

Racializing Restorative Justice: Lessons from Indigenous Justice Practices

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Abstract

As restorative justice matures, questions have been raised about the degree to which practices are sensitive to cultural and racial-ethnic differences or can address the dynamics of inter-racial crime. This paper explores the similarities and differences between restorative justice and Indigenous sentencing practices, with the view to showing the unique contribution that Indigenous sentencing practices make to racializing justice. Racialized justice is not a divided justice. Rather, it refers to practices that recognize and draw on the strengths of racial-ethnic minority group knowledge and community activity in responding to crime. Among the key ingredients is the participation of community leaders, open and honest dialogue between them and admitted offenders about the causes of their offending behaviour, and sentencing outcomes that utilize culturally appropriate and relevant programs and services. The impact of racialized justice is to build trust and cooperation between and among criminal justice officials and racial-ethnic minority groups, to empower and strengthen racial-ethnic minority groups, and to bend and change the dominant perspective of “white law” toward a multi-ethnic perspective. Lessons are drawn from Indigenous sentencing courts in Australia.

Racializing Restorative Justice: Lessons from Indigenous Justice Practices

In my remarks today, I will give you a flavour of Indigenous sentencing courts in Australia. There is no other place in the world where these kinds of courts are operating on the scale that they are in Australia.

As many of you know, Australia is large and diverse. There is a lot happening with restorative justice, Indigenous sentencing courts, and other innovative practices. The justice scene is dynamic and has changed considerably over the past 15 years.¹

Aims

I have three aims in talking about Indigenous sentencing courts in a conference on restorative justice.

First, I want to describe how and why the courts have emerged, drawing from what Elena Marchetti and I have learned in our research. Some features of these courts could be adapted in other places, really any place where there is a racial-ethnic cleavage in society. Second, I will argue that the courts are distinctive from other innovative justice practices. Although they do share some elements with restorative justice and therapeutic jurisprudence, we think that they are in a category of their own (Marchetti and Daly 2007). Finally, I want to inspire reflection on how we may “racialize restorative justice” in a deeper, more profound way. By “racializing” I mean creating *racially meaningful justice practices*, which recognize and draw on the strengths of a racial or ethnic minority group’s knowledge and methods in responding to crime.

Key elements of Indigenous sentencing courts

The courts have the following elements. (Here, I have Indigenous people in mind, but connections can be made to other racial-ethnic minority groups, who are disproportionately criminalized in typically white-dominated legal systems.)

The elements are *to increase trust* between Indigenous people and white justice, *to strengthen and empower* Indigenous communities, and *to bend and change white law*. There are collateral elements: *increasing the stature and respect of Indigenous people* working within the criminal

¹ Thus, commentaries on Australian practices are likely to be outdated soon after publication. Articles such as Scheff’s (1997), for example, are not accurate today.

justice system, and *developing more culturally appropriate and meaningful programs* and services for defendants and victims.

I know that other speakers will be discussing North American Indigenous peoples and justice at this conference. We may differ on whether Indigenous justice practices should be distinguished from restorative justice, or viewed as being in a category of their own.

Reactions to the idea

These courts are working *within* a white legal system, with court staff and community people (both Indigenous and non-Indigenous) who are working *against* a white legal system, i.e., working to change it. They are challenging mainstream court practices from within.

Academic and legal critique comes from both sides. Some critics say these courts are not radical enough, that Indigenous people are being contained and colonized, yet again, by “white justice.” Others say the courts are too radical, a form of “apartheid justice,” where Indigenous people are being treated differently than non-Indigenous people in the criminal process.

Although we hear critiques now and then, there is broad acceptance of the courts in Australia. The people who are involved, in particular, Indigenous Elders and community groups, really like them and want to see them expand. There has been no negative politicization of the courts by media or politicians. Indeed, all the media reports have been positive. The major judicial organization—the Australasian Institute of Judicial Administration—has been supporting the idea and holding conferences.

What these courts are and are not

- The courts are typically located in urban or regional areas.
- They are not like the Circle Courts convened by Barry Stuart while on circuit to remote areas in Canada. Rather, the hearings are constituted as a court, as a regular part of the court’s sentencing schedule.
- The courts are not practicing or adopting Indigenous customary laws. Rather they are using Australian criminal laws in sentencing Indigenous people.
- Although the Elders and Respected persons play key roles in interacting with the magistrate, defendant, and others in the room, the final sentencing decision rests with the judicial officer.

