

Restorative Justice: Theory, Processes, and Application in Rural Alaska

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There is a growing recognition of the unique and challenging justice needs of rural Alaska. Administering an effective criminal justice system in rural Alaska requires continual effort to recognize the strengths and deficiencies of current practices. It also requires the commitment necessary to explore alternative processes that strengthen communities, increase confidence in judicial processes, and uphold the rule of law. There has been a growing movement in recent years, both inside and outside of the United States, to implement processes that more effectively address the needs of victims, offenders, and their communities in ways that reduce future crime and community discord. Many specific response strategies have developed out of this movement, such as community reparative boards, family and community conferences, victim-offender mediation, and circle sentencing. Each is grounded in a restorative justice framework. This article provides a brief introduction to the concept of restorative justice, some common restorative processes, and a discussion on why a balanced restorative approach is beneficial in rural Alaska.

Restorative Justice

Restorative justice is the term coined to describe justice approaches that focus on reparation rather than retribution. Restorative justice is a guiding philosophy broader than any one specific practice or program. Punishment, in its common retribution-focused sense, is secondary to the goals of reparation and reintegration under a restorative approach. Retributive-focused frameworks emphasize punishment-oriented concerns such as what precise crimes were committed and what level of punishment is deserved or statutorily prescribed for that specific offense. Restorative justice focuses on distinctively different questions such as what harm has occurred, what must be done to repair this harm, and who is responsible for this repair. These latter questions demonstrate restorative justice's goal of identifying ways crime has impacted specific victims, offenders, and communities, and discovering ways to remedy these harms and mend damaged relationships. To this end, restorative justice is often referred to as a peacemaking process.

A balanced restorative approach: (1) focuses on the harm that has resulted; (2) assists offenders in fulfilling their reparative obligations to others; and (3) allows victim, offender, and community engagement and

participation to the extent possible. This encourages victims, offenders, and communities to collectively identify harms, needs, and obligations in a unified effort to heal and put things right. This involvement empowers crime victims, helps offenders actively meet their obligation to make amends, and encourages community members to support victims and offenders in the reparation and healing process. To be restorative, community involvement should build local capacity and express community condemnation in constructive ways that encourage and assist offenders both in recognizing the impact of their actions on not only the immediate victim but also on the larger community, and in their efforts to correct their errors and rejoin the community. The focus is on meeting obligations rather than punishment. All requirements imposed on the offender should be viewed as ways of fulfilling their obligations to the victim and community. This approach is best pursued in situations where people have admitted wrongdoing and expressed an interest in correcting the situation.

Commentators on designing conflict resolution systems such as Andrea Kupfer Schneider at Marquette University Law School have observed that dispute resolution systems that do not seek peace and justice fail to provide long-term solutions. For instance, situations that seek only justice (i.e., convictions by a court of law or similar authority) without re-establishing peace or healing have proven a temporary fix. These commentators note the same can be said of processes focusing exclusively on peacemaking. Their conclusion is that most conflicts require both peace and justice and suggest that different processes are needed to develop these two coexisting needs. Restorative justice advocates such as John Braithwaite of the Australian National University and Declan Roche of the London School of Economics and Political Science suggest that processes focused on restorative justice can meet both these aims because restorative justice fosters peace and healing, but does not ignore the importance of personal accountability. However, accountability in restorative justice is not reached through the perpetrator of violence passively accepting punishment imposed by a third party, but rather by investing oneself in active efforts to repair damage caused. The accountability Braithwaite and Roche describe better satisfies the "justice" Schneider addresses.

A balanced process focuses on the needs of victims, offenders, and the community.

Focusing solely on rehabilitation of offenders is restorative for offenders, but it is not balanced without equal concern for victim and larger community needs. The same can be said of processes that focus too heavily upon only victim or community concerns. Creating room for victim, offender, and community participation helps ensure that no group's interests go unrepresented. This joint participation actually encourages restoration as well. Victim involvement validates that individual as a member of the community whose opinions and feelings matter. It also better enables the offender and community to understand the ways crime has impacted the victim. Direct involvement of the offender aids in understanding the reasons and contributing factors for the offense. This involvement provides insight into the offender's character and situation which helps identify realistic ways the offender can seek reparation. Direct involvement allows greater opportunity for sincere apology and active reparation efforts which help victims and offenders. Finally, community involvement is fundamental to an effective restorative response, because at the end of the day it is our communities that live with the cumulative fallout of criminal behavior.

Our legal system has become highly professionalized and takes ownership of community conflict. Conflicts can become depersonalized and invisible to the very group with a vested interest in the process used and outcomes achieved. Restorative justice promotes broader involvement to help ensure the full impacts of crime are identified, that responses are culturally relevant, and that communities identify conditions contributing to the problem. Community participation also reinforces social norms of acceptable behavior and fosters community self-reliance.

