
RESTORATIVE JUSTICE & RESTORATIVE PRACTICES

Description

What is restorative justice? How can Vermont judges, prosecutors, and defense attorneys prudently and practically apply restorative justice principles and incorporate restorative practices within the current legal system? As restorative justice views “justice” with an entirely different “lens” than the traditional justice system, applying its principles and incorporating its practices presents profound challenges to the wisest and best-intentioned judges and attorneys in our criminal justice system. Notwithstanding those challenges, and in keeping within the parameters laid out by the Vermont Legislature in the Criminal Policy statute, 28 V.S.A. § 2a, the Department of Corrections believes it is the responsibility of all branches of our state government to promote these principles and practices whenever and wherever possible. This section of the Sentencing Manual will review the basics of restorative justice and restorative practices and their current state in Vermont. It will conclude with ideas about how they can be further promoted and applied in the sentencing of offenders.

Basics of Restorative Justice in Vermont

A Different Conception of Justice

Restorative justice is a conception of justice that focuses first and foremost on the harm done by a crime or an offense. It is different from the legal system’s traditional justice in so far as traditional criminal justice conceives of crime primarily as a violation of a criminal statute, a trespass against the State. Restorative Justice focuses on the harm caused by crime and on repairing the harm done to victims and communities. To this end, it recognizes the most significant authorities on the harm done are those who have been actually harmed. Restorative justice encourages people who have been harmed by criminal acts to reveal the nature of the harm to legal system officials and to the parties responsible for the harm. It also invites them to disclose their opinions as to the nature of what can be done in the way of restoration. It does not isolate offenders from the harm they have caused to their victims or their communities – although later isolation can be an outcome of a restorative justice agreement. Restorative justice seeks redress for victims, recompense by offenders and, ultimately, the reintegration of both within their communities. It is achieved through a cooperative effort by community members and government officials.

As for offenders, restorative justice requires that they first and foremost take responsibility for their actions and for the harm they have caused with those actions. Participation by offenders in a restorative practice must be voluntary and sincere. Taking responsibility for one’s actions can be extremely difficult. In fact, doing so may be the

most difficult and intimidating step an offender takes. But until an offender is willing to so participate, the traditional criminal justice system must run its course. Offenders who cannot bring themselves to own up to their actions are simply not allowed to participate in restorative practices.

Vermont State Policy

Restorative justice became the State policy of Vermont in May, 2000:

It is the policy of this state that principles of restorative justice be included in shaping how the criminal justice system responds to persons charged with or convicted of criminal offenses. The policy is a community response to a person's wrongdoing at its earliest onset, and a type and intensity of sanction tailored to each instance of wrongdoing.

28 V.S.A. § 2a.

The State's policy objectives are to "[r]esolve conflicts and disputes by means of a nonadversarial community process," and to "[r]epair damage caused by criminal acts to communities in which they occur, and to address wrongs inflicted on individual victims." Id. A last objective is to "[r]educe the risk of an offender committing a more serious crime in the future, that would require a more intensive and costly sanction, such as incarceration." Id.

The policy also delineates its own implementation and gives a broad mandate to "law enforcement officials" to "develop and employ restorative justice approaches whenever feasible and responsive to specific criminal acts . . ." Id.

As all judges, prosecutors, and defense attorneys are "law enforcement officials" of the State of Vermont, the statute proposes that they should all seek ways in which to utilize restorative justice approaches with *each* criminal defendant with whom they are involved.

Restorative Practices

A restorative practice is a process whereby all parties come together to resolve collectively how to deal with the aftermath of the offense and its implications for the future. The following are an assortment of practices current in Vermont:

Reparative Boards

The Reparative Probation Program provides that after being convicted of a minor, nonviolent crime, offenders may be sentenced to probation with the condition that they appear before a reparative board composed of trained citizen volunteers. The board, the offender, and the victim, who may or may not attend, and other invited persons who have been affected by the crime, meet and review the nature of the offender's offense, discuss whom it has affected and how, and, when successful, negotiate an agreement in which the offender agrees to complete a number of tasks during the probationary period. These agreements include tasks intended to help the offender better understand the harmful consequences of his behavior, repair the harm done to the victim, and restore the

community. The agreements are also intended to be developed with a goal of reducing re-offending. See *Reparative Probation*, page 28.