- The courts are not Indigenous-controlled “community courts,” which exist in some jurisdictions. Nor are they tribal courts or peacemaker courts.

Positioning myself

I have been researching restorative justice for over 15 years, and Indigenous justice practices for about 10 years. Restorative justice includes a broad church of people and view points. It includes people, like me, who don't go to church.

People have found it difficult to categorize my views. Critics of restorative justice think I am an advocate. Advocates think I am a critic. Both are right. I see the value of restorative justice and Indigenous sentencing courts, but I also see the limits and problems. There are inevitably gaps in aspirations and what actually occurs on the ground.

In arguing that Indigenous sentencing courts are in a category of their own, I am going against the grain of others who put different types of innovative justice practices under one umbrella. For example, Menkel-Meadow's (2007) review of restorative justice links it with Indigenous Circle practices, therapeutic jurisprudence, problem-solving courts, and transitional justice. Others have done the same (Daicoff 2006: 1-2, comprehensive law movement; Freiberg 2007: 207, non-adversarial justice). I understand their intentions: to show that there are large numbers of people calling for “doing justice differently.” This creates critical mass and a momentum for change, especially in changing law school curricula and legal practice. However, distinctive practices are taking place under the one umbrella, and we need to pay attention to this.

Australian context

In Australia today, Indigenous people are 2.5% of the population, but they are 24% of those imprisoned (both sentenced or awaiting trial). Indigenous Australians are 13 times more likely to be imprisoned than non-Indigenous (using age-adjusted figures) (Daly 2009). Compared with Indigenous peoples in Canada, the United States, and New Zealand, Australian Indigenous people are worse off on nearly all socio-economic measures, including educational attainment, life expectancy, health, and employment (Kauffman 2003). About 25% live in remote or very remote parts of the country, which often lack amenities and infrastructure (Australian Bureau of Statistics 2008: 13). It is in these areas where we see high rates of violence.

Why is there high imprisonment?

Like other colonized nations, criminal justice system “capture” of Indigenous people today is explained by a history of dispossession by white colonizers in the 18th and 19th centuries (with a continued neo-colonizing today). This included forced removal of people from their land and relocation to other areas; separating kin and family groups; and loss of language and culture – all of which broke up effective internal mechanisms of social control. At the start of the “protection area,” in the late 19th century, the assumption was that Indigenous people were dying out. Thus, the state, as “protector” needed to “soothe the dying pillow” and made Indigenous people wards of the state. (The history of colonization and state control was uneven across Australia; it was more intense in some places than others. This is partly reflected today in variable imprisonment rates across jurisdictions.) During the 20th century, redress and change has been slow. It was not until passage of the *Racial Discrimination Act 1975* that all forms of explicit *legal* discrimination in Commonwealth law were removed.² And it was not until February 2008, with the election of the new Prime Minister, that an official federal apology was made to the “stolen generations” and their families.

Emergence of Indigenous sentencing courts

In June 1999, a maverick magistrate in South Australia, Chris Vass, presided over the first session of the Nunga Court. Vass had worked for 15 years in Papua New Guinea as a district officer, and from his experience he learned a good deal about cultural differences and colonial rule. He became a magistrate in South Australia in 1980 and was based in Adelaide. He travelled on circuit to the remote lands in the northern part of the state for many years. In the Lands, his justice practices were more informal, taking place outside a building “under the gum tree.” He had this more informal approach to justice in mind when he began to talk with Indigenous groups in 1996.

A good way to understand these courts is to hear how magistrates, Elders, Aboriginal court workers, and defendants talk about them. I’ll spend a bit more time with Vass because he launched the idea in Australia. His early vision is important, although part of that vision is now in danger of being co-opted by a government agenda that is largely interested in criminal justice aims.

² The Northern Territory Emergency Response (NTER) legislation passed in August 2007, ostensibly aimed at reducing Aboriginal child sexual abuse in certain areas in the Northern Territory, excluded the application of the *Racial Discrimination Act 1975* from its provisions. This and other avenues of appeal were limited to remove any obstacles to the federal government’s speedy intervention (Wallis 2009: 63).

Themes from Chris Vass (Magistrate), Port Adelaide Nunga Court, South Australia (K. Daly interview Sept and Nov 2001)

“Huge mistrust”

I began to talk with Aboriginal people ... and it developed from there. ... I talked to more and more Aboriginal groups ... I sat on committees and I raised the topic. I didn't talk about it to the Chief Magistrate, ... the department, the attorney's office, or any government agency. ... I thought that once I do that, they'll form a committee, and nothing would happen. ... And I visited prisoners. It was a matter of talking with people, listening to them. And what was confirmed ... was the huge mistrust.

