

**Innovative Justice Processes:  
Restorative Justice, Indigenous Justice, and Therapeutic Jurisprudence**

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## Chapter 20

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Kathleen Daly and Elena Marchetti

#### INTRODUCTION

Over the past several decades in countries like Australia, the response to crime is moving in two directions. One tack is innovative: it promises *to change* established forms of criminal justice, to do justice differently. The other tack is repetitive: it promises *to intensify* established forms of criminal justice, to do justice more efficiently, and often more punitively. Crime control and justice policies have always been varied, but as O'Malley says (1999, p 176), there now exists an unprecedented "state of penological inconsistency". Alternative justice forms, such as meetings between victims and offenders, or magistrates who take an active interest in helping defendants, sit alongside mandatory sentences for certain repeat offenders. Put simply, policies of *inclusion* sit alongside those of *exclusion* in any one country, and countries vary in the degree to which their policies are tipped more toward inclusion than exclusion.

This chapter reviews and compares three innovative and inclusion-oriented approaches to justice: restorative justice, contemporary forms of Indigenous justice, and therapeutic jurisprudence. The ground was softened for all three, with social movements in the 1960s and 1970s calling for more humane and effective responses to offenders and victims in the criminal process, and with a variety of justice practices, such as informal justice and popular justice, which aimed to vest more authority in lay actors and community organisations. The three approaches share affinities in that they emphasise the need for more effective forms of

communication in relating to and helping offenders desist from crime and reintegrate into a community. They emerged with force during the 1990s: all identified failures with mainstream criminal justice, and all sought methods of “doing justice” in different ways. Each approach emerged independently, but connections are now being drawn among them. For example, therapeutic jurisprudence proponent David Wexler (2004, fn 15) merges therapeutic jurisprudence with restorative and Indigenous justice when he says that “therapeutic jurisprudence ... [is similar] to concepts such as restorative justice ... concepts that originated in tribal justice systems of Australia, New Zealand, and North America”. Leading restorative justice and Indigenous justice advocates have also traced connections (Braithwaite 2002; Yazzie & Zion 1996; Zion 2001-02). But there are key differences. Restorative justice aims (at least ideally) to address the needs of both offenders and victims, whereas Indigenous justice and therapeutic jurisprudence focus largely (although not exclusively) on offenders’ needs. The levers of change also differ: for restorative justice, it is in the relationship of victims, offenders, and communities; for Indigenous justice, it is the relations between Indigenous people and “white justice”; and for therapeutic jurisprudence, it is the relationship between legal actors, especially judicial officers, and offenders.

## RESTORATIVE JUSTICE

### **Definition and History**

Restorative justice (RJ) resists an easy and agreed-upon definition (see Daly & Proietti-Scifoni 2011). In general, it promises to hold offenders accountable for crime in ways that are constructive, but not punitive or harsh; to include the voice and experience of crime victims; and to be dialogic and participatory, with an emphasis on communication between offenders, victims and their supporters, and with less attention to the formalities of the criminal legal process or the voices of legal actors alone. RJ is one form of *informal justice*, which refers to

practices that give a more central role to citizens, not just legal professionals, and to methods of resolving disputes and responding to crime in ways that more directly engage victims, offenders, and the community (Daly & Immarigeon 1998).

RJ can be used at all stages of the criminal justice process, including *diversion* from court prosecution, actions taken *in parallel* with court decisions, and meetings between victims and offenders *at any stage* of the criminal process (for example, arrest, pre-sentence, and pre-prison release). It can be used by all agencies of criminal justice (police, courts, and corrections). For criminal matters, RJ is used only after a person has *admitted* to an offence; thus, it deals with the penalty (or post-adjudication) phase of the criminal process for admitted offenders. RJ is also used in non-criminal decision-making contexts such as child protection and school discipline; it is sometimes associated with the resolution of broad political conflict (such as South Africa's Truth and Reconciliation Commission), although the term *transitional justice* may be more appropriate for the political contexts of states in transition (Hesse & Post 1999).

Advocates disagree on what is and is not RJ. One popular definition, proposed by Marshall (1996, p 37), is that RJ is “a process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future”. Others believe that this definition is too narrow because it includes only face-to-face meetings, it emphasises process over a desired outcome of “repairing the harm”, and it ignores the fact that actions to repair the harm may need to include coercive responses (Walgrave 2000, p 418). They call for a wider definition of RJ as “every action that is primarily oriented towards doing justice by repairing the harm that has been caused by crime” (Bazemore & Walgrave 1999, p 48). A leading RJ advocate suggests

that RJ is “about restoring victims, restoring offenders, and restoring communities” (Braithwaite 1999, p 1). Rather than viewing RJ as literally about restoring, it may be preferable to view it as a *nominal concept* that stands for a set of activities (see Dialogue Box 21.1). This re-conceptualisation is important because some analysts propose that an appropriate response to some offences is not to restore, but to transform social relations (Coker 2002).

#### Dialogue Box 21.1

For criminal matters, RJ typically contains these elements and set of activities:

- Offenders have admitted to the offence (or have chosen not to deny).
- Offenders and their supporters have a face-to-face meeting with a victim (or a victim representative) and a victim’s supporters, although having a face-to-face meeting is not essential. There may be other relevant people present, such as police officers or victim advocates.
- The process is informal, although the person organising and running a meeting establishes the ground rules for participants (such as people must listen to each other and everyone has a chance to speak).
- Discussion and decisions taken rely on the knowledge and decision-making capacities of lay actors rather than legal actors (although legal actors such as police officers or solicitors may be present).
- The aims are to reduce victim fear and anger toward the offender, for the victim to “tell the story” of how the crime affected him or her, for the offender to acknowledge the harm and the negative consequences the crime caused a victim, to apologise sincerely, and to make up for what s/he did (“repair the harm”) by penalties (or outcomes) agreed to. Common outcomes include verbal or written apologies,

monetary restitution, performing work for the victim or community, and attending counselling sessions.

