Canada, they were created and are organized in a much more decentralized fashion. Having similar information to Canada in the 1990s concerning very high rates of Indigenous incarceration, Australia also conducted a Royal Commission to investigate the problem further, theirs being the Royal Commission into Aboriginal Deaths in Custody published in 1991 (Marchetti and Daly 2004, 2). Eight years later, the first initiatives began to emerge. The first large scale initiative was created in South Australia in 1999 named the Nunga Court, followed by a number of similar courts in different jurisdictions (Marchetti and Daly 2004, 2). Many different types of initiatives, often types of specialized courts and sentencing circles, then began to emerge throughout the country. They have now become a very prominent and formalized part of the criminal justice systems in many jurisdictions (Marchetti and Daly 2004, 2).

The more regionally specific inception of initiatives in Australia means that they differ from Canada in their control and variance. Rather than having national goals or being based on federal laws, Australian specialized courts and community initiatives reflect regional legislation and goals. Because of this, many initiatives are based on regional knowledge and a focus on the participation of local Indigenous communities in the sentencing process, as well as more generally responding to the recommendations of the Royal Commission (Marchetti and Daly 2004, 3). Victoria is the only jurisdiction that has specific legislation to support their Indigenous specialized

court with its Magistrates' Court (Koori Court) Act 2002 (Marchetti and Daly 2004, 3). Despite the decentralized organization of initiatives, it should be noted that most specialized courts in all jurisdictions of Australia have a number of important similarities, including limiting their cases to those with Indigenous offenders, sentencing cases that would otherwise be heard in a Magistrate's court, and only hearing cases from within the respective jurisdiction (Marchetti and Daly 2004, 2).

There is a very important distinction between practices in urban and remote areas of Australia. While urban areas mostly rely on specialized courts with some sentencing circles, including some sentencing circles within specialized courts (sometimes called circle courts), it is more common to find sentencing circles and other community justice initiatives in rural areas (Marchetti and Daly 2004, 4). Practices in remote areas are very important because this is often where organized Indigenous communities reside. In these areas, it is common for community leaders such as elders to give input into sentencing processes. In Victoria, for example, elders in a sentencing circle will come to a sentencing decision with the Magistrate after a sentencing circle (Marchetti and Daly 2004, 4). In the Northern Territory, sentencing circles recognize Aboriginal customary law in sentencing (Marchetti and Daly 2004, 4). Despite the differences in inception and organization, Australia's specialized courts and sentencing circles often mirror those in Canada.

Because both specialized courts and community initiatives in both countries aim to reduce incarceration, some argue that they can and have been used as a cost cutting measure for governments, given that prison sentences are much more costly than community sentences (La Prairie 1999, 139). This argument is supported by the fact that there is often relatively little government funding available for initiatives in more remote areas with low offender populations and evaluations to determine their level of success (Dickson-Gilmore and La Prairie 2005, 94). However, this lack of institutional support can have some positive effects, since it suggests that communities have greater control over the programs' goals and methods if governments have little interference. Community restorative justice initiatives are often characterized as contributing to a focus on Indigenous justice that better addresses the needs of Indigenous offenders, dealing not just with incarceration reduction, but also addressing broader issues such as addiction and mental health problems, and repairing community ties (Dickson-Gilmore and La Prairie 2005, 94). The varying perspectives on both specialized courts and community initiatives reflect the complexity and diversity of the initiatives.

Comparing Canada and Australia

Both specialized courts and a variety of community sentencing and healing programs are present in Canada and Australia. I compare initiatives in Canada and Australia divided into the two categories of specialized courts and community initiatives. My comparison evaluates differences in the amount that existing initiatives allow opportunities for Indigenous autonomy and participation in each country. The analysis suggests that specialized courts in both countries allow limited opportunities for Indigenous autonomy and participation, while community initiatives in Canada allow for greater opportunities those in Australia.