A more comfortable court, opportunity to speak

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.

“I thought it would be good if I got off the bench and came down at eye level [with] an Aboriginal person sitting next to me.”

... I thought it was good if I got off the bench and came down at eye level. ... If I had an Aboriginal person sitting next to me as an advisor on cultural things, to set me straight if I made cultural errors. Then, the court would be less formal. The accused person would be able to sit at the bar table alongside their legal representative, and a companion, a mother or a father, or a sister, or uncle, or aunty or a friend. ... To [make] the court ... a bit more intimate. Family members and friends or community members could come in and be part of the court process. That is what they said they were looking for.

“If you have a different environment, it puts people in the right frame of mind.”

You’ve got to start with the room ... You have to sit opposite each other ... with a circular table so that everybody feels that they’ve got an equal part to play. If you have a different environment, it puts people in the right frame of mind from the start. It makes them feel that they’re part of what’s happening, that they have an equal say, and they’re being listened to, which is pretty important for everybody, not just Aboriginal people.

“Keep the lawyer speak down to the minimum.”

You’ve got to try to think a little bit laterally. You’ve got to try and rid yourself of legal jargon. That’s the first thing: you’ve got to rid yourself of complicated language. ... Try to keep the lawyer speak down to the minimum. The lawyers ... [have encouraged] ... the defendants to talk, and the aunties and the uncles ... It’s better to listen to them because they’re closer to the issues. They know what’s going on.

“They’d say, ‘the thing we like most about it is that we can trust it.’”

“There’s a lot of faith there and it’s very tiring.” “It’s hard work.”

The feedback I got from people ... [was] they thought it was pretty good. They’d say, *The thing we like most about it is that we can trust it.* That’s a bit overwhelming.

There’s a lot of faith there, and it’s very tiring. In fact, there’s a lot of effort in running a court. It’s very draining. The other courts are easy, dead easy. This is not. This isn’t easy because you’ve got to balance so many things. You’re taking risks,

It’s hard work. At the end of the day, if I did a long Nunga Court down at Port Adelaide 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. ...

Being down there amongst them [rather than on the bench], ... 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. ... You have an enormous obligation, and that makes it hard because you think you might let them down. ...

The ordinary court is more comfortable because you’ve been doing it for years and you’ve got the machinery of the ordinary court to hide behind.

Vass’s early vision

To sum up, working with Indigenous people in Port Adelaide, Vass wanted to create a court that would

- redress the “huge distrust” fostered by a history of racism and colonialism
- have a more comfortable environment for defendants to speak and be supported

The court required a culturally-aware and tuned-in magistrate, and people who used plain English. With the increased trust by Indigenous people in the court process came an obligation to make the right decision. It is harder work than an ordinary court.

Expansion of Indigenous sentencing courts

Since that day in June 1999, over 30 Indigenous sentencing courts have been established in all the states and territories in Australia, except Tasmania. They mainly operate in the adult jurisdiction, but in some states, they also operate in the youth jurisdiction. I will give a general description, but practices vary from place to place.

Eligibility: Defendant must be Indigenous, have entered a guilty plea, agree to have the matter in the court, the offence occurred in the geographical area covered by the court, and the offence is normally handled in a magistrates' court. (There is now a felony-level Koori Court, and the South Australian District Court can use provisions under a new section of its sentencing act.)

Sentencing process: Magistrate sits at eye-level with the offender, usually at a bar table or in a Circle rather than on an elevated bench. All courts involve Elders or Respected Persons as participants, although their roles vary inside and outside the courtroom. The offender often has a support person, who is also invited to speak, and there is a significant degree of interaction among those present. The courtroom environment has Indigenous insignia and artwork. Other court staff (sheriff, court liaison officer, probation) are Indigenous, and members of community justice group and Indigenous organizations may be present.

Jurisdictional variation

Type of model used: Nunga Court and Circle Court. Most use the Nunga Court model; but New South Wales and the ACT have drawn from elements of Canada's Circle Sentencing. The Nunga Court model uses a modified mainstream court room, and the Circle court model uses a culturally appropriate location (e.g., a community centre). It is more often a closed court (although observers are invited).

High and low volume: Some jurisdictions handle a higher volume of cases than others. Some have assessment procedures to determine suitability, and to limit cases, while others do not.