The major kinds of RJ practices include conferences, circles and sentencing circles (although some circle courts are types of Indigenous justice), and a variety of enhanced forms of victim-offender mediation. Australia and New Zealand are world leaders in utilising RJ practices, and in particular, conferences.

The history of RJ in the region begins in New Zealand, with the passage of the *Children, Young Persons and Their Families Act 1989*, which introduced the term *family group conferencing* (Maxwell & Morris 1993). New Zealand was the first jurisdiction in the world to provide a statutory basis for conferencing, and it continues to have the most systemic model. A conference is a meeting, where an admitted offender, victim, and their supporters discuss the offence and its impact and decide on what an appropriate penalty (or outcome) should be. A co-ordinator runs the conference, a police officer is typically present, and the conference outcome is legally binding. Conferences vary in duration; and much depends on the nature of the offence, level of harm, and the number of offenders, victims, and supporters attending. However, on average, conferences last about 60 to 90 minutes.

Unaware of the developments leading to the New Zealand legislation, John Braithwaite wrote *Crime, Shame and Reintegration* (1989). He proposed that responses to crime should use *reintegrative shaming*, rather than *stigmatic shaming* of offenders. The link between reintegrative shaming and New Zealand conferencing was initially made in 1990 by John MacDonald, who was then an adviser to the New South Wales Police Service. MacDonald proposed that New South Wales adopt features of the New Zealand conference model, but

that it be located within the Police Service. A pilot scheme of police-run conferencing was introduced in Wagga Wagga in 1991 to provide an “effective cautioning scheme” for juvenile offenders (Moore & O’Connell 1994, p 46).

During the early 1990s, police-run conferencing was piloted in other New South Wales jurisdictions, and in the Australian Capital Territory, Tasmania, the Northern Territory, and Queensland (Western Australia had a variant with juvenile justice teams). There was intense debate over the merits of police-run (“Wagga model”) and non-police run (“New Zealand model”) conferencing (Alder & Wundersitz 1994). Legislated approaches, which incorporated conferencing as one component in a hierarchy of responses to youth crime, emerged first in South Australia (1993, proclaimed in 1994). Since then, all Australian jurisdictions have introduced and enacted legislation, and with some exceptions, all the statutory-based schemes use non-police-run conference models.<sup>1</sup>

### **Practices**

Although conferencing in Australia and New Zealand differs in some ways, there are similarities. With the exception of adult conferences in New Zealand and New South Wales and prisoner-victim/family meetings in New South Wales, all jurisdictions use conferences in youth cases, largely (although not exclusively) as diversion from court. In the context of court diversion, conferences take this form. A young offender (who has admitted to the offence), his or her supporters (often a parent or guardian), the victim, his or her supporters, a police officer, and the conference convenor (or coordinator) come together to discuss the offence and its impact. Ideally, the discussion takes place in a context of compassion and understanding, as opposed to a more stigmatising environment associated with a youth court. Young people are given the opportunity to talk about the circumstances associated with the

offence and why they became involved in it. The young person's parents or supporters discuss how the offence has affected them, as does the victim, who may want to ask the offender "why me?" and who may seek reassurances that the behaviour will not happen again. The police officer may provide details of the offence and discuss the consequences of future offending. After a discussion of the offence and its impact, the conference moves to a discussion of the outcome (or agreement or undertaking) that the young offender will complete. Common outcomes include verbal or written apologies, monetary restitution, performing work for the victim or community, and attending counselling sessions.

Legislated "New Zealand style" conferencing was enacted in South Australia in 1994, then in Western Australia (1995), Queensland (1997), New South Wales (1998), Northern Territory (1999), Tasmania (2000), the Australian Capital Territory (2005), and Victoria (2007). Three kinds of variation are evident in how conferences operate. First, jurisdictions vary in the length of time to complete an outcome, which ranges from six weeks in Western Australia (in practice, although not stipulated in the legislation), to six months in New South Wales (which can be extended), and twelve months in South Australia.

Second, while all jurisdictions prefer that the outcome be reached by consensus, they differ on which people, at a minimum, must agree to it. In South Australia, the young person and the police officer must, at a minimum, agree to the undertaking. In New South Wales (a jurisdiction where a police officer need not be present), the young person and victim (if present) must agree to the outcome plan. And, in Queensland, the young person, victim, and police officer must approve the outcome. In all jurisdictions, the outcome is a legally binding document.



Third, jurisdictions vary in the kinds of offences that can be conferenced, in the upper limits of outcomes, and in the volume of cases handled. For example, in Western Australia, many offences may not be conferenced (termed “scheduled” offences); the state tends to conference a high volume of less serious cases (average of 3,084 per year, although data from the metro area show that 20% of these are traffic offence cases). In South Australia, there are no scheduled offences; the state conferences a high volume of cases (2,000 in 2008) and has the highest maximum of community service hours (300 hours).<sup>2</sup> Key findings from research in the ACT, New South Wales, and South Australia are given in Chan (2005), Daly (2002, 2003, 2006a, 2006b), Hayes (2006, 2007), Hayes & Daly (2003), and Strang (2002).

### **Strengths and Limits**

A consistent finding from research in the region is that conferences are perceived as fair and that participants are satisfied with the process and outcome. Elements of *procedural justice*, such as being treated with respect and having a say, are evident to a high degree (see review in Daly & Hayes 2002). Conferences can also play a role in reducing victims’ anger and fear toward offenders. Compared to the very high levels of procedural justice, there is relatively less evidence of “restorativeness”, that is, positive movement between the offender and victim and their supporters during the conference itself (Daly 2006a). This suggests that although the process is perceived as fair, there are limits on offenders’ interests to repair the harm and on victims’ capacities to see offenders in a positive light. It is not surprising that some conferences (and conference participants) are better able than others to approximate the RJ ideal. Some conferences have remorseful offenders who make sincere apologies, while others do not. Some have more pro-active and more sympathetic victims than others.