Restorative Conferences

Restorative conferencing brings together, to whatever extent possible, all of the people affected by an offense. It includes direct victims and their supporters, indirect victims in the community, the person(s) who offended, their supporters and family, and a facilitator. The facilitator guides the participants through a series of questions that explore the thinking and feelings of the offenders and those who have been harmed, what the participants believe to be the main issues, and what should be done to make amends. All participants are encouraged to speak, and all collaborate on a contract, a restorative justice agreement, that lists actions to be performed by the person(s) who offended. Such actions can include any aspects of the traditional criminal justice system, including programming and incarceration. *The more serious the offense, the more representatives of the criminal justice system should be allowed to participate as representatives of the greater Vermont community.*

Circle Conferencing

Circle conferencing differs from restorative conferencing, although both are restorative and in both all participants sit facing one another in a circle. Circle conferences begin with discussion topics or questions and each member of the circle speaks (or can choose to be silent) one after the other around the circle. Discussions among those in the circle are designed to reach consensus about the best way to resolve a conflict and dispose of a case, taking into account the needs of those who have been harmed, the need to protect the community, and the rehabilitation (and punishment if deemed necessary) of the offender. The circle leader frames the questions that each participant will have a chance to answer or discuss without fear of interruption. Circles, by their very nature, stress the dignity, equality, and the importance of each person within the circle.

Sentencing circles have been conducted successfully in many communities throughout the world. See United Nations Handbook on Restorative Justice, pages 22-25; www.unodc.org/pdf/criminal_justice/06-56290_Ebook.pdf.

Four stages to the circle process have been identified:

- Stage 1: Determining whether the specific case is suitable for a circle process
- Stage 2: Preparing the parties that will be involved in the circle
- Stage 3: Seeking a consensual agreement in the circle
- Stage 4: Providing follow-up and ensuring the offender adheres to the agreement

Victim Offender Dialogue & Mediation

A Victim Offender Dialogue is a victim-centered and victim-initiated service provided by the Department of Corrections' Victim Services Program in which victims of serious and violent crimes meet with the offenders in their cases. The Victim Offender Dialogue takes place in a controlled environment and in the presence of a trained facilitator. The dialogue is designed to engage the participants in a purposeful conversation in which they

discuss the impact of the crime and/or have questions answered. Participation in this program is victim-initiated, victim-centered, and voluntary on the part of the victim and offender. There is extensive preparation for all parties involved before meeting face-to-face.

A Victim Offender Dialogue is not considered a mediation as there is no problem or conflict being resolved between the two parties. The offender in every case has already been sentenced and will in no way receive special sentence considerations if he participates.

Mediation is offered by trained Department and Community Justice Center staff when requested. Issues that might be mediated include restitution amounts, the repairing of relationships, or other matters that a victim may want to address through mediation.

Restorative Justice in Current Practice in Vermont

Since 1994, the Department of Corrections has promoted restorative justice and restorative practices by helping to establish and train reparative boards in collaboration with Vermont communities. Currently, there are 76 reparative boards and community panels in 34 host towns, involving over 800 volunteers. Since the year 2000, these boards and panels have completed over 17,000 cases involving reparative probation sentences. For a study and report comparing reparative versus standard probation see the following report on-line: <http://doc.vermont.gov/about/reports/reparative-v-probation>.

Since 2000, the Department has also helped to establish Community Justice Centers in conjunction with groups of interested citizens and service providers. These centers offer volunteer, citizen-delivered restorative processes as a first step for dealing with conflict and lower levels of crime before resorting to the traditional court process. Citizens, victims, neighborhoods, schools, police, and the municipal government are able to refer issues to their local center for resolution through citizen reparative panels, conferencing, peacemaking circles, and mediation. The justice centers work to ensure that victims and the larger community are safe as people return to the community after incarceration. Services vary with each Community Justice Center.

The Department has also helped train many citizens, including probation and parole officers, police, and some attorneys, in a variety of restorative practices, including group conferencing and peace-keeping circles. Such individuals have helped conduct restorative conferences involving very serious charges whose agreements have been accepted by Vermont courts for sentencing purposes, such as charges of grossly negligent operation with death resulting and DUI #1 with fatality.

Expansion of Restorative Justice Approaches

In accord with 28 V.S.A. 2a, the Department believes that all judges, prosecutors, and defense attorneys should be trying to expand their application of restorative justice principles and practices. All cases at the earliest stages can be vetted for a restorative resolution.

Included here is a general chart of how restorative practices have a place in the traditional stages of criminal adjudication.



The very first question at any stage that must be answered positively is whether the offender takes full responsibility for his behavior as charged. If it cannot be answered positively, there is no sense in going further with a restorative resolution.

The second question is whether the offender is mentally and socially able to fully participate in a restorative practice. Can, for instance, the offender account for his actions intelligently before a reparative board or in a conference? If so, can he empathize with the feelings of those whom he has harmed? If so, can he contribute positively to a discussion about what should be included in a restorative agreement. If any of these questions, or similar ones, are answered in the negative, a restorative practice resolution should not be attempted.

If those questions are answered positively, then there should be a sensitive inquiry of those who have been harmed to find out if there is any desire on their part to be part of a restorative resolution. Such persons need not be part of a reparative board meeting, though they can be. They should, at a minimum, be informed that such a meeting has been recommended. A restorative process can then move forth in further stages, shepherded by trained Community Justice Center professionals and volunteers.