Different names of the courts: In South Australia: it is the Nunga Court; in Victoria, Koori Court; in Queensland, Murri Court. In New South Wales and ACT, it is Circle Court with particular place or group names. In the Northern Territory, it is called the Community Court.

How and why the courts emerged: Each jurisdiction has a particular story of how and why these courts came into being.

Victoria is the only place to have a legislated framework for the Koori Court. The Court emerged from a set of government, Indigenous community, and criminal justice agency commitments, which were part of the Victorian Aboriginal Justice Agreement in 2000. Likewise, in New South Wales, the Aboriginal Justice Advisory Committee proposed the idea of Circle Courts to government. In contrast, in South Australia and Queensland, although there was Indigenous community support, the courts emerged more from activist judicial officers than from government.

Here are some slides of the courts and people.

(1) Queensland Murri Court (Brisbane, August 2005). Left to right, Magistrate Jacqui Payne, Elder Albert Holt, Elder Ella Gordon, and Kathleen Daly (photo by Elena Marchetti).

(2) Queensland Murri Court (Rockhampton, June 2003). Opening day of the court, with all the Elders, Community Justice Group members, Corrections Officer and Magistrate Annette Hennessy (standing just to the left of the painting) (photo by Rockhampton staff person). Resting on the bar are the symbols associated with the court (left to right): scales of justice from the court, Aboriginal message stick, painting, and conch shell.

(3) Queensland Murri Court (Rockhampton, December 2003), with painting and conch shell and message stick (photo by E. Marchetti). Detail from A. Hennessy (2006: 11-12). The painting *Yoombudda gNujeena* (meaning “Listen, I have something to tell you”), with its focus on communication, is by Jim Doyle, local artist, descendant of the Bidjara Tribe of Central Queensland. The central circular region represents the Justice System and Indigenous Elders in partnership; the left side, the Torres Strait Islander Community, with drums; and the right side, the South Sea Island community, with conch shell.

(4) Nowra courthouse, New South Wales (May 2005) (photo by Kathleen. Daly).

(5) Nowra courthouse with Magistrate Doug Dick, Elder Kathleen Davis, Elena Marchetti, and Aboriginal Project Officer Gail Wallace (photo by Michelle Wellington).

(6) Nowra Circle Court, just finished a Circle (Jerringa Community Health Centre, May 2005). Respected Person Doug Longbottom and Kathleen Daly, May 2005 (photo by Elena Marchetti).

(7) Uncle Lou Davis at the office, working on research, Nowra courthouse (April 2008) (photo by Kathleen Daly).

(8) Dubbo Circle Court, about to start a Circle (Chinchilla Gardens, November 2004)
(photo by Elena Marchetti).

**Themes from Daniel Briggs (Aboriginal Justice Officer) and Kate Auty (Magistrate),
Shepparton Koori Court, Victoria (2003)**

“We are listening to what we are told.”

What is impressive about the court ... is that many Aboriginal people have found their voice in it. We wait and take time, we invite rather than compel engagement, we back-track and re-enter dialogue from other places. We are listening to what we are told. We listen to aunties and uncles, to mothers of young babies, and to young men who have committed a criminal offence but who defer and show respect to their elders.

(p. 16)

“Commitment from agencies, service providers, and members of the community.”

Equally important ... is the commitment from community agencies, service providers, and other members of the local community to attend Koori Court. Their attendance enhances the Koori Court's ability to put together meaningful sentencing options and strengthens the Koori Court's status, credibility and relevance in the community.

(p. 16)

“More than just the built environment is under scrutiny. More than the shape of the bench is being changed.”

In embarking on this journey we have started a debate about what it is we are doing ... We have started to talk about how the “culture” of our [white] legal system and our courts needs to change to more comprehensively serve a group in the community whose understanding of justice has always been, since colonisation, from the “outside.” This discussion is still inchoate in that it takes time for us to understand that we are talking about our “culture.” We are talking about taking risks with our processes and making ourselves vulnerable to both rational criticism and intemperate harangue. More than just the built environment ... is under scrutiny, and more than the shape of the bench is being changed. (p. 17)

Desks and furniture as metaphors for power

When people talk about these courts, they discuss the room, the arrangement of desks and furniture, and where people are placed. When doing so, they are referring to changes in social relations and legal power.

Recall that Chris Vass says he can “hide behind the machinery of the ordinary court” when he is on the elevated bench. When he steps down from the bench, he is “closer to the action,” and it is more emotional and draining. Daniel Briggs and Kate Auty say that not only is the “shape of the bench” changing, but so too are power relations in the courtroom itself.