The strength of the conference process is *the potential* to communicate the impact of the offence (on victims, and also on an offender's family members or supporters) and *the potential* for offenders to make a sincere apology, take responsibility for the offence, and attempt to make up for the wrong. When offenders are observed to be remorseful and when conferences outcomes are achieved by a genuine consensus, the prevalence of re-offending is reduced (Hayes & Daly 2003). There can be gaps between the RJ ideal and actual practices. For example, a "sincere apology" is difficult to achieve (Daly 2003, 2006a; Hayes 2006); the conference process can help some victims recover from crime, but this depends on the degree to which the crime distressed them in the first place (Daly 2005).

Several limits of RJ are apparent. First, victims, offenders, and their supporters may not be prepared for restorative ways of thinking and acting. Second, are the legal constraints on the process. Because RJ does not have a fact-finding or investigating mechanism, it cannot replace established criminal justice. As diversion from court, RJ is principally used for youth cases, not adult; and most jurisdictions restrict the kinds of cases that can be diverted. As pre-sentence advice to magistrates, RJ is used in some jurisdictions for youth cases, but not in others. RJ for adults was first piloted in 2001 in New Zealand and established there in 2005, and it was first introduced in New South Wales in 2005 and established there in 2007. Despite these limits in scope and practices, RJ can make inroads into methods of penalty setting and it may be effective in providing assurances of safety to individual victims and communities.

## INDIGENOUS JUSTICE

### **Definition and History**

Although definitions vary,<sup>3</sup> Indigenous justice (IJ) refers to a variety of contemporary justice practices in which Indigenous people have a central role in responding to crime. IJ practices include urban sentencing courts, community justice groups' participation in sentencing, community and Elder<sup>4</sup> panels' participation, and a variety of forms and contexts of sentencing circles. IJ can be seen as a way to rebuild Indigenous communities and to redress the destruction of Indigenous peoples' culture and social organisation brought about by colonialism and state violence.<sup>5</sup>

IJ practices vary, and a major axis of variation is the degree to which Indigenous people have control over the process. Rudin (2005, p 99) argues that unless Indigenous people "are given some options and opportunities to develop processes that respond to the needs of that community", such practices should not be termed Indigenous justice. This is a crucial point and one way to distinguish IJ from RJ. Although non-Indigenous RJ advocates say that RJ is drawn from Indigenous peoples' justice practices, this glosses over the histories and particularities of Indigenous social organisation before and after colonial conquest. The repackaging of Indigenous culture by the white, western mind is called *orientalism* (see Blagg 1997, 2008). Indigenous culture is dynamic and changing, but at times, it is wrongly depicted in romantic and static terms, as if culture were frozen in time.

Indigenous justice practices can be arrayed on a continuum. At one end are practices, such as the Navajo Nation's Peacemaking Division in the United States, which has been developed from within the Navajo Nation. Navajo authorities also control entry into the criminal justice system: Navajo police make arrests, and Navajo Nation courts refer cases to Peacemaking

(Coker 2006). Peacemaking Courts were established in 1982 and strengthened in the 1990s. Courts like this are rare: the Navajo Nation has a semi-sovereign relationship with the United States federal government in ways that do not exist for Indigenous peoples in Australia, New Zealand, or Canada. The typical Indigenous justice practices in Australia are those in which Indigenous groups or communities have “input” into sentencing decisions; such “input” or “advice” may have developed from consultations with Indigenous groups, who have a degree of control over the process and the outcome, or they may have been almost completely imposed by “white justice”. It seems inconceivable that a white-imposed justice could be called Indigenous justice. In fact, Rudin (2005, p 99) says that Canadian sentencing circles are mistakenly called Aboriginal justice because circles “were judge-made and judge-led initiatives”, and thus, he says they should be called a type of RJ, not IJ. Having said that, and as is explained in more detail below, IJ practices are neither RJ or TJ. IJ practices in Australia are operating according to a transformative, culturally appropriate and politically charged participatory jurisprudence that goes beyond the principles found in restorative justice and therapeutic jurisprudence (see Marchetti & Daly 2007).

In Australia, Indigenous urban courts and other practices have emerged for the following reasons:

- To address the over-representation of Indigenous people in the criminal justice system (Briggs & Auty 2003, Magistrates Court of Victoria 2003; Queensland Department of Justice 2003; Potas et al. 2003). At 30 June 2010, the age standardised imprisonment rate for Australian Indigenous adult prisoners was 14 times higher than non-Indigenous adult prisoners (Australian Bureau of Statistics 2010).

- To address the recommendations by the Royal Commission into Aboriginal Deaths in Custody (RCIADIC), which centred on reducing Indigenous incarceration, on increasing participation of Indigenous people in the justice system as court staff or advisors, and on identifying mechanisms for Indigenous communities to resolve disputes and deal with offenders in culturally appropriate ways.
- To complement Justice Agreements, which have been forged throughout Australian jurisdictions (Briggs & Auty 2003). These recognise the need for partnerships between state governments and Indigenous organisations to build a better system of justice for Indigenous people.

These contemporary courts differ from earlier Aboriginal courts, such as the Courts of Native Affairs in Western Australia (which operated from the mid 1930s to the mid 1950s) and those established in Western Australia and Queensland in the 1980s to handle breaches of community by-laws (Harris 2004).

