CAN RESTORATIVE JUSTICE BE OF VALUE IN FORENSIC CASES? PERSPECTIVES OF A LAWYER AND A PSYCHOLOGIST

Michael L. Perlin, Esq.
Professor Emeritus of Law
Founding Director, International Mental Disability Law Reform Project
New York Law School
185 West Broadway
New York, NY 10013
212-431-2183
michael.perlin@nyls.edu
mlperlin@mdlpa.net

Dr. Valerie McClain
Licensed Psychologist
Neurology and Physical Therapy Centers of Tampa Bay
2835 West DeLeon St., Suite 205
Tampa, Florida 33609
813-831-6622
vraemac@aol.com
Introduction

• Restorative justice (RJ) is a means by which to restore victims, restore offenders, and restore communities in a way that all stakeholders can agree is just, via the values of participation, reparation, equality, a forward-looking approach, respect, and dignity.

• Concepts of RJ have been steadily growing in the context of the criminal trial process since the mid-1980s, but most growth has come in cases involving post-sentencing victim-offender interaction.

• There has been virtually no movement to apply restorative justice principles to forensic cases
Roadmap

• Paper will preliminarily explore how RJ principles might be used in the full range of forensic cases, involving defendants with mental disabilities, from the perspectives of both
  • the lawyer (MLP),
  • and the forensic psychologist (VRMccC).
The meaning of RJ, 1

• Professor John Braithwaite: RJ is a means by which to restore victims, restore offenders, and restore communities “in a way that all stakeholders can agree is just,” “a process whereby all the parties with a stake in the offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future.”

• Its objectives: “restoring property loss, restoring injury, restoring a sense of security, restoring dignity, restoring a sense of empowerment, restoring deliberative democracy, restoring harmony based on a feeling that justice has been done, and restoring social support.”

• Critical RJ values include participation, reparation, community involvement, deliberation, flexibility of practice, equality, a forward-looking approach, victims’ involvement, and, “most important[ly]”, respect.

• At core of restorative justice is a focus on the “restoration of human dignity.”
The meaning of RJ, 2

- Optimally, RJ involves the victim, the offender, and the community in a search for solutions which promote repair, reconciliation, and reassurance.
- It is “a process whereby all the parties with a stake in a particular offense come together to resolve collectively how to deal with the aftermath of the offense and its implications for the future.”
- Its core values are “healing rather than hurting, moral learning, community participation and community caring, respectful dialogue, forgiveness, responsibility, apology, and making amends.”
- RJ scholars have critiqued traditional criminal law's narrow retributive justice model.
Aside from accountability, RJ provides for other needs of offenders. Criminal justice rarely takes into account what might be driving an offender to commit the actions he does, and even when it is taken into account it merely serves as a defense against accountability of the offender.  
  - E.g., the extreme emotional disturbance and insanity defenses.  
  - Restorative justice recognizes the need to help the offender heal from any harm that might have “contributed to their offending behavior.” The understanding and healing of personal harms is one piece of the greater need of personal transformation.  
  - Other elements of that need include “opportunities for treatment for addictions and/or other problems” and “enhancement of personal competencies.”
Impact of RJ on mental health courts

• RJ may have a positive impact on the ultimate value of mental health courts:
  • Although restorative justice must be further studied in an MHC context, it can likely enhance the impact that MHCs have on the communities they serve, making them an influential fixture in society.
  • MHCs can increase understanding and trust among victims, offenders, and community members and reduce recidivism, all of which can begin to undo some of the damage caused by decades of criminalizing mental illness.
  • Thus, combining MHC restorative justice programs with increased funding for community resources and mental health training for police officers can forge a community network that would be based on a solid foundation of caring, relationships, and true understanding within communities.
Potentially coercive elements?

• In reality there will be a certain level of coercion in most restorative processes, because the looming alternative (and predecessor) will usually be the traditional criminal justice system.

• It is coercion of the offender by the police that lands her in the criminal justice system, and thus in a restorative justice process such as victim-offender mediation, and it is a much higher level of coercion that probably awaits her as a default if she does not successfully complete such a program.

• A lesser level of coercion to successfully complete the program exists for the victim if he wishes to play a leading role in the outcome of the process.
Restorative justice and the criminal law

- In criminal justice, concepts of restorative justice have been steadily growing since the mid-80’s, mostly in cases involving post-sentencing victim-offender interaction.

- RJ seeks to re-frame the conversation of criminal justice so that contextual needs of victims are taken more seriously and the nature of crime is understood primarily as a violation of persons and relationships rather than as primarily against the state or an abstract notion of universal justice.

- RJ assumes that a deeper connection exists between the victim of the offense, the offender, and the community than is assumed by the formal criminal justice system.
  - One commonly-used mechanism in restorative justice is the sentencing circle, an approach that seeks to provide a non-adversarial approach that draws on extended family and community members to assist in resolving the dispute between the parties.
Empirical studies

- Empirical studies show that RJ often increases perceptions of fairness; as is the case with procedural justice, offenders perceive restorative justice sessions as more fair and more just than the traditional criminal justice process.
  - A recent study showed that 80% of victims felt that the process and result was fair in restorative justice cases compared with the 37% who went through the traditional criminal justice system.
  - RJ clearly has an important rehabilitative component as well as a deterrent one.