Ultimately, restorative justice seeks to move from processes where the justice system works separately and independent from the community to a system where the government follows community leadership because the community has shown itself to be an effective problem solver. When this occurs, formal justice professionals operate in support of community efforts and goals while protecting the rights of individual parties and ensuring fairness in the process.

Restorative Processes

As previously mentioned, restorative justice is not any one precise procedure. Different approaches can be "restorative." The

degree to which they are restorative depends on their ability to meet the reparative needs of victims, offenders, and communities. There are many variations of restorative-focused processes in use throughout the world. Three are briefly discussed here by way of example. In the context of criminal cases, these approaches all generally presume an acceptance of guilt by the accused and a focus on alternate means of sentencing.

Victim-Offender Mediation

One restorative approach is victim-offender mediation. This typically involves a victim and an offender in direct mediation facilitated by one or two mediators. Sometimes victims and offenders converse face-to-face, but other times they meet separately with the mediator, and the mediator relays information between them. In face-to-face mediation, family members or friends are often present as support persons. These meetings are designed to help the parties better understand why the crime occurred and what the impacts are and explore avenues for reparation. While not used in the criminal context in all jurisdictions, in others these programs have a respectable multi-decade track record. Many of these mediations involve less serious property crimes committed by young people, but this process is being expanded to more serious offenses by juveniles and adults. Multiple studies by

Mark Umbreit of the Center for Restorative Justice and Peacemaking at the University of Minnesota and others have shown this process leads to victim and offender satisfaction with the outcome, and significantly reduced recidivism rates among juvenile offenders.

Conferencing

Group conferencing broadens the range of persons involved. Group conferences vary in name and style, but each tends to use group discussion attended by a combination of victims, offenders, their respective family members or other support persons, and some additional community members such as government or school representatives. A trained facilitator leads the discussion, which may follow a particular speaking order. The session begins by discussing what occurred and how individuals were harmed. The facilitator then moves the discussion towards focusing on what must be done to make appropriate reparations. Finally, the group seeks to develop a consensus agreement regarding what must be done by the offender and how and when that will occur. By involving representatives of the community, this process takes into account community concerns.

Circles

Circles involve similar numbers and types of persons as those involved in group

conferences, but can be expanded to include the input from more members of the community. This process gets its name because participants generally seat themselves in a circle where all have equal ability to participate and share their views. Often, a trained facilitator or community leader leads the process by facilitating the discussion, but all in the circle have the opportunity to speak. A *talking piece* is passed around the circle to designate who may speak. (This is usually an object (e.g., an eagle feather) chosen by the facilitator and has some cultural or personal significance.) Participants express their feelings in a shared search to identify why crimes have occurred, identify what harms need repair, and identify the steps needed in the healing process. Circles can be used in numerous contexts from community talking circles (meant to discuss events of community significance) to circle sentencing where the circle members (which can include victims, offenders, family, friends, community members, police, and lawyers) deliberate and come to a consensus for a sentencing plan that addresses the concerns of all interested persons.

Mediation, conferences, and circles have many similarities, and communities can be flexible in the approach used in a given circumstance. In some instances it may be

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Restorative Justice References

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Restorative Justice Programs and Sentencing

Below are the amendments to Alaska Rule of Criminal Procedure 11(i) and Delinquency Rules 21(d)(3) and 23(f) which describe the requirements for referral to a restorative justice program as part of the sentencing process. These amendments took effect April 15, 2014. These rule changes were proposed by the Alaska Supreme Court's Local Dispute Resolution Subcommittee of the Fairness, Diversity, and Equality Committee. To support implementation of the rule changes, Alaska Supreme Court Chief Justice Dana Fabe assigned Superior Court Judge Eric Smith to facilitate meetings between local judicial officers and interested tribes or other organizations that the local groups want to be involved in and to work out specific agreements for referrals. Judicial officers in Kenai, Cordova, and Dillingham have approached Judge Smith for possible assistance in working with local tribes.

An Alaska Court System judge may refer a defendant to a re-

storative justice program with "the consent of the victim(s), the prosecutor, and the defendant(s)." Alaska R. Crim. Pro. 11(i)(1). The sentence recommended by the restorative justice program may then be sent to the court for consideration. The judge may, but is not required to, attend the restorative justice proceeding. Following a consideration of the recommendations of a restorative justice program, the judge will determine the sentence.

Restorative justice programs "include, but are not limited to circle sentencing, family group conferencing, reparative boards, and victim-offender mediation." Alaska R. Crim. Pro. 11(i)(3). Under this rule, the Alaska Court System's therapeutic courts, also called wellness courts—such as the Felony DUI Court, Felony Drug Court, Veteran's Court, Mental Health Court, Family Care Court, and Family Preservation Court—are not considered restorative justice programs.