Specialized Courts

Specialized courts for Indigenous offenders in both Canada and Australia are organized within the mainstream justice system, their purpose being to reduce the over-incarceration of

Indigenous offenders by limiting prison sentences, reducing recidivism, taking the offender's personal circumstances into consideration, and connecting offenders with legal aid and appropriate treatment programs (Marchetti and Daly 2004, 1; Clark 2016, 16). These courts are much the same as other courts in the mainstream justice system, but are only for Indigenous offenders. Court officials (such as judges, magistrates, and crown prosecutors) usually volunteer to be involved in these courts and therefore can be particularly well informed about Indigenous issues. These courts often sit on certain days and sentence those Indigenous offenders who have been referred after their initial hearing and who have pled guilty. The plea of guilty is a required precondition as specialized courts are sentencing courts, and do not have the time or resources for lengthy trials (Clark 2016, 12). They often have Aboriginal court workers who have a range of roles including explaining the process to offenders and family, collecting and presenting relevant background information to the court, and suggesting a post sentence healing plan for the offender (Clark 2016, 7).

Aboriginal court workers and other court officials in Indigenous specialized courts are usually well connected with local Indigenous resources, and are the most common courts to defer charges to community initiatives and treatment programs in lieu of a sentence with prison time (Clark 2016, 7). Some scholars oppose specialized courts on the grounds that they may in fact result in offenders having a lengthier involvement with the justice system as a result of bail denial and high instances of remand (Anand, 2000). However, many see them as limiting the number of Indigenous people sent to prison in the long-term, and responding more appropriately to the needs of those people within the justice system (Rudin & Roach, 2000). Specialized courts may seem to fit outside the scope of Indigenous justice initiatives on their face because, while they aim to reduce the over-incarceration of Indigenous people, their institutional structure within the mainstream justice system does not reflect common models of restorative justice in which the offender, victim, and community aim to resolve conflict through reconciliation and rehabilitation (Clark 2016, 12). I have included them in the study because they have become a commonly used and widely studied approach to Indigenous justice in both Canada and Australia, making it important to consider the level of Indigenous input that they allow (Marchetti and Daly 2004, 1; Clark 2016, 12).

Specialized courts for Indigenous offenders in both Canada and Australia are usually found in urban areas with concentrated Indigenous populations where there are often fewer community initiatives available (Marchetti and Daly 2004, 2). Most provinces in Canada have at least one specialized Indigenous persons court, and those that do not often employ a variety of Gladue initiatives in courts also aimed at reducing Indigenous incarceration and recidivism (April and Orsi 2013, 6). The Gladue decision makes up the legal framework for specialized Indigenous persons courts in Canada, informing their purpose: to reduce the over incarceration of Indigenous offenders (R. v Gladue, 1999). The courts are generally created by court officials (judges and crowns) and supported by government branches and non-governmental organizations through financial support and connections with legal resources (such as legal aid workers and Aboriginal court workers) (April and Orsi 2013, 15). Some courts have adopted sentencing circle styled courts that aim to incorporate Indigenous community members and supports into the sentencing process, while still maintaining the formal legal structures of tradition Canadian courts (April and Orsi 2013, 18). However, because of their position within the mainstream justice system, they are mainly controlled through government funding and the formal framework of the mainstream legal system.

Australian specialized courts are similar to those found in Canada. Their principle goals are also to reduce the over incarceration Indigenous offenders. They are also similarly structured, being situated within the mainstream justice system, with some being organized like other

courtrooms, and some being organized as sentencing circles (Marchetti and Daly 2004, 1). However, Australian specialized courts differ from their Canadian counterparts in their legal and institutional framework. While Canada's Aboriginal Persons courts emerged from the Gladue decision that applies federally, the Australian courts emerged without such legislation and therefore have more flexibility when it comes to their goals (Marchetti and Daly 2004, 2). Rather than only focusing on the reduction of Indigenous over incarceration, they also aim to increase the participation of Indigenous people in the justice system as court staff and advisors (Marchetti and Daly 2004, 2). This is not to say that Indigenous people are not encouraged to participate in the Canadian justice system, but rather that their specialized courts are narrower in focus. Also, since only one jurisdiction in Australia has any legislation concerning Indigenous offenders to support specialized courts, this suggests that Australia has a weaker legal framework for Indigenous justice, but also that Indigenous courts are controlled more regionally rather than being federal like in Canada (Marchetti and Daly 2004, 3).

