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ROLE OF STAKEHOLDERS IN ENSURING THE FUNCTIONAL EFFICIENCY OF THE JUVENILE JUSTICE SYSTEM

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Abstract

This research analyzes changes made by a juvenile court over five years toward the progressive inclusion of victims as "stakeholders" within the implementation and development of restorative justice practices. In doing so, the court also amended how offenders fulfilled their diversion or probation requirements at the court, particularly in relation to its use of VOMs. This research follows the initial inclusion of victims as "stakeholders" within the use of VOMs beginning in 1999, and explicates how and where these stakeholder roles were amended over time until 2005, when the court had largely finalized the structure of victim involvement and participation. The ensuing discussion describes the rationale for the court's changes, and the effects of these changes on how victims were able to participate and make decisions in both diversion and probation cases. The paper concludes by discussing the implications of these changes as they involve the role of victims as stakeholders within restorative justice as used in formal justice settings, and in particular the possible limits of such roles when enacted through justice agencies such as juvenile courts.

Keywords: juvenile justice, restorative justice, stakeholders, victims

INTRODUCTIO

The term "stakeholder" is often used within restorative justice to both identify and legitimate the inclusion of victims into specific restorative interventions and justice processes (c.f. McCold and Watchel 2003; Schiff 2007; Zehr and Mika 1998). The questions of who or what constitute stakeholders, and exactly how victims should and can be involved as "stakeholders," however, are more oblique within restorative justice (Ashworth 2002; Bazemore and Leip 2000; Miers 2001; Van Ness 1993). Empirical research on restorative justice interventions that involve victims as stakeholders is widespread (Bradshaw and Umbreit 1998; Coates and Gehm 1989; Griffiths 1999; Mika et al. 2004; Umbreit 1998; Umbreit, Coates, and Vos 2002), as is literature that looks more directly at the theoretical implications of involving victims as stakeholders (McCold 2000; Schiff 2007; Zehr and Mika 1998). Among practitioners, there is consensus that victims should be able to meet and address their offenders and should be entitled to the benefits of restitution or other remunerations. There is decidedly less empirical research in restorative justice on how victims become stakeholders, what this entails in terms of the agency and decision-making abilities of victims, the relationship between victims and justice agencies, and the auspices under which victims are able to act as stakeholders. Thus, if victims are indeed stakeholders within restorative approaches to justice, they are not all stakeholders in the same way or to the same extent across differing restorative interventions, programs, jurisdictions, and agencies.

This research explicates the changes made by one juvenile court over a period of five years toward the progressive inclusion of victims as stakeholders within its development and implementation of restorative justice. Beginning in late 1999, the Clark County Juvenile Court (CCJC) in Washington State introduced a Victim Offender Mediation (VOM) program. Over the next five years the court gradually altered diversion and probation practices in ways that provided several significant services to victims, and allowed

victims increasing decision-making in aspects of their cases related to redress from offenders, restitution, and to a limited degree terms of diversion or adjudication.

REVIEW OF LITERATURE

The term restorative justice is generally attributed to Albert Eglash (1977), who contrasted "retributive" "distributive" and "restorative" forms of restitution and argued that the latter provided more creative and meaningful possibilities for both victim and offenders beyond that of financial restitution (cf. Van Ness and Strong 1997). However, the origins of restorative justice are more diverse (Van Ness and Strong 1997). In the 1970s, meetings were used in Canada and the United States which brought offenders together with victims in informal settings, and evolved into more fully-developed "victim-offender reconciliation" programs" (VORPs) and "victim offender mediation" (VOM) programs in the late 1970s and 1980s (Umbreit 1985; Van Ness and Strong 1997). In 1989, New Zealand implemented the use of FGC for most youth offenders (Umbreit 2000), and in the 1990s Australia saw the implementation of forms of youth justice conferencing in all states (Hayes and Daly 2004). Other restorative interventions such as sentencing circles also emerged in Canada in the 1990s (Stuart 1996).

Within the growth of restorative interventions in the last thirty years, the larger question of *what is restorative justice* is not a straightforward one. Braithwaite (1999:4) noted over a decade ago that restorative justice had emerged "most commonly defined by what it is an alternative to." By the late 1980s, restorative justice advocates had set forth a number of criticisms or deficits of contemporary criminal justice practices that they argued could be better addressed through restorative approaches, namely: 1) the excluding of victims from participation and knowledge of their own cases (Christie 1977; Umbreit 1985; Van Ness 1989; Van Ness *et al.* 1989; Zehr 1985, 1990), 2) the lack of meaningful redress for victims (Christie 1977; Van Ness 1989; Zehr 1989, 1990), 3) the re-victimization of victims by law enforcement and/or prosecutors (Umbreit 1989), 4) the lack of incentive in adversarial justice systems for offenders to take accountability for harms they have caused (Braithwaite 1989; Zehr 1989, 1990), 5) the lack of means for offenders to make amends to victims outside of restitution (Braithwaite 1989; Eglash 1977), 6) poor rates of offender re-integration (Umbreit 1989), and 7) the growth of justice policies that reflected the interests of the state and policy makers over those of local communities (Christie 1977; Van Ness 1989).