These ideas are evident when Magistrate Doug Dick reflected on the first Circle Court convened in New South Wales, in the Nowra Local Court, February 2002.

**Themes from Doug Dick (Magistrate) and Gail Wallace (Aboriginal Project Officer),
Nowra Circle Court, New South Wales: Dick (2004), Nowra Field Notes (2005), and
Interviews 2008**

“I don’t wanna sit behind no desk.”

Recalling his first Circle Court in Nowra, 2002, the Magistrate Dick (2004) said:

At our first Circle Court I ignorantly ... suggested that we arrange tables in a Circle. ... Having already abandoned my suit coat and tie, it was another gesture at informality. An Aboriginal man in the group said, *“Hey Mr. Magistrate, you’re not sending me back to school, I don’t wanna sit behind no desk.”* The order for the desks was cancelled; a Circle of people formed and the first Circle Court was underway. (p. 59)

[This] symbolizes for many what ... Aboriginal people feel about the trappings and formalities of western institutions and in particular the legal system. The system is entrenched with proprieties, rules, and regulations that have always signified for Aboriginal people, their powerlessness and the power of white men over them. *“I don’t wanna sit behind no desk”* was a crucial objection. The removal of the desks was the removal of the overwhelming power of the western legal system. Without a desk, a barrier, the proceedings would appear fairer, more equitable and less formal. (p. 59)

“The Circle, in removing the table, literally turns the tables.”

The Circle, in removing the table, literally turns the tables and allows not just for a sentence to be considered and passed, but in this process also demands that the offender be responsible for his or her actions. (p. 61)

Removing barriers to “hiding” by the magistrate and defendant

The above remarks, and those shown below, show that the Indigenous sentencing court or circle can remove barriers, which both the magistrate and defendant hide behind. For the magistrate, he or she hides behind the trappings of western [white] law, a source of power and intimidation, while on an elevated bench. For the defendant, he or she hides behind legal barriers: the table and the “solicitor’s shield.” When these barriers are removed, more effective and honest communication can take place. The Elders play important roles in making this possible.

Elders’ actions in the Nowra Circle Court

The Elders *pierce the solicitor’s shield*, as this excerpt from Magistrate Dick’s transcript shows:

Elder says: “We’ve known him since he was born.”

Solicitor *It is important for the Circle to know that my client suffers from depression, alcohol, and substance abuse. He had an exposed upbringing in a domestic violence family with a father dependent upon alcohol.*

Elder 3 *We know about his childhood. We’ve known him his since he was born.*

The prosecutor outlines the defendant’s criminal history and points out that the majority of entries are alcohol-related.

Solicitor *But he had also run out of medication.*

Elder 4 *The system didn’t let you down, you let yourself down. If you are running low on medication, you do something about it, 3 weeks before.*

(p. 65)

The *Elders* also pierce a defendant's shield, by challenging excuses for offending, which may include "hiding behind past injustices." At the same time, the Elders are supportive.

Nowra magistrate describes what an Elder says to "an offender who was hiding behind past injustices."

... [The Elder] had participated in Circle Court with vigour and enthusiasm. Her words of wisdom had the potential to influence ... future behaviour. One passage that I often quote was directed to an offender who was ... feeling sorry for himself and was hiding behind what he considered past injustices. She drew reference to the offender's own children and linked them to his offending. His outward demeanour visibly changed. He was humbled as her words sunk in. She said,

My parents didn't teach me how to live. They lived and I watched.

Your children are doing the same.

(p. 64)

During our visit to Nowra in May 2005, Elena Marchetti and I spoke with a Nowra Elder about her experiences growing up and her role as mother and Elder. During our conversation, she said that the Circle was emotional and spiritual in nature. I asked her to say more about this.

Nowra Elder: "It comes from the heart ... We shame their actions, not themselves."

It's very much about culture and about our people. It comes from the heart. It instils our values. Affirms wisdom, Aboriginality, and commonsense.

In reflecting on what the Elders try to communicate to offenders, she says,
when we talk to [the offenders], we never tell them they're no good. We want them to be somebody. We use the language, use the words [using Aboriginal language]. ... We shame their actions, not themselves. We say to them, if they don't pull up their socks and do something, who's going to do the Circle [when we go]?

(K. Daly field notes, May 2005)

Two-way learning

Since the start of the Nowra Circle Court, Gail Wallace has been the Aboriginal Project Officer. She works with the Elders and bridges their worlds with those of the defendant and victim, and the court. She sees the court as “bring[ing] down barriers between the criminal justice system and Indigenous people” and between Indigenous and non-Indigenous people. This occurs in a process of “two-way learning.”