When it comes to specialized courts in Canada, I find that Indigenous autonomy and participation have a notably small role. Because the courts are conceptually grounded in Canadian law and the mainstream justice system, and are created by court officials, Indigenous communities have little influence on their structure and goals. Also, because of their existence within the mainstream justice system, the state has ongoing control over the direction of the courts. Some limited opportunities for Indigenous participation can be seen in the participation of Aboriginal court workers, as they play a role in connected offenders with community supports and can therefore direct offenders to Indigenous support systems (Marchetti and Daly 2004, 2). Additionally, community non-governmental organizations, such as Aboriginal Legal Services in Toronto, can bring in important resources and perspectives to specialized courts. Aside from this, however, these courts are, for the most part, state-led initiatives and therefore allow little room for Indigenous autonomy and participation.

This is very similar to the opportunities for autonomy and participation found in Australian specialized courts. Their grounding in the mainstream justice system severely limits the degree to which concepts of Indigenous self-determination may be employed. Australian specialized courts allow slightly more variation and breadth in their goals, since the courts did not emerge from specific national legislation; however, it remains court officials that have the final say in all court-related decisions, meaning that this flexibility likely results in limited Indigenous power over initiatives. Based on these findings, I conclude that both Canadian and Australian specialized courts allow very few opportunities for Indigenous autonomy and participation. This does not necessarily mean that the courts cannot have positive effects, or that Indigenous people have no impact whatsoever on the courts, but rather it suggests that specialized courts are principally a state led initiative to address Indigenous over incarceration and are not a cite in which Indigenous communities are likely to have a strong impact on the outcomes of their community members.

Because specialized courts in both Canada and Australia are found within the mainstream justice system, there is little question as to who conceptualizes them, creates them, and administers them. Although Canada's specialized courts stemmed from Supreme Court legislation, while Australian specialized courts emerged without specific legislation, both countries' specialized courts are grounded in the formal legal system with the principle goal to reduce Indigenous over incarceration, giving them very similar conceptual backgrounds. Both countries' specialized courts are created by court officials such as judges, crowns, and lawyers, meaning that they are both created in similar ways within the justice system (Marchetti and Daly 2004, 2; Clark 2016). Finally, specialized courts in both countries are mainly controlled through the principles and practices of

the mainstream justice system. This means that the courts are formally controlled through the state. It should be noted, however, that Indigenous communities do seem to have some say in how the courts are organized through their participation in the form of Aboriginal court workers, and through Indigenous community resources for such as legal aid programs, and through the emergence of some courts adopting circle sentencing court styles (Marchetti and Daly 2004, 2; Clark 2016, 7). While Indigenous communities may be consulted in some ways, the state has the final say, suggesting that the courts allow some participation but very little autonomy.

Community Initiatives

Community initiatives function as a resource for mainstream justice systems, but are not considered to be within them. Instead, these initiatives are situated within communities and accept offenders who have been referred from the courts. Depending on the program, offenders can be referred pre-charge, pre-sentence, or pre-integration. Pre-charge referrals only exist in some areas, and are the least common of the three categories. They are usually made by police officers as an alternative to pressing charges, and involve cultural or treatment programs with the goal to rehabilitate rather than incarcerate for minor offenses (Latimer and Kleinknecht 2000, 7). Pre-sentence justice initiatives are the most common, and include such programs as Community Councils, sentencing circles, and other restorative sentencing programs. These programs are referred cases from courts for sentencing, and often combine elements of the Canadian criminal justice system and local Indigenous laws to decide a sentence that focuses on rehabilitation and reconciliation with the victim and the community (Latimer and Kleinknecht 2000, 7). Pre-integration programs often involve treatment and rehabilitation programs that offenders complete after they have carried out their sentence, with the purpose to help offenders successfully reintegrate into their community (Latimer and Kleinknecht 2000, 7).