Many of these criticisms were not unique to restorative justice. In particular, victims' rights organizations, which had gained visibility and political influence by the late 1970s, had many similar criticisms of the justice system. Feminist organizations critical of the treatment of women (especially rape victims) by the criminal justice system played a pro-generative role in the rise of the victim rights' movement (Abrahamson 1985), as did Civil Rights organizations critical of the overrepresentation of Blacks and other minorities as victims and the relative lack of interest or enforcement by criminal justice agencies (Karmen 1992). These groups found common ground with more conservative organizations focused on victims' rights in relation to the rise in crimes rates since the early 1960s (Karmen 1992), and the attention, services, and rights afforded to offenders at the expense of victims (Carrington 1975). The 1973 Supreme Court decision *Linda R.S. v. Richard D.* (410 U.S. 614) enhanced the perception of many victims' rights advocates that victims were in fact no more than "just another piece of evidence, a mere exhibit to be discarded after the trial" (Karmen 1992:158). The efficacy of victims' rights organizations resulted in the passing of legislation on federal and state levels, including the federal Victims and Witness Protection Act in 1982 and 2004 Crime Victims Rights Act, as well as victims' rights legislation in some form in all U.S. states.

The victims' rights movement and restorative justice shared common criticisms of many of the problems facing victims. However, they also diverged in notable ways. From the outset, restorative justice advocates were critical of what they termed "punitive" or "retributive" forms of justice (Umbreit 1989; Zehr 1985). For supporters of restorative justice, the problem was (and remains) not simply one of victims

being excluded or re -victimized (Achilles and Zehr 2001), but, equally one of barring offenders from any way to make amends for harms they have caused and be accepted back into their communities. As Zehr (1985:2) argued, "During the past several decades, the U.S. has experienced . . . a major shift in the philosophy of punishment. Rehabilitation is now out of fashion; punishment is definitely in. An unholy alliance of liberals and conservatives made possible the victory of a just deserts philosophy." Such a philosophy, argued Zehr, did not eliminate the excesses of judicial discretion as much as it shifted these excesses to other parts of the justice system, with the result of a continued overrepresentation of minority offenders, growing prison populations, and not much to show for it in terms of recidivism rates. Moreover, Zehr (1985:2) argued that such a system was not only ineffective in reducing crime, but was not "holding offenders accountable" in a way that allowed them to "understand the real human consequences of their actions . . . [and] take responsibility for making things right, for righting the wrong."

Who or what are Stakeholders in Restorative Justice?

While much of the debate within restorative justice has been around which type of interventions or processes may be rightly considered restorative, equally important are questions of who counts as a "stakeholder" within restorative practices, and in what capacity? Arguably, the origins of stakeholder theory as they relate to restorative justice stem from an influential article by Nils Christie, published in the *British Journal of Criminology*. In this work, Christie (1977) argued that modern criminal justice systems effectively usurp "ownership" of conflict more rightly owned by victims of crime themselves in lieu of other state interests such as crime control, offender rehabilitation, monetary gain, and the "professionalization" of a class of people whose livelihoods were vested in laboring in or managing criminal justice systems. His argument was in some ways literal insofar as he proposed that under the auspices of modern criminal justice systems, "Not only has [the victim] suffered, lost materially or become hurt, physically or otherwise. And not only does the state take the compensation. But above all [the victim] has lost participation in his own case" (Christie 1977:7). In short, Christie argued that criminal justice systems had divested victims in particular from rightful participation in systems that directly "concern" them directly, financially and otherwise.

Christie's (1977:10) concept of what he termed a "victim-oriented" form of justice organization provided a significant theoretical justification for the inclusion of victims into justice processes such as VOMs and other restorative interventions that allow victims a participatory role in the determination of financial remunerations. Yet his argument of "conflicts as property" was also directed at questions beyond financial aspects of such ownership, allowing as well for "ownership" of less material aspects of victimization such as emotional suffering and victims' exclusion from knowledge from and participation in their own cases. Such nonmaterial aspects of "conflict ownership" were expanded upon by Howard Zehr (1990:29), who acknowledges in his work *Changing Lenses* a recognition of the victim's right to reclaim less calculable losses such as the violation of trust, the trauma that often accompanies victimization, fear of personal safety, and the need to explain to the offender and others the effects of these harms.