### **Practices**

There are now two kinds of IJ practices in Australia: courts in urban centres, which set aside one to three days a month to sentence Indigenous offenders, and practices in remote Indigenous communities when judicial officers travel on circuit. Increasingly, there is a blurring of these two types with hybrid forms such as the introduction of Circle Courts to more remote areas of New South Wales. Despite the fact that the IJ practices do not use or adopt Indigenous customary law, the aim of these practices is to make court processes more culturally appropriate, to engender greater trust between Indigenous communities and court staff, and to permit a more informal and open exchange of information about defendants and their cases. They may also have collateral effects in strengthening Indigenous communities by

re-establishing the authority of Elders, reinvigorating cultural protocols, and promoting self-government. IJ is typically used in adult courts, normally in Magistrates' Courts, but not exclusively; and it is used as pre-sentence advice, not as diversion from court.

### *Urban courts*

The first Indigenous urban court, the Nunga Court, was convened in Port Adelaide, South Australia, on 1 June 1999. Currently there are over 50 urban adult and children's Indigenous sentencing courts in all Australian states and territories apart from Tasmania, operating under varied legislative frameworks and with differing eligibility criteria (for a list of courts see the Appendix in Marchetti 2009).

Jurisdictions vary in how the courts were established, how the hearings are conducted, and the degree of control by and integration of Indigenous people or groups in the process (Marchetti & Daly 2004, 2007). They have these elements in common:

- an offender must be Indigenous (or in some courts, Indigenous or South Sea Islander) and have entered a guilty plea;
- the charge is one that is normally heard in a Magistrates' Court;
- the offence must have occurred in the geographical area covered by the court; and
- a magistrate retains the ultimate power in sentencing the offender, while seeking the advice of Indigenous Elders.

During the sentencing process, the magistrate sits at eye-level with the offender, usually at the bar table rather than on an elevated bench, with an Indigenous Elder. An Elder's role varies considerably: from giving oral advice to a magistrate or briefly addressing the offender about his or her behaviour to having a significant role in interacting with the offender, determining

the sentence, and monitoring the offender's progress after the hearing. The variability in the role of Elder(s) *across* jurisdictions and *within* jurisdictions over time precludes any generalisation about their power in the legal process. However, their decisions are advisory to a judicial officer who has final decision authority. The number of Elders varies over time and place: some jurisdictions have just one; others, three to six; and in one jurisdiction (Rockhampton), as many Elders as possible turn up on the day in court, but only one sits besides the magistrate at the bench.

The offender sits at the bar table beside his or her solicitor, with a support person (a family member or partner) beside him or her. After the charges are read and the defence lawyer has responded, the offender and the support person are invited to speak directly to the magistrate about the offender's behaviour. Others in the spectators' area may also speak. The degree of informality adopted by the court varies by jurisdiction and magistrate, but typically more time is taken for each case than in a regular court. Some courts are convened in a regular courthouse; whereas others are convened in community centres. Some courts have purpose-built oval tables, whereas others do not.

An important development is the presence of Indigenous court workers (called Aboriginal Justice Officers, Aboriginal Project Officers, or at times, an Indigenous Court Liaison Officer employed by the Department of Corrective Services), whose role varies by jurisdiction. Some take an active part in assisting the prosecutor, offender and defence lawyer to devise a sentence plan that is presented in court to the magistrate; some coordinate post-sentence follow-ups; and some do not speak during the sentence hearing, but play key roles behind the scenes.

### *Remote Areas*

Although recorded information is sparse, indications are that in years past, judicial officers incorporated the views of Elders of Indigenous communities, when travelling on circuit to remote areas. In the last decade these practices have become formalised. Here are some examples.

In the mid 1990s, Community Justice Groups were established in three remote Indigenous communities in Far North Queensland, after extensive consultations with the Yalga-binbi Institute of Community Development (Chantrill 1997). Today, there are over 40 statutory and non-statutory Justice Groups in remote and urban areas of the state (Department of Justice and Attorney-General, Queensland 2008). They vary in size, strength, and tasks undertaken; but generally, they use community norms and mechanisms of Indigenous social control in responding to crime, provide pre-sentence advice to judicial officers, visit incarcerated Indigenous people, and at times, supervise offenders on community-based orders. Legislation in 2001 formalised their powers, saying that courts “must have regard” to the views of community members at sentencing. In practice, this means that judicial officers seek the advice of Justice Group members before sentence, either orally or in the form of a written submission.

In Western Australia, reflecting a cross-fertilisation of urban and remote justice practices, a Circle Court was established in Yandeyarra, an Aboriginal community of approximately 250 people, located in the Pilbara in Western Australia. The Circle Court sits with two Elders from Yandeyarra. After the prosecutor and defence lawyer present their case and the offender is invited to speak, the Elders and the magistrate have a private discussion, in another room,



about the sentencing options for the offender. Their determination is then jointly communicated to the offender in court.

### **Strengths and Limits**

Indigenous groups say that they have more trust in and better understand the court's decisions because they are involved and have a say (Briggs & Auty 2003). Our research finds that the strengths of the courts lie in improved communication, reliance upon Indigenous knowledge and mechanisms of social control, and fashioning more appropriate penalties (Marchetti & Daly 2004). There is greater attention paid to the reasons for and contexts of offending behaviour, coupled with "Indigenous friendly" procedures and Aboriginal justice workers. Magistrates who sit in these courts say there are significant increases in defendants' court attendance rates and reductions in re-offending (Boxall 2005, p 5). Magistrate Doug Dick (2004, p 64) says

I have seen habitual offenders return to their communities and become productive community members. This is because the Circle Court does not end in the courtroom. Victims have been recognised. The circle continues to surround those who enter: encouragement, and the presence of community members, ensures the Circle Court's lasting impact.