Change to Alaska Criminal Rule 11

IN THE SUPREME COURT OF THE STATE OF ALASKA ORDER NO. 1816

Adding Criminal Rule 11(i) and Delinquency Rule 21(d)(3) and 23(f) concerning restorative justice programs, to implement the recommendations of the Local Dispute Resolution Subcommittee of the Fairness, Diversity, and Equality Committee.

IT IS ORDERED:

1. Criminal Rule 11 is amended to add a new subsection (i), to read as follows:

Rule 11. Pleas.

(i) Restorative Justice Programs.

(1) With the consent of the victim(s), the prosecutor, and the defendant(s), the judge may refer a case to a restorative justice program. The parties must inform the restorative justice program about any applicable mandatory sentencing provisions at the time the matter is submitted to the program. The parties may propose to the court the sentence recommended by the participants in proceedings convened by that program.

(2) The parties may include the recommendations of the restorative justice program in a sentencing agreement subject to the provisions of subsection (e).

(3) The term "restorative justice program" means a program using a process in which persons having an interest in a specific offense collectively resolve how to respond to the offense, its aftermath, and its implications for the future. Restorative justice programs include, but are not limited to, circle sentencing, family group conferencing, reparative boards, and victim/offender mediation. For purposes of this rule, the term "restorative justice program" does not include the Alaska Court System's therapeutic courts.

(4) Except as provided below, the sentencing judge shall not participate directly in any restorative justice program to which a case is referred for sentencing recommendations.

(A) The judge may be present during the proceedings of the program provided that:

- (i) the proceedings are conducted on the record; or
- (ii) minutes of the proceedings are kept in a manner that the parties agree will fairly and accurately represent what is said at those proceedings.

(B) The judge may speak at these proceedings provided that the judge's comments do not detract or appear to detract from the judge's neutrality.

2. Delinquency Rule 21(d) is amended to add a new paragraph (3), which reads as follows:

Rule 21. Adjudication Hearing.

(d) Judgment.

(3) A minor may, with the consent of the Department and the victim(s), condition an admission to one or more acts alleged in the petition upon the court's agreement to the recommendations made by a restorative justice program to which the matter is referred pursuant to Delinquency Rule 23(f).

3. Delinquency Rule 23 is amended to add a new subsection (f), which reads as follows:

Rule 23. Disposition or Dual Sentence.

(f) Restorative Justice Programs.

(1) With the consent of the victim(s), the Department and the juvenile may stipulate to a stay of disposition pending a referral of the matter to a restorative justice program. The parties must inform the restorative justice program about any applicable mandatory disposition provisions at the time the matter is submitted to the program.

(2) The court shall give due consideration to the recommendations made pursuant to a referral authorized by paragraph (1).

(3) The term "restorative justice program" means a program using a process in which persons having an interest in a specific offense collectively resolve how to respond to the offense, its aftermath, and its implications for the future. Restorative justice programs include, but are not limited to, circle sentencing, family group conferencing, reparative boards, and victim/offender mediation. For purposes of this rule, the term "restorative justice program" does not include the Alaska Court System's therapeutic courts.

(4) Except as provided below, the judge rendering the disposition shall not participate directly in any restorative justice program to which a case is referred for dispositional recommendations.

(A) The judge may be present during the proceedings of the program provided that:

- (i) the proceedings are conducted on the record; or
- (ii) minutes of the proceedings are kept in a manner that the parties agree will fairly and accurately represent what is said at those proceedings.

(B) The judge may speak at these proceedings provided that the judge's comments do not detract or appear to detract from the judge's neutrality.

DATED: December 4, 2013

EFFECTIVE DATE: April 15, 2014

/s/

Chief Justice Fabe
Justice Winfree
Justice Stowers
Justice Maassen
Justice Bolger

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desirable to only involve the victim and offender in a mediation session because of privacy concerns. Other matters may be of such community importance that a larger community circle is necessary.

These processes can also be implemented at various stages in the case. Many are implemented as diversionary tools meant to direct certain cases away from formal adversarial court proceedings. Diversion can be deemed appropriate because of the nature of the offense or because the situation involves a remorseful defendant who freely admits guilt and a victim willing to engage in the reconciliation process. When used as a diversionary tool, these processes generally operate as alternatives to and in the shadow of traditional court procedures. Because guilt is admitted and voluntary consent to participate is obtained from the defendant, these diversionary processes can appropriately focus more on interests rather than individual rights. This allows the needed flexibility to truly address harms and focus on involving the defendant in reparation efforts.