The premise of Zehr's (1990) argument was not simply that there are nonmaterial effects of victimization, but more broadly that crime itself can be better addressed and redressed by focusing on the concept of "harm" instead of "crime." Crime is, by its very definition, "owned" by the state both conceptually and legally – i.e. the state both defines "crime" as well stands as the sole legitimate plaintiff. The concept of "harm," on the other hand, denotes a broader understanding of the effects of crime, particularly in the lives of victims. It also opens up a conceptual and even potential legal space for the attribution of "ownership" of the harms caused by crime, as well as other harms not recognized by the state as such.

VICTIM-STAKEHOLDER ROLES IN DIVERSION

Diversion was mandated by Washington State law for all first time juvenile misdemeanor offenders.[1] For youth cases referred to the prosecuting attorney's office between 1999 and 2005, about a third of youth each year received diversion, another third received community supervision (i.e. probation), and about a third of the referrals were dropped (i.e. no charges filed or charges dismissed). The final 10% or so consisted of offenders sent to state youth facilities (JRA), youths sentenced to specialized dispositions, and remands to adult criminal court, etc.

Prior to the implementation of restorative justice in late 1999, the CCJC used a diversion program not unlike others in Washington State and in many juvenile courts. Upon receiving a case, the juvenile court manager responsible for intake and diversion made the decision to proceed with a case or to drop the charges. When cases proceeded, juveniles eligible for diversion were required to meet with probation staff, where they were asked to participate in the court's diversion program. If a youth did not agree, the case was returned to the intake manager and charges could then be filed. If the youth agreed, the terms of the diversion were set by a probation staff in a meeting with the offender. These terms included possible conditions such as no further offending, no drug or alcohol use, and so on. They also included possible outcomes such as community service or restitution. The use of diversion at the court during this time was largely focused on the offender, with minimal possibility for victim involvement and participation in any sense. The only exception to this was the use of restitution, but restitution was set by the court, so victim involvement consisted mostly of providing the court with information in hopes of recompense.

VICTIM-STAKEHOLDER ROLES IN PROBATION

In many ways the changes to probation practices paralleled changes made to diversion cases at the CCJC between late 1999 and 2004. In other ways, however, there were significant differences as they impacted the ability of victims to act as stakeholders, in particular as these differences related to due process, which applied to youth who had been formally charged in a manner different from diverted cases. These differences extended as well to Washington State's use of determinate sentencing for youth offenders.

Offenders agreed to participate in diversion to have the charges against them eventually dropped and sealed. They were not pleading guilty to a crime, and their acceptance of the terms of diversion constituted in effect a circumventing of due process, insofar as it was not the criminal charge itself but rather the acceptance of the diversion agreement that allowed the court to require or request that offenders participate in certain restorative interventions or programs. In cases where offenders either pled guilty or were adjudicated however, due process as set forth under federal and state law applied throughout the adjudication process, up until the terms of probation were set by a juvenile court judge. These terms moreover constituted a court order that in many ways was less flexible than a diversion agreement, particularly in Washington State, where determinate sentencing guidelines for youth offenders limited judges' ability to alter or amend dispositions outside the guidelines.

These differences also extended to victims in terms of how and to what extent they were able to be involved in adjudicated cases. Victim input, while allowed at disposition hearings in the form of a victim impact statement, could not inform the terms of probation to the same degree as in diverted cases. This again was a legal difference; where due process applied to offenders throughout the adjudication proceedings and disposition, and where Washington State's use of determinate sentencing guidelines for youth offenders required judges to adhere to these guidelines unless they could show "manifest" reasons for not doing so. For example, the use of VOMs assumed that an offender was willing to "take responsibility" for his or her actions, something that was possible in diversion cases prior to the setting of the diversion agreement, but impossible in cases prior to adjudication where the offender was presumed "innocent" until adjudicated otherwise.

The distinction between diversion and probation was thus fairly pronounced in terms of how the court legally amended diversion and probation processes in implementing restorative justice. Diversion was decidedly less formal, and more flexible, both in terms of the process itself (i.e. meetings between offenders and court staff), as well as in terms of the setting of the diversion contract. Probation was decidedly more formal and less flexible in terms of due process and recommending the terms of probation.

Like diversion, these changes did not happen at once, but rather in a series of progressive organizational and procedural changes between late 1999 and 2005. Prior to late 1999 the prosecuting attorney's office generally filed changes for felony offenses. In the case of most misdemeanors, the filing of charges was ceded to "intake" probation staff. When charges were filed, youth could either elect to be tried as a juvenile or to plead guilty. After a youth pled or was found guilty, the disposition was by and large proscribed by the state's determinate sentencing guidelines for youth offenders in terms of placement either to JRA or to "local sanctions."[3] In cases where the disposition resulted in local sanctions, such sanctions could include community supervision, local detention, community service, or fines. At the court, terms of probation were guided in part by an "intake screening" process, administered by intake probation staff to all adjudicated youth in Washington State.[4] Restitution, when applicable, was also set by the judge.