There have been a number of Indigenous sentencing court evaluations. Four evaluations have focused on the New South Wales circle courts (CIRCA 2008, Daly & Proietti-Scifoni 2009, Fitzgerald 2008, Potas et al. 2003), two on the Victorian Koori courts (Harris 2006, Sentencing Advisory Council 2010), and one on the Victorian Children's Koori Courts (Borowski 2010), two on the Queensland Murri courts (Morgan & Louis 2010, Parker & Pathe 2006), and one on the South Australian Nunga courts (Tomaino 2004). Payne also

prepared a report for the Australian Research Council, which was based on an “exploratory review” of specialty courts in Australia (Payne 2005). Since the evaluations have been jurisdiction specific, comparisons are difficult. All of the studies identified limitations in the manner in which the data were either collected or analysed, such as a lack of an appropriate control group for the purposes of comparison; inadequate follow-up periods; and inadequate, incomplete or inaccurate court records and data.

The courts have both criminal justice aims (reducing recidivism, improving court appearance rates, and reducing the over-representation of Indigenous people in the criminal justice system) and community building aims (providing a culturally appropriate process, increasing community participation, and contributing to reconciliation). The evaluations have generally found that the Indigenous sentencing courts have improved court appearance rates, but they have not had a significant impact on recidivism (Borowski 2010; Fitzgerald 2008; Morgan & Louis 2010). The only qualitative analysis of the impact of the courts on recidivism rates, which used in-depth interviews of defendant’s experiences and views of the Circle process, found that “positive Circle experiences were associated with all forms of desistance and also with persistent offending” and that “[m]any other facets of a defendants’ circumstances and their will to change explain desistance from offending” (Daly & Proietti-Scifoni 2009, p 110). In relation to the community building aims, the evaluations found that the Indigenous sentencing courts provide a more culturally appropriate sentencing process that encompassed the wider circumstances of defendants’ and victims’ lives, and facilitated the increased participation of the offender and the broader Indigenous community in the sentencing process (CIRCA 2008; Harris 2006; Morgan & Louis 2010; Parker & Pathe 2006; Potas et al. 2003; Tomaino 2004).

## Dialogue Box 20.2

South Australian Magistrate Chris Vass talks about the Nunga Court

### *On how the Nunga Court began*

It was apparent to me that Aboriginal people were getting a pretty raw deal from the justice system as a whole and that Aboriginal people mistrusted the system. They certainly mistrusted the police, they don't trust the prisons, and they didn't trust the criminal justice system. Well, I couldn't do anything about the police and the prisons, but I could do something about the courts.

It was a matter of spending a couple of years talking to Aboriginal people. I didn't talk about it to the Chief Magistrate or the attorney-general's office, or with any government agency. I thought that once I do that, they'll form a committee, and nothing would happen. It was a matter of talking with Aboriginal people, listening to them. And what was confirmed was the huge mistrust.

My idea was to have a court that Aboriginal people could feel more comfortable with, that they could trust, where there was less formality -- a court that would give people an opportunity to speak and have their family members with them, where they would feel comfortable without being overwhelmed by a large white presence. I got huge support for that idea. In fact, I don't think anyone was against it. Oh, some of them said, "That's apartheid. You're excising Aboriginal people from the mainstream". I could see that point of view, but I don't think it's legitimate. I was doing something that Aboriginal people really wanted. Some people thought there would be huge criticism from the media and the public, saying "Why are Aboriginal people getting something that we're not?" That didn't concern me that much. I thought, if they thought that the rest of the court system should change in the same way, then

let it change. There's nothing to stop them having the same thing. Perhaps we should be looking at changing the way we conduct our court system here in Australia anyway. We should be Australianising the courts.

*On how the Nunga Court differs from the regular Magistrates' Court*

The ordinary court is more comfortable because you've been doing it for years and you've got the machinery of it to hide behind. It is easier. [In the Nunga Court] you get down at eye level with people, and I find it far more stressful. It's hard work. At the end of the day, when I did a long Nunga Court, I was quite exhausted, mentally and physically. You've got to listen to a lot more. You're closer to the action, it's much more emotional, you really feel that there's a greater obligation on you to do right. When you're on the bench, and you talk, it's very impersonal. You're detached from everybody. That's, of course, the ideal judicial officer. They say the detachment allows you to come up with an impartial decision because you know nothing about anybody. In that rarified atmosphere it's easier to make a decision, but is it necessarily the best decision? Being down there amongst them, you are closer, you hear people and it makes you think hard about what you should be doing. In a sense you have to agonise a little bit more. That can be stressful, having to make the decision and knowing you've got to do it quickly and hoping that it's right. I feel that you have an enormous obligation, and that makes it hard because you think you might let them down. But if you're listening to people and you're caring and you explain why you've done something, I think really you don't have much to fear.

The Nunga Court is not just about keeping people out of prison. I think that's a misconception that people have. It's certainly something the court tries to achieve because that's part of looking at alternative sentencing, but the main role is to gain the confidence of the Aboriginal

people, to have Aboriginal people trust the legal system, make them feel like they have a say, make them feel more comfortable with what is happening, encourage them to be at court, encourage them to feel some ownership of the court process, which they've never had before. That's the main role. That's what it's about. It's their court, and that's how I've always seen it. The Aboriginal groups never said to me, "we want a court which will keep us out of jail". Penalty was never mentioned. What they wanted was a court free from the constraints of the ordinary court where they could come together as family groups, as community groups, and have their say, and have a magistrate listen to them.

Excerpts from interviews with Chris Vass, September and November 2001, conducted by Kathleen Daly. *Note:* Vass was appointed a magistrate in 1980; in 2003, he shifted from the adult criminal court to the youth court. Upon his retirement from the magistracy, he was Principle Magistrate in the Solomon Islands during 2007 and 2008. In 2009 he was acting as an auxiliary magistrate in South Australia (Courts Administration Authority *Newsletter* July 2009).