In Canada, the most common community initiatives are community sentencing programs, restorative justice programs, and wellness and treatment programs (Latimer and Kleinknecht 2000, 7). The programs are not federally or provincially regulated, and therefore do not necessarily follow consistent guidelines, resulting in significant variation between programs' structures and practices (Government of Canada 2016). These programs also do not need to have certification from the state; they rather need to develop relationships with local court officials to the extent that they have the credibility and reputation necessary to have cases diverted to them (Dickson-Gilmore and La Prairie 2005, 93). Because Indigenous community justice initiatives in Canada are not situated immediately within the mainstream justice system, it moves some of the power away from the state and into Indigenous communities. These initiatives incorporate conceptions of wellness and community restoration rather than solely criminal law, making the initiatives more reflective of varying conceptions of Indigenous justice rather than Canadian justice, especially since the limited regulations allow communities to tailor programs to their needs (Dickson-Gilmore and La Prairie 2005, 94). This is evidenced by a study that found that 73% of community justice workers interviewed in 2016 stated that their program was adapted to the needs of the community (Government of Canada 2016, 30). Because the initiatives are created at community level and can reflect local challenges and needs, decision power concerning how programs are organized and run lies somewhat in communities.

However; it is likely that many such initiatives are created in ways that will be accepted by the mainstream justice system in order to be seen as credible and to receive federal or provincial funding, influencing to some degree their level of decision making power. In urban areas with less

concentrated and homogenous Indigenous populations, restorative justice initiatives are often created and run by non-governmental organizations that may better represent some Indigenous cultural practices than others (Dickson-Gilmore and La Prairie 2005, 94). For example, in Toronto the Aboriginal Legal Services program supports the Toronto Community Council diversion program for sentencing Indigenous offenders. Additionally, the federal government, through the Indigenous Justice Program and provincial governments, are the main source of funding for many community initiatives, giving some power to governments in deciding which programs receive funding (Dickson-Gilmore and La Prairie 2005, 93). Notably, the Indigenous Justice Program funds over 200 community-based justice programs across the country (Government of Canada 2016). However; these initiatives can be privately funded, or funded through non-governmental organizations, allowing some flexibility concerning funding sources (Dickson-Gilmore and La Prairie 2005, 99). Despite some significant sources of state control, Indigenous communities hold much of the control over how programs are conceptualized, created, and administered.

Many community initiatives in Australia are similar to those found in Canada; however, there is a greater focus on pre-sentence and pre-conviction programs involving the offender, victim, and community representatives (Larsen 2014, 2). Many of these community sentencing programs emerged originally for juvenile offenders exclusively, but are now available to all types of offenders (although usually reserved for offenders with less serious charges) (Larsen 2014, 5). The initiatives are organized regionally with different guidelines based on legislation in each jurisdiction. For example, in New South Wales, community justice initiatives emerged from recommendations in the Young Offenders Act 1997 (Larsen 2014, 13). They are described as being a joint effort between governments, non-governmental organizations, and community members (Larsen 2014, 7-21). This creates more consistency within each jurisdiction, while allowing a fair amount of variation across the country.

The Australian community initiatives' grounding in government legislation places greater control in the hands of the state. Although the concept of restorative justice that is reflected to different degrees in many community programs is drawn from some Indigenous communities' conceptions of justice, and communities play an important role in running the programs, the fact that each jurisdiction has an act regulating restorative justice makes its conceptual framework largely grounded in the law (Larsen 2014, 7-21). Similarly, it seems that communities can have limited control over the creation of these initiatives, given that they are grounded in government legislation and coordinated and funded through government departments (Larsen 2014 7-21). The limited role of communities becomes even more evident at further examination. For example, in Western Australia, restorative justice programs are organized and run by a combination of police officers, representatives from the Department of Corrective Services and the Department of Education and Training, and "can" also include community representatives (Larsen 2014, 12). In Victoria, restorative justice programs are coordinated by the Department of Human Services and run by such non-governmental organizations such as Anglicare, which is a Christian organization (Larsen 2014, 9). This suggests both that restorative justice programs are created largely by governments and organizations outside of Indigenous communities, and that they can also hold the bulk of ongoing control over the programs.