Nowra Aboriginal Project Officer: “Two-way learning”

At first, the Elders were not sure they wanted to be part of the Circle process. In time this changed, and now *they are more trusting of the process. They are more aware of the seriousness of the offence*, Gail says. One side of the two-way learning is the Elders and Respected Persons knowing more about what an offender has done, more about the seriousness of their acts, and the logic behind “white justice” sentencing. *They never knew what the offenders had done when they were sent off. Now they understand why people need to be sent to prison.* Gail says that the Circle process *brings down barriers between the criminal justice system and Indigenous people*, but it *took a long time to develop the trust. ... It was a major job to bring them together* [the Elders and the court system].

The other side of two-way learning is how the magistrate and criminal justice staff change. Among the things that occur, the magistrate, prosecutor, and defence do less talking. They listen more, and they work with the ideas coming from the Elders in the Circle. Gail says *there is respect by the community for Doug* [the magistrate], *and Doug for the community* although *both of them were hard to bring around.* (K. Daly field notes, May 2005)

Nowra defendants reflect on the Circle and Elders

In April 2008, I returned to Nowra to interview twelve defendants who had participated in Circle Courts. I worked with a Nowra Elder, Uncle Lou Davis, in locating people, encouraging them to participate in the research, and interviewing them. Among the areas we explored was the role of Elders and their impact. I excerpt from a longer report of Nowra Circle defendants (Daly, Proietti-Scifoni, and Fisher 2009), but here is brief sampling (all names are pseudonyms).

Defendants in the Circle

John: “He makes you have a good look at yourself.”

... Having all the Elders there. ... Uncle Alf, he’s pretty strict. And it’s good he’s on it because he doesn’t put you down. He just makes you have a good look at yourself and what you’re doing. More or less telling you to wake up to yourself and have a look at yourself and see what you’re doing and what you’ve been doing.

Jackie: “Without them [the Elders], I’d be dead now. That’s a fact.”

With the Circle it’s different because you know they [the Elders] care, and you know that they’re to help you. In other courts I went, ... they just [claps her hands] go away, but with Circle they really care. They want to help, they want to see their culture do better for themselves, not just get a slap on the wrist and say “you pay this fine and go and do it again” because that’s what I did. ... Look, I reckon it’s good. Well, it helped me, and I know it helped a couple of others. If you want to be helped ... You’ve got to want to be helped. ... It’s no good going to the Circle if, no. But without them, I’d be dead now. That’s a fact.

Jason: “[The Elders talked] about me kids you know, start thinking about me kids and staying out of trouble and stuff like that. That made me stop and think ...”

There was a couple of things brought up about when I was a kid ... because me mum was alcoholic, see. So yeah, a couple of things were brought up, ... and I didn’t really want to remember them ... but it was brought up ... But [the Elders talked] about me kids you, know, start thinking about me kids and staying out of trouble, and stuff like that. That made me stop and think ...

Rueben: “I remember sitting there, and ... I was trying to fight back the tears ... It just really hit home ...”

They [the Elders] were just very straight out and upfront ... They talked about the family, about my young kid at the time. They said, “how would you like it if this was your house, your family, your car, your shop?” They put things very blunt and it really made me think. I remember sitting there, and ... they said something about family, ... I got really emotional, and I was trying to fight back the tears ... It just really hit home, you know? ... It really made me think...

Themes from Annette Hennessy (Magistrate), Rockhampton Murri Court, Queensland (2006)

Annette Hennessy has played a significant role in coordinating Queensland's Murri Court and initiating the Rockhampton Murri Court. This court is different from others in that three Indigenous groups participate: Aboriginal, Torres Strait Islander, and South Sea Islander. And in this court, the Elders and Community Justice Group members are involved. There is more involvement of both groups outside the courtroom, both before and after the sentence hearing. Magistrate Hennessy (2006) describes these elements of the process.

“The power of the natural authority and wisdom of the Elders is striking.”

.. After consideration of all the material presented ..., the sentencing decision is taken by the magistrate alone. This is made quite clear to the offender and his family ... to protect the Elders from any potential backlash.

What cannot easily be explained is the power of the Murri Court process on a spiritual or emotional level. The power of the natural authority and wisdom of the Elders is striking in the courtroom. There is a distinct feeling of condemnation of the offending, but support for the offender's potential, emanating from the Elders and the Community Justice Group members. (p. 10)

“Communication ... flows in all directions, and everyone takes a part.”