## THERAPEUTIC JURISPRUDENCE

### **Definition and History**

Therapeutic jurisprudence (TJ) "focuses attention on the ... law's impact on emotional life and psychological well-being" and "proposes ... [to] use the tools of the behavioural sciences to study the therapeutic and antitherapeutic impact of the law" (Winick & Wexler 2003, p 7). The term was first introduced in the United States in the late 1980s for mental health cases (Wexler 1990), but has since expanded to include family, criminal, and civil cases. A leading proponent, Judge David Wexler (2004, p 1), argues that TJ and *problem-oriented courts* were

“born at the same time and have always been closely connected, but they are close cousins rather than identical twins”.

Problem-oriented courts (also termed problem-solving courts) were established in 1989 in the United States, with the founding of the first drug court. Drug courts (and other specialist courts) were then linked to TJ (Freiberg 2005; Hora, Schma & Rosenthal 1999). In 2000, a United States Conference of Chief Justices and the Conference of State Court Administrators endorsed the idea of problem-solving courts, using the principles of TJ. Winick & Wexler (2003, p 8) now propose that TJ principles could be brought into *all* judicial contexts to “help people solve crucial life problems”. They suggest that with a broader application of TJ principles, judicial officers

- can interact with individuals in ways that induce hope and that will motivate them to [using] available treatment programmes;
- can use techniques [to] encourage offenders to confront and solve their problems, to comply with rehabilitation programmes, and to develop law-abiding coping skills;
- will need to develop enhanced interpersonal skills, understand the psychology of procedural justice, and learn to be effective risk managers (p 8).

The TJ approach to justice is evolving. In addition to a *way of judging* (described above), TJ continues to be associated with a *set of practices* that are normally featured in problem-solving courts, which include:

- integration of treatment services with judicial case processing;
- ongoing judicial intervention and close monitoring; and
- multi-disciplinary involvement and collaboration with community-based and government organisations (Freiberg 2002, p 11)

In the United States, TJ is used in a range of problem-oriented courts, including drug treatment, domestic violence, mental health, and teen courts; and it is also being applied when taking guilty pleas and in appellate procedures. In Australia, TJ is discussed not only in the context of problem-solving courts, but also in corrections, administrative tribunals, and appellate procedures (Freiberg 2002, p 9). More recently, TJ has become subsumed within a broader change agenda for courts, which King, Freiberg, Batagol & Hymans (2009) refer to as “non-adversarial justice”.

### **Practices**

Like the first drug court established in the United States, the first Australian drug court, established in 1999, did so without TJ in mind (Freiberg 2002, p 10-11). TJ came into common use in Australia in the late 1990s. In a special issue of *Law in Context* on TJ, editors McMahon and Wexler (2002, p 1) define TJ as a “flexible heuristic that emphasises the impact of law and legal processes on psychological well-being and encourages the incorporation of relevant social and behaviour research”. Emphasis is given to “adopting a more respectful approach to clients” and the “need for a different style of judging [that] may encourage greater insight and behavioural change in offenders”. TJ is seen as promoting an “ethic of care” in professional activities and as “resonat[ing] with the alternative dispute resolution/restorative justice movement”. In November 2004, Western Australian country magistrates passed a resolution unanimously to “endorse and adopt the principles of therapeutic jurisprudence” (p 1). These magistrates take a wide view of TJ, saying that it is not solely concerned with problem-solving courts, but rather with ways of judging that use processes to promote the positive involvement of participants in the court process and thereby promote respect between the judicial officer and participants, [including]

actively listening to participants, courteously allowing them to fully present their case and acknowledge their position ... (King 2003, para 19).

Thus, TJ is used today in two ways: to describe a new approach to the judicial officer's role that could be used in any court, and as an approach that is *applicable* to problem-solving courts, although it may not necessarily be the approach taken in all such courts. As a way of judging, King et al. (2009, p 37) describe several contexts where TJ principles have been applied in Australia, including family courts, care and protection matters, coronial procedures, and tribunals. The authors suggest that there could be a wider application of TJ, beyond problem-solving courts, to "mainstream judging and legal practice" (p 37), but there has been some resistance to this idea in Australia.

For problem-oriented (or problem-solving) courts in Australia, we highlight recent developments, drawing from Freiberg (2005). Drug courts or drug court programmes have been established in New South Wales, Queensland, South Australia, Western Australia, Victoria, and the Northern Territory. There are also youth drug courts in New South Wales and Western Australia. A problem-oriented mental health court began in South Australia in 1999; others are under discussion in Victoria and Western Australia (Queensland's Mental Health Court is not a problem-oriented court). Family violence courts were established in South Australia in 1997, then in Western Australia and Victoria, with pilots announced for New South Wales. Other courts established or under discussion include a sexual offences court (for child sexual assault, New South Wales) and a homeless person's court (Victoria and in Queensland).



## **Strengths and Limits**

As Freiberg (2002, p 9) says, TJ is an “imprecise and ambiguous” concept, but one with “powerful symbolic resonance”, which “trips off the tongue of government officials”, much in the same way, he says, that RJ did in the 1990s. The principles of TJ invite judicial officers to take a hands-on approach to their cases, to know more about offenders/litigants and the contexts of their cases, and to be attentive and sympathetic listeners (Wexler 2004, fn 18).

Research on problem-oriented courts in Australia is most developed for drug courts. Like research on RJ, a recurring finding is that participants say they are listened to and they perceive the process as being fair. Although studies vary, another common finding is that graduates of drug programmes fare better than others in reduced re-offending; however, there is a great deal of attrition from entry to the programme to graduation. The literature on TJ largely centres on judicial officers’ and others accounts of using TJ principles in diverse settings (see, for instance, Winick & Wexler 2003), but there is scant research on whether the desired positive effects of TJ, as a way of judging, do in fact occur.