I find that community initiatives in Canada represent notable opportunities for Indigenous autonomy and participation. Their grounding in local Indigenous conceptions of justice allow communities to conceptualize and create initiatives that reflect local conceptions of Indigenous justice and that address local needs. The lack of comprehensive government regulation of restorative justice definitions and programs enhances opportunities for Indigenous autonomy, as it

puts ongoing control over the initiatives in the hands of community organizations, leaving the fate of community justice programs in the hands of the community. Indigenous participation in community initiatives is depleted to some degree by the more limited Indigenous input in urban communities that are often run by non-governmental organizations (although these organizations are often run by Indigenous people), and autonomy is limited by the importance of government funding for initiatives that likely influences the direction of many programs to satisfy government funding requirements. This suggests that Indigenous community justice initiatives in Canada allow for some opportunities for Indigenous autonomy and participation, but still present significant limitations.

The findings for community initiatives in Canada are quite different from those in Australia. Although community initiatives in Australia do allow more opportunities for Indigenous autonomy and participation than in Australian specialized courts, it is still limited for a number of reasons. The inclusion of community members and Indigenous community supports in many restorative justice initiatives (but not all) allows for some opportunities for Indigenous participation that would not be possible in the mainstream justice system, as community members have a greater influence on the resources available to offenders and the direction of the programs (Larsen 2014, 4). However, opportunities for autonomy are notably limited because of the grounding of these initiatives in regional government Acts, rather than community conceptions of justice. It is also limited by the fact that many of these initiatives are largely controlled and sometimes even administered by government departments and non-Indigenous non-governmental organizations, such as Christian organizations, that may represent colonial interests. These findings suggest that community initiatives in Australia reflect limited opportunities for Indigenous autonomy and participation, and although they may have a positive impact on Indigenous representation in the justice system, they seem to represent a somewhat paternalistic attitude towards Indigenous communities in deciding their own collective destinies.

Indigenous community justice initiatives in Australia and Canada have a number of similarities, but also part ways significantly when it comes to the locus of power. Both countries' initiatives are often based on principles of restorative justice, involving the offender, victim, and community representatives. They also both lack strict definitions of restorative justice, resulting in a variety of interpretations. However, while initiatives in Canada are created at the community level, and can reflect local needs, initiatives in Australia are grounded in specific legislation that limits the flexibility of initiatives and gives greater creative power to the state. Also, while initiatives in Canada are usually created within communities, by community members with some input from non-governmental organizations, initiatives in Australia seem to be principally organized and run by government departments and non-governmental organizations with varying input from Indigenous communities. This suggests that the Australian state holds the bulk of the power in creating and administering community initiatives, while the Canadian state holds somewhat more limited power over these initiatives.

Based on the comparative analysis of Indigenous justice initiatives in Canada and Australia, I find overall that community initiatives in Canada somewhat better reflect Indigenous autonomy and participation than those in Australia. Specialized courts in both countries were found to allow some avenues of Indigenous participation, but very limited opportunities for autonomy given the courts' existence within the mainstream justice system. It is in community initiatives that the two countries diverge. While communities initiatives in both countries allow much broader opportunities for Indigenous participation than in specialized courts, community initiatives in Canada allow more Indigenous autonomy than those in Australia. Indigenous

autonomy in Australia is quite limited by the more institutionalized structure of community programs. Community initiatives in Canada, on the other hand, allow for Indigenous communities to have greater autonomy over programs. It is important to note; however, that while the decentralized nature of community initiatives in Canada gives greater autonomy to Indigenous communities, their reliance on government funding likely dampens this autonomy by governments deciding what makes a good program according to their goals. This highlights the importance of Indigenous communities having a voice both in justice initiatives themselves, but also in broader conceptions of the long-term goals of the initiatives. While autonomy and participation are important components of a self-determination approach, there are additional barriers to the potential realization of Indigenous self-determination in the context of Indigenous justice initiatives that are lost in such a limited analysis.