Youth Court mediation in Fairbanks, for example, and the Circle Peacemaking program in Kake are Alaska instances of these restorative diversionary programs used in delinquency and criminal matters. Restorative principles can also be infused into standard court procedures themselves. If carefully crafted, court procedures can combine restorative justice principles while simultaneously preserving the individual constitutional rights of defendants. For example, there is ample room for community and victim input when setting conditions of pretrial release and at the sentencing stages of a case. The recent efforts of the Galena District Court to encourage community talking circles that discuss what is needed for healing and accountability and solicit community sentencing recommendations is an example of melding restorative principles into sentencing hearings (see “Community Justice Initiatives in the Galena District Court,” p. 6). Thus sentencing becomes more reflective of the approach taken in juvenile cases where goals of rehabilitation and reconciliation are emphasized rather than procedural formalities of the adjudicatory phase of a case. Finally, restorative processes can also be used as a part of probation or incarceration. Programs such as the Sycamore Tree Project in the United Kingdom and Australia, where prisoners meet with victims and their families, are an example.

Again, how restorative a particular

practice is depends on its ability to meet the overall objectives of restorative justice. Some are more restorative than others in considering and meeting victim, offender, and community needs. Government agencies and the communities they serve should explore and develop options together.

Restorative Processes in Rural Alaska

Rural Alaska is fertile soil for implementing restorative processes. First, rural Alaska is filled with individuals, Native and non-Native alike, who recognize their dependence on one another and value community harmony. These residents may be isolated from urban populations, but they are not isolated from each other in their respective communities. Many communities consist of a web of people bonded by blood relations or marriage. The need for harmony, restoration, and healing is great because many crimes involve persons who will continue to be in close proximity and association with each other. These close relations often make the collateral impacts of crime more pronounced. When someone is victimized or punished their loss is felt by the collective community. It is not like Fairbanks, Anchorage, Juneau, or other urban areas, where many residents are only exposed to the community’s crime through the news media. Additionally, rural Alaska is filled with people who culturally relate better to peacemaking approaches. Peacemaking is emphasized as a justice response in many indigenous cultures. The goal is to return parties to cooperative coexistence and interpersonal harmony. For example, circle peacemaking practices are being practiced in several tribal courts throughout Alaska, First Nations communities in Canada, and in the Navajo Nation of Arizona.

Second, rural communities have little opportunity to view, understand, or participate in many court procedures. Rural Alaskans deserve and need an opportunity to participate in self-governing processes like dispute resolution. Lack of familiarity, due in part to cultural and physical barriers to ready participation, can lead to feelings of mistrust and vulnerability regarding the operations of the Alaska Court System and other justice agencies. This is compounded by the use of proceedings that are not culturally relevant to much of the Alaska Native population. In 2012, the Alaska Rural Justice and Law Enforcement Commission stressed in their report to Congress and the Alaska State Legislature the message they had heard during public testimony: “Public testimony impressed upon [the Commission] the importance, and success, of *locally driven* approaches that respond to the immediate and cultural needs of communities. Citing

its congressional mandate, the Commission asserted that the state judicial system does not have a sufficient profile in rural Alaska communities” (emphasis in original). The Commission also noted that “[a]t the same time, state-tribal jurisdictional conflicts and state policies have often prevented tribal courts from filling this tremendous void.” This conclusion was echoed in the recent findings of the Indian Law and Order Commission provided to President Obama and Congress in 2013.

Many rural Alaska communities are more difficult to access and lack social and justice services available in the more accessible regions of the state. While accepting this reality, it is imperative we not become complacent regarding the need for law, order, and justice in these areas. The state and federal governments can do more to reasonably meet these community justice needs by adopting practices that partner with and utilize healthy localized social control mechanisms. Government agencies can also adjust their own practices to build community capacity to heal and control future crime. Justice delivery must not isolate the remote segments of the population from meaningful involvement, and must harness local resources to prove effective.

Conclusion

The Alaska Court System is taking significant steps to increase the involvement of local communities and the use of restorative justice programs in its cases. The Alaska Supreme Court adopted rules changes effective April 15, 2014 to formally authorize referrals to restorative justice programs, such as circle sentencing, in criminal and delinquency cases. (See “Restorative Justice Programs and Sentencing,” p. 4.)

The demographics of rural Alaska and its residents suggest restorative justice processes will help increase local participation in dispute resolution and crime prevention, provide a justice focus that is less adversarial, and better meet small community needs and cultural preferences for reconciliation. These processes could empower rural areas to partner with state agencies in implementing strategies directed by the challenges they face. The adoption of practices that emphasize community, victim, and offender needs through direct involvement of these parties increases the likelihood that obligations imposed on defendants are culturally relevant, and directed at repairing the damage caused to those most impacted by harmful behavior.

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