Among the criticisms of TJ as a way of judging and as a problem-solving orientation are that it undermines the role of judicial officers as neutral arbiters, applying law to cases. The TJ judge is more of a coach, and in the criminal court context, this means helping an admitted offender to become more law-abiding, taking a team approach and working with others, and relying on social science knowledge. With an emphasis on negotiation, mediation, and teamwork, not adversarial lawyering, TJ poses challenges to the typical roles of prosecutors and defence attorneys in the court process. Problem-solving courts are labour intensive, time consuming, and require resources; it is not possible to have them in all jurisdictions. For this

reason, some are now advocating for a problem-solving *approach* to cases, which is not necessarily tied to specialised courts.

#### SIMILARITIES, DIFFERENCES, AND RELEVANCE

When RJ, IJ, and TJ emerged in the 1990s, each identified faults with mainstream criminal justice, among them, its procedures in handling cases, its over-reliance on incarceration, and its posture of social exclusion toward lawbreakers. At the same time, each had unique reasons for pursuing an innovative justice process. RJ desired to bring the voice and experiences of victims more centrally into the criminal process; IJ, the voice and experiences of Indigenous communities; and TJ, a more responsive and social science informed judiciary and magistracy.

Differences among the three are apparent in their histories, the coalitions of people seeking change, the sites of legal activity, the role and participation of victims, and their legislative basis. RJ's history is the most complex, having different contexts and antecedents in North America, New Zealand, Australia, among other countries. In Australia, conferencing emerged largely from a coalition of policy-makers, administrators, and practitioners (police and coordinators). Although its history is also complex, IJ in Australia emerged from a coalition of Indigenous groups, judicial officers, and in some cases, policy-makers. TJ, which was spawned in the United States, emerged largely from the activism of judicial officers. For the site of legal activity, RJ is the least court-centred; TJ, the most court-centred, and IJ falls midway. For the role and participation of crime victims, this is central to RJ, but somewhat less evident in IJ, and least evident in TJ (with the exception, perhaps, of the Family Violence Court). For whether the practices operate within a legislative framework, this is most frequent for RJ, but less so for IJ and TJ.

The three approaches share elements in common. Foremost, they are set in motion only after a person has admitted responsibility for offending (although there can be some exceptions in the drug courts). In general, then, the three approaches are used in the penalty phase of the criminal process. However, if a person has been wrongly accused, there must be procedures to test the veracity of the state's claims of criminal offending. For that reason, none of the three approaches to justice, as currently practiced, can replace mainstream criminal justice. None has yet introduced a new way to adjudicate "facts" or a new vision of the trial. These practices are, however, relevant in most cases in Magistrates' Courts because most defendants eventually plead guilty to offences.

RJ, IJ, and TJ seek ways to fashion more meaningful and effective responses to admitted offending. All emphasise *improved communication* between legal authorities, offenders, victims, and community members. This means using words that everyone understands (which may include the need for a translator or using Indigenous traditional language), reducing the distance between legal authorities and others (such as sitting in circles, not being in a courtroom, a judicial officer conversing directly with a defendant), and reducing legal formalities (such as people not having to stand when a judicial officer comes into the room). For RJ and IJ, in particular, emphasis is placed on *negotiating a variety of views* in fashioning outcomes, including those of offenders, victims, and community people or organisations. To secure trust in the authority of legal actors (and quasi-legal actors such as conference coordinators), emphasis is placed on *procedural justice*: treating people with respect, listening to what people say, being fair to everyone). Emphasis is also placed on *using persuasion and support* to encourage offenders to be law-abiding. This means that lawbreaking *acts* are censured as "bad", but lawbreaking *actors* are not stigmatised. The focus is on identifying outcomes that can be constructive in changing the offender's behaviour, and in the case of RJ,

that may also directly assist victims' recovery from crime. All approaches view *incarceration as a penalty of last resort* (excepting the procedures in some drug courts), and all give an enhanced role to community people and agencies to work with the police, courts, and corrections. Finally, compared to regular court practices, all the elements of the new practices assume that *more time* is required in each case, and some may require new staff and programmes. It is uncertain what this will mean for potential increases in costs for justice (we are not aware of any analysis of the economic implications). Although costs would increase for some features of these new justice practices (and especially, the problem-solving courts), costs may go down in other areas.

## CONCLUSION

The turn of the 21st century has witnessed an explosion of new justice forms and a willingness by states, criminal justice personnel and agencies, and citizens to experiment with different ways of "doing justice". Three innovative justice processes were presented in this chapter. Each is currently viewed as an alternative to mainstream justice, although RJ, IJ, and TJ advocates would say that their approach reflects the ways in which mainstream justice ought to be done. Specifically, they would say that justice practices ought to be more inclusive, dialogic, and participatory (and with IJ, more empowering for Indigenous people and communities); they should be less formal and more communicative; and they should aim to change offenders and assist victims in constructive ways. Advocates assume that if justice practices are moulded along these lines, criminal justice can be more effective and meaningful. It will take some time to determine if their assumptions about justice practices are right, and that will depend on whether these new approaches to justice can withstand the political test of time. Will they remain popular, acceptable, and sustainable?

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## VISUAL MATERIALS

### **Restorative justice**

*Face to Face* (video, undated)

Family conferences in South Australia , produced by the Courts Administration Authority, Adelaide, South Australia.

*Youth Justice Conferencing: Information Resource 2005* (video)

Conferences in Queensland, produced by Queensland Government, Department of Communities.