A wealth of information on restorative practices, their processes, and studies of their outcomes is available from two prominent on-line sources:

RestorativeJustice Online (at <http://www.restorativejustice.org/>) and

The International Institute of Restorative Practices (at http://www.iirp.org/lib_online_collection.php).

Information is also available through the Community Justice Centers throughout our state and the Community and Restorative Justice Division of the Department of Corrections. See Appendix, Contact Information, Community Justice Center Contact Information, page.

Expanding Restorative Justice in the Current Criminal Justice System

In accord with the implementation section of 28 V.S.A. 2a, the Department believes there are specific practices that legal system officials can employ that will promote the implementation of the State policy. Below are some suggestions as to those practices. Given the relatively nascent stage of implementation of restorative practices in our state, these suggestions are given more in the mode of ideas to consider rather than as suggestions to implement without further specific assessment and analysis by all the officials involved.

Judges

Judges can discover at the earliest stage feasible, preferably at arraignment, whether a defendant has been informed that restorative justice is the criminal policy of Vermont and whether he is willing to take full responsibility for his actions as charged. If a judge determines that a defendant has been so informed but is not willing, the traditional process and pleading proceeds. If the judge determines that he has been informed and is willing to so plead, then an inquiry should be made to determine if the defendant is further willing to waive the rights he would have within the traditional criminal litigation process. If the answer is yes, the defendant should also be made aware of how evidence revealed during a restorative justice process can be used in the future by the State if the process fails to reach a restorative agreement or if such an agreement is not fulfilled, resulting in his case having to be resolved in the traditional criminal justice manner. After the defendant is made so aware, then further traditional proceedings can be suspended until an assessment is made as to whether or not an attempted restorative resolution is advisable. A judge can hold regular status conferences to check on the progress of the restorative resolution. At any time that a judge determines that further efforts to progress with a restorative resolution are contrary to the best interests of any of the parties involved, the judge may order the resumption of the normal steps of criminal litigation. Judges may always reserve the right to modify a restorative agreement. But as participating in a restorative justice process is a voluntary one from start to finish, there is no obligation for a defendant or any of the parties involved to accept such secondary modifications. If any party does not accept a judge's modifications, the traditional criminal litigation process resumes.

State's Attorneys

Besides being actively involved in assessing the defendant's ability to positively participate in a restorative process, State's attorneys also need to monitor how interested those harmed by the defendant are in going forward with a restorative process. State's attorneys or their representatives can partake in the process themselves as community

representatives, including having an active role in suggesting aspects of the restorative agreement.

Defense Attorneys

Defense attorneys should discover as soon as possible whether their clients are willing to take full responsibility for their behavior as charged. If they are so willing, their attorneys can then inform them about what to expect from a restorative process, such as the questions they will be asked.¹ Defense attorneys should also make as clear as possible (1) the differences between a restorative process and the traditional criminal process, and (2) what rights defendants will give up if they choose and are able to participate in a restorative process. They can also help make a preliminary assessment as to a defendant's general ability and intention to interact responsibly and respectfully with those whom he has harmed. Defense attorneys can monitor the progress of a restorative process and be available to advise the defendant if the process should falter and/or fail in terms of the implications for resolving the case through the traditional criminal process.

Conclusion

The Department of Corrections recognizes that criminal justice officials face many hurdles in applying the principles and incorporating the practices of restorative justice. But given how helpful restorative practices have been shown to be for victims, communities, and offenders, as well as in lowering recidivism, the Department fully endorses the continued expansion of the use of restorative justice practices in our criminal justice system.

A list of major studies on restorative practices and recidivism is available from RestorativeJustice Online:

<http://www.restorativejustice.org/editions/2003/jan03/editions/2002/July02/recidivism>

Other countries that have developed their justice systems out of the English common law have also embraced restorative justice principles in many aspects: New Zealand, Australia, Canada, and Great Britain herself. Other states in the United States have also incorporated restorative practices within their criminal justice systems, especially Minnesota, Colorado, and California. An abundance of information is available on-line concerning these nations and states' efforts in expanding the use of restorative justice.

¹ These questions are generally alike and aimed at eliciting the same information. Examples of such questions for offenders are a) what happened? b) what were you thinking at the time? c) what have you thought about since? d) who has been affected by what you have done? e) in what way? and f) what do you think you need to do to make things right? Examples of such questions for others in the conference are a) what did you think when you realized what happened? b) what impact has this incident had on you and others? c) what has been the hardest thing for you concerning this incident? and d) what do you think needs to happen to make things right? (Questions here are from REAL Justice scripts of the International Institute of Restorative Practices of Bethlehem, PA.)