Barriers to the Realization of Self-Determination in Indigenous Justice Initiatives

While some opportunities for Indigenous communities to control the conceptualization, creation, and administration of community justice programs may exist, there remain important barriers that can limit the ways that Indigenous communities can realize these opportunities. My analysis above focuses on the autonomy and participation components of self-determination, and the policy structure of justice initiatives; however, other structural and institutional barriers may hinder the realization of a comprehensive understanding of Indigenous self-determination in a variety of ways. While my work focuses on autonomy and participation in initiatives, I do not draw on concepts of self-determination more broadly. In order to make an argument about the realization of Indigenous self-determination in the context of Indigenous justice initiatives, a number of additional considerations are necessary that I was unable to measure with the available information. This section outlines feminist critiques of community justice programs to highlight one such additional consideration outside of the comparison.

Decolonizing conceptions of justice and encouraging a greater degree of self-determination in Indigenous justice initiatives is an important goal, but it is also important to acknowledge unequal power relations within Indigenous communities that have resulted in some voices going unheard. An important barrier to the realization of Indigenous self-determination in community justice initiatives is the further victimization of Indigenous women through the process. Indigenous women in both Canada and Australia have been particularly marginalized as a result of patriarchal values enforced and internalized through colonial and assimilation policy (FIMI 2006, 27). These practices, as well as the history of Indigenous trauma associated with them, have resulted in domestic violence becoming prevalent in many Indigenous communities, especially as some communities do not always condemn instances of domestic violence that stem from women violating strict gender roles such as being sexually compliant or completing domestic tasks (FIMI 2006, 27).

The same problems concerning stigma against speaking out about domestic violence and pressing charges, anonymity and rejection from family and communities, and limited resources found in many Indigenous communities are often mirrored in community initiatives with restorative justice principles. Because restorative justice principles generally involve the offender, victim, and community, restorative justice programs often involve the victim directly in the sentencing process (FIMI 2006, 27). This can be very empowering for victims to be able to be heard by the offender, to be given some form of explanation from the offender for their actions, and to have some degree of say in the sentencing agreement and possible restitution (Blaney,

Huntley, & Stewart 2001, 64). However, in cases concerning domestic violence and violence against women, harmful trends can be reproduced in restorative justice processes, resulting in the re-victimization of victims.

During the sentencing process, the extent of harm might be played down by the offender or sentencing participants such as the Elder or the process facilitator which can cause unintentional victim blaming and be very harmful to victims' recovery (Blaney, Huntley, & Stewart 2001, 39). Also, in small communities, victims' participation and perspectives presented during their participation may not remain confidential which can result in the alienation or ostracizing of victims from their community (Blaney, Huntley, & Stewart 2001, 36). Not only can Indigenous women be re-victimized through the sentencing process, they can also be re-victimized through a lack of supports and resources. In many restorative justice programs, there is a strong emphasis on offenders rather than victims, which limits victims' knowledge of and access to the resources and supports they may need throughout the process (Blaney, Huntley, & Stewart 2001, 30). Some restorative justice programs, especially those is very remote areas, also have a lack of offender accountability, meaning that sentences and agreements are not always effectively monitored. In these cases, offenders may not honor sentence conditions such as staying away from the victim, or completing treatment or counselling to help keep them from reoffending, potentially putting the victim in danger (Blaney, Huntley, & Stewart 2001, 19). The factors that contribute to the re-victimization of female Indigenous victims in restorative justice processes raise numerous concerns about gender equality and victim safety.