*Widening the Circle: The Family Group Decision Making Experience 1998* (video)

Conferences in family violence cases, produced by the Centre for Academic & Media Services, Memorial University of Newfoundland for Health Canada, Minister of Public Works and Government Services, Quebec.

*Rooted in Respect 2010* (video)

Introduction to restorative justice by Howard Zehr and the Mennonite Central Committee in the United States.

### **Indigenous justice**

*Aboriginal Court* (video, undated)

Early operation of the Nunga Court in South Australia, produced by the Courts Administration Authority, Adelaide, South Australia.

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### **Therapeutic jurisprudence**

“Kids Doing Time” 2009, *Four Corners* (broadcasted 24 August), Australian Broadcasting Corporation (ABC), <http://www.abc.net.au/4corners/content/2009/s2662775.htm>.

Fast forward to minute 34; a presentation of the Youth Drug Court in New South Wales starts at 34 minutes 40 seconds.

### QUESTIONS

1. List the similarities and differences between restorative justice, Indigenous justice, and therapeutic jurisprudence.
2. Imagine you walked out of your home one day and your car was gone. You ring the police, and they know where your car is and have identified two teenage males as suspects. You then learn that the youth have admitted to stealing your car and their case has been diverted from court to a RJ conference. Would you as a victim want to attend? Why and why not?

Now imagine you are one of the two admitted offenders. Would you want to attend the conference and face the victim? Why and why not?

3. In Australia, RJ conferences are typically used in youth, not adult cases. Should conferences be used in adult cases? Why and why not?

4. If the effect of RJ conferences on future offending is shown only to be small or to have no impact at all, should the government and community continue to support RJ? Why or why not?

5. From time to time, conferences are used when prisoners are nearing their release date to the community. These may occur at the initiative of victims or offenders, but both must consent or be willing to participate. What are the potential benefits of these conferences? Potential drawbacks or problems?

6. Indigenous justice practices have emerged for several reasons, but foremost they aim to address the negative effects of colonisation on Indigenous people and the distrust many Indigenous people have toward established criminal justice. Do you think these new practices are warranted? Why and why not? Do you think these new practices are adequate? Why and why not?

7. Consider Magistrate Chris Vass's response to the criticism of the Nunga Court as "apartheid justice". Are you persuaded by what he says? Why and why not?

8. Indigenous justice and therapeutic jurisprudence call for a new role for judicial officers. Rather than being neutral and dispensing "the law", they are to be engaged problem solvers. Rather than a justice relation that is vertical, hierarchical, and distant, it is to be horizontal, less or non-hierarchical and close.

If you were a defendant, what kind of judicial officer and justice relation would you prefer? If you were a victim? If you were a member of the general community?



If you were a judicial officer, what would you prefer? If you were a police prosecutor? If you were a defence lawyer?

9. Political and legal objections can be raised for restorative justice, Indigenous justice, and therapeutic jurisprudence. For each approach, identify the objections and how you would respond to them.

#### FURTHER READING

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**USEFUL WEBSITES:****Restorative justice**

[http://www.aic.gov.au/en/criminal\\_justice\\_system/rjustice.aspx](http://www.aic.gov.au/en/criminal_justice_system/rjustice.aspx)

Australian Institute of Criminology

[www.restorativejustice.org](http://www.restorativejustice.org)

United States website on restorative justice

[www.justice.govt.nz/policy/criminal-justice/restorative-justice/](http://www.justice.govt.nz/policy/criminal-justice/restorative-justice/)

New Zealand Ministry of Justice research and policy on restorative justice

**Indigenous justice**

[www.aic.gov.au/topics/indigenous/interventions/](http://www.aic.gov.au/topics/indigenous/interventions/)

Australian Institute of Criminology, community and government interventions in Indigenous justice

[www.indigenousjustice.gov.au/](http://www.indigenousjustice.gov.au/)

Indigenous justice clearinghouse of news and publications

[www.lrc.justice.wa.gov.au/](http://www.lrc.justice.wa.gov.au/)

Law Reform Commission of Western Australia on Aboriginal Customary Laws

**Therapeutic jurisprudence**

[www.law.arizona.edu/depts/upr-intj/](http://www.law.arizona.edu/depts/upr-intj/)

International Network on Therapeutic Jurisprudence (including extensive bibliography), a major United States website for TJ

[www.druginfo.nsw.gov.au/diversion/adult\\_drug\\_court](http://www.druginfo.nsw.gov.au/diversion/adult_drug_court)

New South Wales Office of Drug & Alcohol Policy; information on drug courts in Australian jurisdictions and links to international sites

<http://www.lawlink.nsw.gov.au/drugcrt>

Website for New South Wales drug court

## NOTES

1 There are several exceptions. In the Northern Territory, two statutory-based schemes provide for non-police-run conferences (enacted in 1999) and police-run conferences (enacted in 2000); in Tasmania, there is a dual system of police conferences (as “caution plus”) and non-police facilitator conferences; and the ACT uses both civilians and police officers to facilitate conferences.

2 For Queensland, there are no scheduled offences. Up until 2003, before conferencing was offered state-wide, it was a low-volume jurisdiction (180 conferences per year); now there are some 2,200 youth conferences per year. New South Wales has some scheduled offences and 1,500 to 1,700 youth conferences annually. New Zealand has no scheduled offences and runs an estimated 6,000 to 7,000 youth conferences annually.

3 For example, Navajo Nation analyst Zion (2001-02) has a substantially broader understanding of the term when he says that “indigenous justice is the pre-state form of justice” and is “not confined to indigenous thought”.

4 Community participation can be from an Elder or Respected person, but for simplicity, we refer to this person as Elder.

5 We capitalise Indigenous except when it is not capitalised by others in quoted material. We also capitalise Elder and the *name* of particular Indigenous courts such as the Nunga Court in South Australia and the Aboriginal Court in Wiluna.