Communication is a theme and integral component of the ethos of the Murri Court. Communication is improved, more detailed, flows in all directions, and everyone takes a part. No one person or group has all of the wisdom or knowledge, and each depends on the other for a just outcome. (pp. 12-13)

Other benefits

There are other benefits of the courts. They may encourage the development or better coordination of services and programs for defendants. They also have the potential to change relationships within the courthouse (two-way learning again!). For example, Magistrate Hennessy (2006) observes that before Murri Court began in Rockhampton, the non-Indigenous courthouse staff did not know Indigenous people in the area or have regard for them. This changed with their presence coming to court and interacting with the staff.

“Significant building of relationships.”

There has been a significant building of relationships between workers in the criminal justice system and the members of the Indigenous community throughout the process, and the Elders and members of Community Justice Groups are accepted as an important part of the local justice system. (p. 14)

Restorative justice, therapeutic jurisprudence, or something else?

As we listen to the words of the people associated with these courts, we see some aspects of restorative justice (i.e., the honest and open communication, respectful listening) and some aspects of therapeutic jurisprudence (i.e., judicial officers who take an active role in interacting with the defendant and others). But there are key areas of difference: they are about changing relationships between “white justice” and the Indigenous domain. We learn that it is partly about making better decisions that have “more information” about the defendant, with a more holistic understanding of that person. But it is also about building greater authority within Indigenous communities, and to use that authority, both inside and outside the court process, as effective social control.

Perhaps it doesn’t really matter that some say these courts are a type of restorative justice, and others, a type of therapeutic jurisprudence. What *is* important is recognizing that unlike any other justice innovation to date, they aim to redress centuries of racial oppression and distrust that has been forged by the actions of police and other criminal justice officials. It is recognition and acknowledgment of this distinctive aim, which is important.

Lessons learned

1. There a tension between two sets of aims for these court:

- The *criminal justice aims* are to increase “turn up” rates on the day, to complete sentences, and to reduce re-offending.
- The *community-building aims* are to increase trust in the criminal justice system, to increase the stature and respect of Indigenous people working in the system (Elders,

Respected Persons, and staff people), and to strengthen and empower Indigenous communities, more generally.

At present and like so many other innovative justice forms, there is too much government-led research, which is mainly interested in quantitative measures of criminal justice aims, especially differences in re-offending, with research time frames that are too short. There needs to be greater emphasis on the community-building aims, although credible information on criminal justice aims is also required.

2. There is a misplaced belief that reductions in re-offending or imprisonment can come from criminal justice activities alone. Conventional criminal justice practices can be improved by being less harmful and more re-integrative, but other socio-economic policies are required in education, health, and economic development, and health.

3. When people ask, do the courts work? I roll my eyes and try to remain calm. The problem is two-fold. First, we lack the research infrastructure to document and compare conventional courts with Indigenous sentencing courts. (In only jurisdiction today, New South Wales, is there statistical data collected on court outcomes by type of court, i.e., conventional and Indigenous.) Second, what we want to know is complex, not simple. For example, compared to conventional courts:

- Is there greater trust by Indigenous people towards these courts?
- Is the legal process more relevant and meaningful to offenders and victims?
- Do offenders have a greater commitment to becoming more law-abiding?
- Do the courts strengthen Indigenous communities?

These questions cannot be answered by big datasets and sample surveys, but will require innovative research designs, qualitative approaches, and Indigenous methodologies.

4. The courts are vulnerable with a lack of research evidence, including that on the gaps between aspirations and actual practices. One gap is victim participation. Although this is changing to some degree, the process is largely offender-centred. Another gap is significant reductions in re-offending, compared to conventional courts. One quantitative study in New South Wales finds no evidence of this (Fitzgerald 2008). However, much depends on how the question of re-

offending and desistance is raised and analysed. Qualitative approaches give a better understanding of people's lives and the circumstances that lead to criminalization.

5. There is no single approach for an effective Indigenous sentencing court. Practices vary across jurisdictions, the role of Elders varies, eligibility and assessment varies. However, the more that practices are driven from the Indigenous domain, the better. Also, the more that practices change the broader response to Indigenous offending, the better. This means intervening at all phases of the criminal process, not just sentencing.

For the workshop

Reflect on how features of these courts may be applicable to other sites of race relations or to restorative justice practices. How can restorative justice practices become more deeply racialized?