The protection of female victims in Indigenous justice reflects tensions between individual and collective self-determination. While collective self-determination functions to protect the collective rights of peoples internationally, representing the ability and entitlement of peoples to control their own destinies, Individual self-determination concerns individual agency and the ability to control one's own life (Napoleon 2005, 40). In the context of Indigenous communities in Canada and Australia, collective self-determination has been the focus of most studies and debates concerning self-determination, in large part because that is how it has been framed in international human rights discourse (Anaya 1996, 79). However, looking at individual self-determination in this context helps bring to light the possibility of discrimination within a people by acknowledging the individual element of the collective.

In Jennifer Nedelsky's feminist legal theory she conceptualizes individual self-determination as being inherently social (Nedelsky 1989, 1). This is an important departure from liberal theory that sees the individual as being the primary unit in a society because it recognizes the complicated nature of interactions within a people striving for collective self-determination and asserts that individuals only feel agency in relation to the people in their society or community (Nedelsky 1989, 12). Based on her theoretical approach to self-determination, Nedelsky finds that Indigenous women's individual rights have been overridden by the collective rights in many colonial contexts, which is especially problematic given that the collective rights often reflect rights held by men (Nedelsky 1989, 14). Based on this view of self-determination, collective self-determination in community justice programs cannot be fully realized until women are effectively protected from victimization through the programs. Indigenous women's disadvantage should be addressed not only as a women's issue but as a community issue in the path to collective self-determination.

This concept emphasizes the importance of individual rights being protected for all participants in restorative justice processes, especially when it comes to the vulnerability of victims participating and the possibility of victims being re-victimized. It also highlights the importance

of Indigenous women having avenues to protect their individual rights if they are being overshadowed by collective rights in communities. For these programs to really be successful in representing the collective self-determination of a people, they need to ensure that all individuals involved have agency and support throughout the process. It is critical that self-determination include the individual self-determination of vulnerable intragroup populations in order to avoid perpetuating inequalities within Indigenous communities. While this issue does not necessarily require the involvement of the state, it is nonetheless an important barrier to the realization of Indigenous self-determination in the context of Indigenous justice initiatives.

Conclusion

Although autonomy and participation are a limited scope with which to measure self-determination, they still provide important insights into the power that Indigenous people have over initiatives that affect their communities. Based on a comparative analysis of initiatives in both countries, I find that community initiatives in Canada allow more opportunities for Indigenous autonomy and participation than those in Australia, while specialized courts in both countries allow very limited opportunities for autonomy especially because of their existence within the mainstream justice system. Community initiatives in Australia are found to allow fewer opportunities for Indigenous autonomy because they are more grounded in state legislation and programming than in Canada, where community initiatives are created by the community and apply for funding through the state. Although Australia has often been praised for its established and expanding use of various Indigenous justice initiatives, this work suggests that the more structured approach to addressing Indigenous justice may limit the impact that Indigenous communities have on the conceptualization, creation, and administration of the programs. If the goal of Indigenous justice initiatives is to meaningfully address Indigenous marginalization in the criminal justice system, Indigenous communities and actors should have autonomy over and participate in those initiatives.

Anand, Sanjeev. 2000. 'The sentencing of aboriginal offenders, continued confusion and persisting problems: A comment on the decision in *R. v. Gladue' Canadian Journal of Criminology* 42(3):412-420

Anaya, S. James. 1993. "A Contemporary Definition of the International Norm of Self-Determination." *Transnational Law & Contemporary Problems* 3(1): 131-164.

Anaya, S. James. 1996. *Indigenous Peoples in International Law*. New York: Oxford University Press.

April, Sebastien, and Mylène Magrinelli Orsi. 2013. *Gladue Practices in the Provinces and Territories*. [Department of Justice]: Research and Statistics Divison. http://www.justice.gc.ca/eng/rp-pr/csj-sjc/ccs-ajc/rr12_11/rr12_11.pdf.

Australian Bureau of Statistics. 2016. "Prisoners in Australia, 2016." http://www.abs.gov.au/ausstats/abs@.nsf/mf/4517.0.

Blaney, Fay, Audrey Huntley, and Wendy Stewart. 2001. "The Implications of Restorative Justice for Aboriginal Women and Children Survivors of Violence: A Comparative Overview of Five Communities in British Columbia." Prepared for the Aboriginal Women's Actions Network.