Where the juvenile court judge set the terms of probation, court probation staff nevertheless had some latitude in terms of how these terms were implemented. This latitude came from the dual role afforded them as both officers of the court, as well as caseworkers for youth offenders. As officers of the court, they could function in a law-enforcement capacity insofar as they had discretion as to whether or not to charge a youth for a probation violation. As caseworkers and advocates, they were able to provide social services and other support to offenders, including at their discretion services beyond those determined in the risk assessment. In both roles, probation staff was able to decide how strictly they would monitor and supervise particular offenders.

Yet while diversion and probation were different for offenders, prior to 1999 they were markedly less so for victims. As with diversion, the primary way that victims were involved in probation was though the use of restitution. In Washington State, victims also had at this point the right to submit a victim impact statement prior to the disposition hearing. However, the influence of such statements was usually minimal, as the disposition itself was largely proscribed by the state's sentencing guidelines for youth offenders. Secondly, such statements did not provide the victim with any more decision-making power over the outcome of any particular case, although in an exceedingly small number of cases (approximately 2 percent of all adjudicated cases) statements may have been used in part to justify a "manifest up" or "manifest down" decision (i.e. a sentence outside of the guidelines) on the part of the judge.

DISCUSSION OF FINDINGS

The implementation of restorative justice and subsequent changes to victim stakeholder positions in diversion and probation practices at the CCJC involved quite a bit of "groping along," to borrow from Lemley and Russell's (2002) description of an adult restorative justice program in Spokane, Washington. On the one hand, the ability of the court to implement and effect changes as they related specifically to the inclusion of victims as stakeholders came from various aspects of Washington State law that allowed for, but also limited, victim participation and restitution in juvenile justice services. On the other hand, these laws regarding victims' rights to restitution and participation in mediation programs were ambiguous as to how restitution could be remunerated, whether or not mediation could be concluded with an "agreement" between the victim and offender, or how victims could be involved in the justice process outside those victims' rights specifically identified in state law.

Thus, while the CCJC did have some latitude in terms of its ability to implement VOMs and other "restorative justice" approaches, between 1999 and 2005 it was regularly adapting these in response to

both organizational needs and identified victims' needs. There was no clear initial formula for how to best include victims as stakeholders within the limits set forth by due process and Washington State law, and in choosing to implement a fairly "traditional" VOM program in 1999, the CCJC was almost immediately presented with two sets of interrelated problems that were worked out over the course of five years, largely through trial and error.

Primarily, the court recognized that the use of VOM merely as an outcome of diversion or probation left victims with little actual input into their cases, outside of being able to meet with offenders and express harms they had caused. Research on restorative justice has recognized the importance of such meetings to victims in terms of being able to express harms caused by offenders and engage in questions or dialogue (Coates and Gehm 1989; Strang 2002; Strang and Sherman 2003; Umbreit and Coates 1992; Umbreit 1995, 1998). The restorative manager had significant experience with VOMs, so both he and the court's mediation staff viewed VOMs as significant in this regard. However, from the outset it also seems clear that there was recognition by the court administrator, restorative manager, and mediation staff that no "alternative" justice processes in Washington State could be conducted outside of the state's use of determinate sentencing and due process. In this regard, the goal thus became one focused not only on affording victims an opportunity to meet with offenders, but on how to provide victims more decision-making capacity.

The second problem, which is related to the first, was recognition on the part of the court administrator, restorative manager, and mediation staff that victim needs were not necessarily best being met by probation staff specifically, and the court more generally. As discussed above, probation staff was initially responsible for screening appropriate cases for mediation. At the same time, probation staff was usually in a position of having to advocate for offenders in the same cases –in effect leaving probation staff in a position of having to make decisions regarding different needs or rights for victims and offenders. The decision to have mediation staff screen appropriate cases for mediation, and to provide this and other services to victims, was a result of this recognition.

In turn, this led to the growing perception that the court was not meeting victims' needs by relying on VOMs as the only option for victim involvement in diversion and probation cases. As mediation staff began to be the primary point of contact for victims, and as victims were contacted more quickly by the court, over time it became clear to these staff that: 1) a larger number of victims did not want to meet with offenders, while for a smaller number this was important, 2) victims identified many other problems or needs that were not being met, particularly about their rights as victims, restitution, and information about the process and outcomes of their cases,

3) the CCJC could provide these significant services to a larger number of victims by shifting towards a "victim-driven" approach that involved early contact for all victims of juvenile crime, and 4) by utilizing this early contact, victims were able to have input into the outcome of cases *prior to* the setting of diversion agreements and input into some elements of how the probation agreement was structured by the court.

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