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Appendix I. Adult Courts in Seven Jurisdictions as of July 2007 (adapted from Marchetti and Daly, 2008)

Jurisdiction and model used	Court and establishment date
Australian Capital Territory – Circle Court model	<ul style="list-style-type: none"> • Ngambra Circle Sentencing Court – May 2004
New South Wales – Circle Court model	<ul style="list-style-type: none"> • Nowra Circle Court – Feb 2002 • Dubbo Circle Court – Aug 2003 • Brewarrina Circle Court (on circuit) – Feb 2005 • Bourke Circle Court – Mar 2006 • Kempsey Circle Court – Apr 2006 • Armidale Circle Court – Apr 2006 • Lismore Circle Court – Mar 2006 • Mt Druitt Circle Court – Nov 2006 • Walgett Circle Court (on circuit) – June 2006
Northern Territory	<ul style="list-style-type: none"> • Darwin Community Court (also used in Nhulunbuy and Nguiu on the Tiwi Islands when the magistrate is on circuit) – Apr 2005
Queensland – Nunga Court model	<ul style="list-style-type: none"> • Brisbane Murri Court – Aug 2002 • Rockhampton Murri Court (Aboriginal people, Torres Strait Islanders and South Sea Islanders) – Jun 2003 • Mt Isa Murri Court – restarted Dec 2005 • Townsville Murri Court – Mar 2006 • Cherbourg Murri Court – Nov 2006 • Ipswich Murri Court – Feb 2007 • Coen Murri Court – Mar 2007 • Cleveland Murri Court – May 2007 • Caloundra Murri Court – June 2007 • Cairns Murri Court – Jan 2008 • Caboolture Murri Court – May 2008 • St George Murri Court – June 2008 <p>Note: Most of these courts have a Murri Children’s Court sitting, as well.</p>
South Australia – Nunga Court model	<ul style="list-style-type: none"> • Port Adelaide Nunga Court – Jun 1999 • Murray Bridge Nunga Court (on circuit) – Jan 2001 • Port Augusta Special Aboriginal Court – Jul 2001 • Ceduna Aboriginal Court (on circuit) – Jul 2003 (although currently on hold) • Adelaide (Aboriginal Sentencing) District Court, Section 9C of <i>Criminal Law Sentencing Act 1988</i> – 2007 • Berri Nunga Court – proposed to start July/August 2008
Victoria – Nunga Court model	<ul style="list-style-type: none"> • Shepparton Koori Court – Oct 2002 • Broadmeadows Koori Court – April 2003 • Warrnambool Koori Court (on circuit including Hamilton and Portland) – Jan 2004 • Mildura Koori Court – July 2005 • Moe/Latrobe Valley Koori Court – May 2006 • Bairnsdale Koori Court – March 2007 • Swan Hill Koori Court – July 2008 • Latrobe Valley County Court – due to be launched in Nov 2008

Western Australia	<ul style="list-style-type: none"> • Norseman Aboriginal Sentencing Court – Feb 2006 • Kalgoorlie Aboriginal Sentencing Court – Nov 2006
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Number of files or defendants per year

The approximate number of files or defendants dealt with by each *adult court* for each year for courts in selected jurisdictions are shown below. Note that the estimates for the Australian Capital Territory and New South Wales are for numbers of defendants, and for the other jurisdictions (Queensland, South Australian and Victoria), they are the number of files. The number of defendants will always be less than the number of files. For example, based on data from Port Adelaide, there are on average three files per defendant. Further, when the Circle Court model is used, there may be more than one Circle convened for each defendant.

Approximate number of files or defendants, selected jurisdictions

Court	Approximate number of files or defendants per year
Australian Capital Territory – Ngambra Circle Sentencing Court	10 defendants
New South Wales – Nowra Circle Court	7 defendants
New South Wales – Dubbo Circle Court	15 defendants
Queensland – Brisbane Murri Court	260 files
Queensland – Rockhampton Murri Court	48 files
Queensland – Mt Isa Murri Court	60 files
South Australia – Murray Bridge Nunga Court	72 files
South Australia – Port Adelaide Nunga Court	414 files
South Australia – Port Augusta Nunga Court	73 files
Victoria – Shepparton Koori Court	172 files
Victoria – Broadmeadows Koori Court	184 files
Victoria – Warrnambool Koori Court	32 files
Victoria – Mildura Koori Court	117 files
Victoria – Moe/Latrobe Valley Koori Court	101 files
Victoria – Bairnsdale Koori Court	72 files