- Research suggests that RJ processes have been successful in many jurisdictions; some judicial officials are aware of its potential power. Chief Justice Elliott Maynard of the West Virginia Supreme Court has stated:
  - As we learn more about treatment for mental illness and as our jails and prisons become more crowded, the courts must learn how to use community sentencing alternatives to provide therapeutic and restorative justice.
A different way of looking at crime

- RJ involves thinking of crime in a quite different manner from the long-established picture of a violation of the state, defined by lawbreaking and guilt and subject to a criminal justice mechanism that determines blame and administers pain in a contest between the offender and the state directed by systematic rules.
- RJ instead envisions crime as a violation of people and relationships that creates obligations to make things right and justice as a process that involves the victim, the offender, and the community in a search for solutions which promote repair, reconciliation, and reassurance.
  - For restorative justice proponents, crime is defined by the harm it has caused to victims, and the primary function of the reaction against it is to repair or compensate for the harm.
Howard Zehr’s categories of needs that restorative justice addresses

(1) Accountability that addresses the resulting harms, that encourages empathy and responsibility, and transforms shame;

(2) Encouragement to experience personal transformation, including healing for the harms that contributed to their offending behavior, opportunities for treatment for addictions and/or other problems, and enhancement of personal competencies;

(3) Encouragement and support for integration into the community, and

(4) For some, at least temporary restraint.
Must keep due process in mind

• In this context, it is always critical that we keep in mind the relationship between the due process rights protected by the criminal justice system and restorative justice.
• Due process rights are also a key concern in the restorative justice process.
• Without special protection, restorative justice may become just another form of plea bargaining, a practice that debatably may lead to the deprivation of certain fundamental rights of the defendant.
RJ and defendants with mental disabilities

- Key question: Is this restoration process even “on the table” in the criminal justice system in cases involving defendants with mental disabilities (or, in the context of the wider restorative justice movement, *victims* with mental disabilities)?
  - Scholars agree that restorative justice recognizes that a criminal act has many consequences which are not addressed by the traditional model of criminal justice, but, these insights have generally not been applied (at least in the US) directly to cases involving incompetency, insanity or sentencing mitigation (the three most likely potential points of intersection for restorative justice and the cases of criminal defendants with mental disabilities).
  - On the other hand, much of the “community justice model” can be read as an attempt by the criminal justice system to respond to these challenges.
RJ and stigma

• Braithwaite sees restorative justice as a means of “dissuade[ing] hasty resort to … stigmatizing response,” noting “we should abolish … stigma as [a] doctrine[].”

• I write and speak frequently about the ravages of sanism- -- an irrational prejudice of the same quality and character of other irrational prejudices that cause, and are reflected in, prevailing social attitudes of racism, sexism, homophobia, and ethnic bigotry, one that permeates mental disability law, affecting all participants in the mental disability law system, and whose corrosive effects have warped all of mental disability law jurisprudence, and stress that underlying sanism's power is the malignancy of stigma.

• There is also some evidence that one value of restorative justice practices is to avoid the detrimental mental health consequences victims experience as a result of their contact with the adversarial criminal justice system.

• Scholars have, in fact, written about the potential “zealous” advocacy role for a lawyer in advising her client about the pros and cons of participating in a restorative justice conference.
RJ and the marginalized, 1

• But this does not necessarily consider the potential impacts on defendants in such cases.
• There is real danger that rights of those who are disempowered, excluded and vulnerable due to economic, social and racial inequalities may be at risk in restorative justice practices”), and that “power imbalances” – arising from differences such as race, class, culture, age and gender – in restorative justice programs also may pose a serious risk.
  • E.g., The extreme power imbalance present in child abuse and domestic violence cases presents a serious challenge to restorative justice.
RJ and the marginalized, 2

- Consider the value of restorative justice in the cases of individuals who are members of minority groups alienated from the criminal justice system. Often, of course, persons with mental disabilities are, similarly, often seen as “The Other” and similarly alienated from mainstream society:

- (W)e do two things: we are distancing ourselves from mentally disabled persons--the “them”--and we are simultaneously trying to construct an impregnable borderline between “us” and “them,” both to protect ourselves and to dehumanize what Sander Gilman calls “the Other.” The label of “sickness” reassures us that “the Other”--seen as “both ill and infectious, both damaged and damaging” not like us and further animates our “keen . . . desire to separate ‘us' and ‘them’.”
Until such time as the criminal justice system takes these issues seriously – in the whole range of cases involving litigants with mental disabilities, *not just* those in which questions such as incompetency or insanity are raised – I believe it is unlikely that we will ever truly create a system that comports authentically with dignity.
The perspective of the forensic psychologist

ADVOCATING RESTORATIVE JUSTICE AND INTERACTING WITHIN THE JUDICIAL SYSTEM TO PROVIDE PROACTIVE EDUCATION CONCERNING MENTAL DISABILITIES
Proactive Strategies

- Education regarding mental disorders
- Education regarding how mental disabilities are related to behaviors which result in criminal charges
- Providing rehabilitative plans which promote treatment and decrease recidivism
Opportunities for Incorporating RJ

COMPETENCY EVALUATIONS
NGI EVALUATIONS
DUAL DIAGNOSIS EVALUATIONS
MITIGATION REPORTS
Proactive strategies

- EDUCATION REGARDING MENTAL DISORDERS
  EDUCATION REGARDING HOW MENTAL DISABILITIES ARE RELATED TO BEHAVIORS WHICH RESULT IN CRIMINAL CHARGES

- PROVIDING REHABILITATIVE PLANS WHICH PROMOTE TREATMENT AND DECREASE RECIDIVISM
Steps to obtain RJ

- Obtain relevant documents (discovery, mental health records, academic records, medical records)
- Use of appropriate tests (neuropsychological, intelligence, personality testing)
- History gathering from the client and family members
- Review of prior interventions and outcomes