Government of Canada. Department of Justice. 2016. "Evaluation of the Aboriginal Justice Strategy December 2016." Prepared by the Evaluations Division, Corporate Services Branch. https://www.justice.gc.ca/eng/rp-pr/cp-pm/eval/rep-rap/2016/ajs-sja/ajs-sja.pdf.

Clark, Scott. 2016. "Evaluation of the Gladue Court: Old City Hall, Toronto." Evaluation for Aboriginal Legal Service: Scott Clark Consulting Inc. http://www.aboriginallegal.ca/assets/gladue-court-evaluation---final.pdf.

Coker, Donna. 2006. "Restorative Justice, Navajo Peacemaking and Domestic Violence." *Theoretical Criminology* 10(1): 67-85.

Coulthard, Glen S. 2014. *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition*. Minneapolis and London: University of Minnesota Press.

Dickson-Gilmore, Jane, and Carol La Prairie. 2005. *"Will the Circle Be Unbroken?": Aboriginal Communities, Restorative Justice, and the Challenges of Conflict and Change*. Toronto: University of Toronto Press.

FIMI. 2006. *Mairin Iwanka Raya: Indigenous Women Stand against Violence. A Companion Report to the United Nations Secretary-General's Study on Violence against Women*. New York: International Indigenous Women's Forum.

Indigenous Affairs and Northern Development Canada. 1996. "Royal Comission on Aboriginal Peoples." Established by order in council on August 26, 1991.

La Prairie, Carol. 1999. "Some Reflections on New Criminal Justice Policies in Canada; Restorative Justice, Alternative Measures and Conditional Sentences." *The Australian and New Zealand Journal of Criminology* 32(2): 139-152.

Larsen, Jacqueline Joudo. 2014. "Restorative Justice in the Australian Criminal Justice System. [Australian Government]: Australian Institute of Criminology. http://www.aic.gov.au/media_library/publications/rpp/rpp127.pdf.

Latimer, Jeff, and Steven Kleinknecht. 2000. "The Effects of Restorative Justice Programming: A Review of the Empirical." [Department of Justice Canada]: Research and Statistics Division.

Latimer, Jeff, Craig Dowden, and Danielle Muise. 2005. "The Effectiveness of Restorative Justice Practices: a Meta-Analysis." The Prison Journal 85(2): 127-144.

Marchetti, Elena, and Kathleen Daly. 2004. "Trends & Issues in Crime and Criminal Justice. No. 277." [Australian Government]: Australian Institute of Criminology. http://www.aic.gov.au/media_library/publications/tandi_pdf/tandi277.pdf.

Marchetti, Elena, and Thalia Anthony. 2016. "Sentencing Indigenous Offenders in Canada, Australia, and New Zealand." *University of Technology Sydney Law Research Series 27.* http://classic.austlii.edu.au/au/journals/UTSLRS/2016/27.html.

Napoleon, Val. 2005. "Aboriginal Self Determination: Individual Self and Collective Selves." *Atlantis* 29(2): 31-46.

Nedelsky, Jennifer. 1989. "Reconceiving Autonomy: Sources, Thoughts and Possibilities." *Yale Journal of Law and Feminism* 16(1): 7-36.

R. v. Gladue, 1 S.C.R. 688 (1999)

R. v. Ipeelee, S.C.J. No. 13 (2012)

Rudin, Jonathan. 2005. "Aboriginal People and the Criminal Justice System." In the Ipperwash Inquiry (Ont.).

Roach, Kent and Jonathan Rudin. 2000. '*Gladue*: The judicial and political reception of a promising decision' *Canadian Journal of Criminology* 42(3): 355-388

United Nations. 1979. "Convention on the Elimination of All Forms of Discrimination against Women." Accessed from: http://www.un.org/womenwatch/daw/cedaw/cedaw.htm.

United Nations. 2008. "United Nations Declaration on the Rights of Indigenous Peoples." Accessed from: http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf.