

Changing the Sentencing Lens: From Adversarial to Restorative Approaches

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Introduction

With the emergence of problem-solving adjudication approaches such as drug, mental health, and most recently, veterans' courts, collaborative models of justice are finding their place within the larger justice landscape. And for good reason, they work! Lower recidivism rates and sanctioning costs and a larger focus on treatment, healing, and reintegration research show that these approaches are actually more effective than retributive models of justice.

The following article explores a philosophy and series of practices known as *restorative justice*, an idea that has been piloted in the Eighth Judicial District in Taos and Raton. Over the past decade the restorative justice approach has been successfully applied to offenses ranging from non-violent misdemeanors to high-risk felonies, including: vehicular manslaughter, gang-related shooting deaths and intra-family homicides. One of the intentions of this article is to introduce and expand the restorative justice concept to defense counsel in other judicial districts across New Mexico.

While focusing primarily on innovative uses of restorative justice, this article will also address some overall advocacy approaches that can increase sentencing effectiveness for defense counsel, drawing upon the author's nearly four decades of work with various parts of criminal justice systems and specifically as an expert witness with criminal defense attorneys across the country.

Restorative Justice as a Sanctioning Philosophy

The guiding belief of a restorative justice approach is that crime, rather than simply a statutory violation, is an offense against people that harms victims, communities and offenders themselves. While this idea may appear straightforward, it also runs counter to the traditionally adversarial nature of adjudication. Rather than seeking retributive ends by meting out punishment, the process seeks to first understand the factors that contributed to the offense and then seek ways to repair the harm to victims, communities and clients themselves that arise from the offense.

In my recent work with the Albuquerque Capital Crimes Unit of the Public Defender Department, Attorney Lee Hood described her personal view of restorative justice:

When the world is broken and torn, the only way to make it whole is through restorative justice. Traditional litigation only makes the tear larger. If only our adversaries (the DA's and the Government) would consider the option of restorative justice in serious cases, like homicides, we could begin the mending process.

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-retired District Court Judge

Generally, the role of restorative justice is not meant to replace the current adversarial system, rather to augment it. As most of us know, the chief purpose of the retributive system is *not* intended to uncover the truth. Rather, it is a process of judicial

inquiry that is largely concerned with the guilt or innocence of a defendant's guilt and does so under a narrowly defined set of laws and rules of procedures.

Restorative justice places a greater emphasis on holistic approaches that involve the needs, concerns and involvement of offenders, victims or affected parties and community members. Justice in this form is less hierarchical and takes a more democratic shape that is consistent with larger social adjudication and decision-making trends. The search for a single factual "truth" and the use of adversarial processes are replaced by narrative and dialogic methods. Concepts of individual and collective accountability, responsibility, health and balance are socially reconstructed, and the roles of professionals and community members are reconfigured.

Focus on Constitutional Issues and Respect for Human Concerns of All Parties

The use of restorative justice is obviously not right for every client. For clients who are factually innocent or where there are serious constitutional issues, then a vigorous traditional defense is certainly warranted. However, while it may seem obvious, once a defense attorney realizes his client has no valid constitutional issues to stand on, it's in the client's best interest to move the case out of the adversarial context sooner rather than later. This requires a proactive

stance beyond the goal of simply getting the best deal possible for your client.

The benefits of petitioning for and using restorative justice for your client, as well as for victims and your community, are significant for each party. A few readers right now might be thinking, "It's not my job to be concerned with victims and the community." My hope is that by the end of this article you'll be able to see the value to your client's case and future involvement in the system to take a more holistic and collaborative stance in your advocacy strategies without sacrificing your client's rights and future needs.

Taos defense attorney Alan Maestas observed what he called the "human" benefits of the restorative process for his client. He articulated that the circle gave his client a venue where he would be actually listened to and respected by people who would normally not see him as a human being. In addition, it was also the one place where he and his family could directly address how the crime had affected their lives.

Restorative Origins: Reintegrative vs. Stigmatizing Shame

What most offenders experience in the criminal justice process is called stigmatizing shame. It is a quality of shame that humiliates, exiles and separates, and the core message to most offenders is that *they* themselves are bad, rather than what they did. Accountability in this context tends to take the form of exiling. Perhaps the ultimate motif of the concept of stigmatizing shame is most accurately reflected in our penal systems that serve largely punitive rather than corrective ends.

Restorative justice uses a different model of shame that we call "reintegrative" shame and is experienced differently, especially by the client. In reintegrative shaming (which comes from the Maori tradition in New Zealand) the process acknowledges that offenders are part of the community and then uses a form of community accountability to hold them *in* a "community of care," rather than resorting to forms of labeling and banishment. Clients are asked to sit with the community and speak openly for everyone to understand the impact of the offense. Clients are then given an opportunity to make things right by actually participating in forming the sanctions that repair harm to the victims, restore the community and help the client make better future choices. Clients move from a passive position of "taking their punishment" to a more active role in which they work to repair the harm their actions have created. By doing so, they re-earn the trust and respect lost through the offensive behavior.

Accountability and Support

In the course of a criminal proceeding we all have heard a judge, a prosecutor or probation officer utter the words, in

reference to the client: "he/she needs to be held accountable." We all know the word "accountable" is code for punishment. In a restorative justice framework, accountability takes on a different meaning: Namely, the client is accountable to their victim and the larger community, not simply for the harm associated with the offense. My experience is that frequently when this happens, instead of the expected stigmatizing, the client surprisingly receives respect and support. In one DWI restorative "sentencing circle" involving a DWI fatality, Assistant District Attorney Barbara Martinez remarked: "It was one of the few opportunities I've had to participate in a justice process where an offender was held accountable to his victims and his community and through it all, he was able to maintain his personal dignity". These are words rarely uttered from a prosecuting attorney about our clients.

Criminal defense attorney, Gary Fernandez of Grants, who used restorative justice for one of his clients charged in a DWI fatality in the Thirteenth Judicial District, called the restorative justice process "an unusually effective way for the criminal justice system to operate; one that returns justice back to where it once was - concerned with defendants well-being."

Retired District Court Judge Peggy Nelson points out another benefit from the bench perspective. She has found that the quality of information she hears in a restorative justice circle is both qualitatively and quantitatively superior to what she reads in presentence reports. Having family and community members as well as defendants and victims present allows for more complete stories and a fuller understanding of what happened and this enables her to make better sentencing decisions.

The Importance of Client Community Support

Many clients (and their defense counsel) are often surprised to discover the overall support they receive during the course of a restorative justice session. What is often overlooked is that many victims actually want their offender to accept responsibility for their actions and offer an authentic apology. However, the adversarial nature of the process often impairs or eliminates this as a possibility. The courtroom,

I contend, is not a place where substantial remorse, forgiveness or reconciliation often occurs. I don't believe that the formal sentencing is the most appropriate stage for clients to offer statements of remorse. There are other options. The restorative circle

session is one of them, and one where all of the participants can be humanized rather than discounted and at times demonized by your adversaries.

In one restorative circle in Taos involving vehicular manslaughter case, the client Arturo, while under the influence of alcohol, got into an argument with a girlfriend,

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- Assistant District Attorney after a sentencing circle

and while attempting to drive his car away, ran her over causing her death. In the restorative circle in his case, the parents of Antonia, the victim, listening intently to Arturo as he spoke and witnessed the guilt and remorse he felt about his actions. The parents could then acknowledge that Antonia had been drinking that night as well and this was a factor in the offense. As result, they *wanted* a relationship with the man responsible for their daughter's death. Following the circle, Arturo received a term of incarceration, the length of which was mitigated by his participation in the restorative justice process, and in the months that followed, the relationship with the victim's parents continued to grow. They began visiting him in Los Lunas and later attended his parole hearing where they successfully advocated for his release.

A recent sentencing involved an intra-familial homicide in which two adult drug court clients were drinking when one fatally stabbed the other. Because of the suffering of the two families, a circle was convened prior to sentencing in which all affected parties could be heard. Judge John Paternoster at the formal sentencing pointed out that the restorative justice approach used prior to the sentencing, allowed the victim's and offender's families in this case to meet and heal over crimes and that this was not the role of the courts. The community, he noted, is the principal instrument of healing, otherwise tragedies of this nature will continue.

Restorative Sanctioning Outcomes

The sanctioning or consequences in the circle are often made part of the court's formal sentencing following the restorative process, reaching beyond the immediate issues associated with mitigating the sentence. It is common that sanctions that come from the community process, rather than stigmatizing, often have a reintegrative quality. For example, in the previously cited DWI fatality involving Arturo, the victim's family and the community wanted an aspect of the sentence to have the client take responsibility for maintaining Antonia's "descanso" or roadside memorial erected in her honor. In addition his circle wanted him to get drug and alcohol treatment, anger management and his GED while incarcerated. All became part of the Judgment of Sentence. The process of support he received encouraged him to successfully complete all of these conditions while he was incarcerated and pave the way for his release back into the community.

Not surprisingly, few clients who participate in restorative circles reoffend. I was involved in development of a restorative justice project in Longmont, Colorado involving juvenile offenders in the late 1990s. In the project evaluation we learned that of the youth who went through the restorative process, 94% successfully completed their sanctions and the same percentage (94%) committed no new offenses over the following 12-month period.

Defense-Based Sentencing Planning

In some cases, the use of a restorative justice circle practice, as described above, may not be the most appropriate

advocacy approach. Prior to using restorative circles, I developed a sentencing consulting practice and worked directly with defense counsel in fashioning client-specific sentencing plans or private presentence reports. One of the most common shortcomings for defense counsel I have seen over the years is their failure to provide the sentencing court with credible and proactive sentencing plans, ones that go beyond simply offering drug and alcohol treatment for the client. One basic reason for fashioning defense-based sentencing proposals for your clients rests in the inadequacy of most presentence reports and their capacity to represent the client's needs. With an occasional exception, most presentence reports provide little benefit to your client. They yield little or no insight into the circumstances surrounding the offense, often reflect the "law enforcement" roles of probation and are typically devoid of creativity in terms of sanctioning options.

Effective sentencing proposals give the court specific, credible options between probationary sentences and full terms of incarceration. In developing these plans, consider reaching out to a sentencing consultant or forensic social worker who can be particularly useful in fashioning these plans. For public defenders, several offices in New Mexico have social workers as part of their staff. I would strongly encourage the expansion of their sentencing advocacy roles.

Beyond the issues related to client needs, a defense-based sentencing reports allows for a more "objective" path by discussing issues that addressed some of the defense counsel "undiscussables," including the need for: accountability, community safety, client risk assessment, victim restoration and deterrence – or most of the issues that are of concern to the decision-maker in the matter, the sentencing court. Most sentencing proposals are fashioned around a restorative justice philosophy that represents the needs of victims, and the community as well as those of the client. Reaching out to the victims and community and making specific recommendations that address their needs often lessens the adversarial tone of a sentencing. In my experience an adversarial sentencing rarely, if ever, benefits the client.

While on its face it may appear questionable, I often encourage criminal defense attorneys to proactively address the issues of accountability, community safety, victim restoration and future deterrence in sentencing plans and do so *before* sentencing. It's my experience that it is a rare jurist that does *not* have a sentence formulated before the hearing. Furthermore, there is little said by either side at sentencing that impacts the final outcome in any substantial way.

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