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Restorative Practices for Juveniles in Hawai'i, United States

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Abstract

The rule of law and restorative justice are compatible concepts that can improve and benefit juvenile justice. Hawai'i has been experimenting and successfully providing restorative practices for youth in a variety of areas including 'ohana conferencing (its version of family group conferencing), youth transition planning circles, reentry circles for incarcerated youth and for youth with incarcerated parents, solution-focused planning for homeless youth, and diversion for juvenile law violators and status offenders, from traditional justice interventions.

Keywords: juvenile justice, restorative justice, the rule of law, restorative practices, solution-focused brief therapy, restorative reentry planning circles, 'ohana conferencing

Introduction

It was May 2000, and the end of the school year on the island of O'ahu in Hawai'i. My home telephone rang. It was my 13-year-old son's school principal calling to tell me that our son had been "hit in the head by another student" (Walker, 2013). When I learned that the other student was a boy who had a history of fighting with our son, I became more worried and afraid of the possibility of further violence. I felt some relief and reassurance that the school took immediate action to protect our son and that there was a school rule against hitting, which was upheld and applied. My husband and I did not, however, agree with the school's rule that automatically expelled the boy from school for three days. I asked the principal to please not suspend the boy from school, but he said it was the rule and there was nothing we could do about it. We believed keeping

the boy out of school was unhelpful for him, and that it would only exacerbate the problem and risked making him more resentful toward our son. It was also discouraging that we had no input into what the consequences for the boy would be. Additionally, it felt unfair that none of us including our son, the boy, and his family, were consulted at all about what to do about the problem. It seemed clear that until the boy and our son worked out their differences, our son was at a risk for harm, and I would continue to worry about his safety.

Fortuitously, when our son was assaulted I happened to be conducting a juvenile justice pilot project diverting arrested youth to restorative justice conferences (Walker, 2002). Also fortunate for us was having a facilitator for the pilot project who happened to live in our neighborhood, and who kindly agreed to arrange and conduct a restorative conference with the boy, his family, and our family at the boy's intermediate school.

The restorative conference was held two weeks after the assault. On the afternoon that the conference was scheduled, the principal from the intermediate school was suddenly unavailable to participate, and there was no one else at the school who could, so we could not have the conference there. Again luckily, the elementary school, which both boys had attended and each had younger siblings attending, was close by. The elementary school principal immediately changed her schedule to accommodate and participate in the restorative conference. This principal had known our son and the boy for years and was trained in restorative facilitation. She appreciated the value of the restorative conference and arranged to have the conference in her office after being asked only fifteen minutes before.

During the conference the boy, my son, husband, the boy, and his father talked freely. Through open discussion we came to see we were more alike than different. We also saw the kindheartedness in each other. We came into the restorative conference apprehensive and admittedly with some biases and misgivings about each other, but the conference gave us the opportunity to openly communicate our shared values. Our participation in the restorative conference helped us leave that day friends.

While restorative justice was needed when our son was hit, the rule against hitting others was just as necessary. The boy needed to know he could not assault others no matter how much he disagreed with them, and we all needed to know the rules would be fairly applied, including the boy and his family. At the same time, we also needed restorative justice and a way to address our harm caused by the violation of the rule.

Over the following six years that the boys attended school together, they never had another negative incident. My son even defended the boy one day when they were about 17 years old. I was driving him home after school had ended and we saw the boy across town about 2 miles from the school. It was obvious that the boy had been truant. "Humm," I said, "I guess he didn't go to school today," I said out loud in the car. My son responded, "He walks fast mom." Ten years after we participated in the restorative conference, our son works with youth. He called me recently. "Mom, I need some restorative justice stuff. Some of the kids are fighting. One girl is picking on another kid. How do I do one of those circles?"

With deep sadness, however, I am very sorry to report that the boy who hit my son back in 2000, died shortly after he finished high school at the age of 19. Tragically he

was shot and killed by another teenager. His family and our community still grieve for his loss.

This chapter discusses the need for both the rule of law and restorative justice and describes how restorative justice has been applied and is evolving in Hawai'i for juveniles. Hawai'i's experiments providing restorative interventions for youth, demonstrate how restorative justice strengthens individuals and communities, and is a necessary component to the juvenile justice system.

Defining the Rule of Law and Restorative Justice

“The rule of law is an ideal that relates to legality” (Tamanaha, 2012, p. 234). Rules and laws set boundaries for human behavior and establish group expectations for community members. The rule of law has been recognized as a vital component for societies since Ancient times. In 350 BC, Aristotle said, "The rule of law is better than the rule of any individual” (Aristotle. *Politics*, Book 3#3:16. n.b.).

While most agree that the rule of law is necessary for stable communities, there is no universal consensus on its definition. How the rule of law is defined can be confusing even for scholars (Tamanaha, 2004).

Brian Tamanaha, an American law professor, is a rule of law scholar who “distinguishes between formal and substantive definitions of the rule of law (Moller & Skaaning, 2010 p. 5). The formal definition has also been called “thin” and the substantive definition as “thick” by rule of law scholars.

The following is Tamanaha's definition of the formal or “thin” definition, which he believes can be applied to “a broad range of systems” (Tamanaha, 2007, p. 3):

The rule of law, at its core, requires that government officials and citizens are bound by and act consistent with the law. This basic requirement entails a set of minimal characteristics: law must be set forth in advance (be prospective), be made public, be general, be clear, be stable and certain, and be applied to everyone according to its terms. In the absence of these characteristics, the rule of law cannot be satisfied (Id.).

The “thick” or substantive definition of the rule of law includes references “to fundamental rights, democracy, and/or criteria of justice or right” (Id.).

Like the rule of law, the definition of restorative justice also lacks universal agreement, but minimally its “thin” definition is that it is concerned with people’s needs after they have been harmed by wrongdoing and social injustice, and how people affected by the harm might find healing (van Wormer & Walker, 2013).

Restorative justice, like the rule of law, can also have a broader, or “thicker,” meaning. “Restorative justice is a broad term which encompasses a growing social movement to institutionalize peaceful approaches to harm, problem-solving and violations” (Suffolk University, 2012). Restorative justice is “victim-centered and looks at how ‘victims,’ very broadly defined, are affected and can be healed” (Boyes-Watson, 2003).

Restorative justice (RJ) and restorative practices are different concepts. RJ is a philosophy while restorative practices represents the application of the philosophy to people involved in specific incidents of wrongdoing or social injustice. Ted Wachtel is the founder of the International Institute of Restorative Practices, which provides training, and an accredited graduate school for the advanced study of restorative justice. Wachtel defines restorative practices as: “a social science that studies how to build social

capital and achieve social discipline through participatory learning and decision-making (Wachtel, 2013, p. 1).”

Restorative practices could be used in place of or in addition to detention and punishment. For adults, it is estimated that 97 percent of people convicted of felonies in the United States plead guilty to offenses (Givelber & Farrell, 2012). “Restorative justice emerged in the 1970s as an effort to correct some of the weaknesses of the western legal system while building on its strengths” (Zehr, 2013). Restorative justice is advocated for children and youth crime victims (Gal, 2011).

In our son’s case, we desired a restorative approach that could resolve the problem and help everyone heal. Our family, the boy who hit our son, and his family, were all affected from the assault and all of us participated in the restorative conference. The elementary school principal participated too. She was there as a supporter for the boys who she had known for many years. She was also indirectly affected because both boys’ siblings attended the school she administered.

In a restorative practice, each individual affected is respected, and is offered equal participation opportunity, but no one is forced to participate. In my son’s case, he was not initially interested in participating in a restorative encounter, and he did not want to meet with the boy and his family. When he came home from school the day he was hit, I told him, “We need a restorative conference.” He rolled his eyes, and adamantly said, “No way!” I explained to him, “I can’t keep worrying about you getting hurt. We need to work this out. I need a conference.” It was through motherly pressure that my son agreed to participate, and afterwards he was satisfied he had. ‘I’m glad we did it,’ he said later.

Indeed, it was his participation in the restorative conference that resolved things between he and the boy. It was also because of his experience participating in the conference that he understood its value, and was able to see the usefulness of restorative practices for the youth he works with ten years later.

Application of the Rule of Law and Restorative Justice

The rule of law is necessary for establishing legal boundaries for human behavior and the legal mechanisms for dealing with violations of rules. Restorative justice is necessary for dealing with law violations that harm people to help them heal and rehabilitate. Both the rule of law and restorative practices are necessary for juvenile justice.

One legal author has discussed the rule of law for applying due process to restorative practices provided by community agencies. He suggests that administrative law principles be used to deal with any dissatisfaction in restorative outcomes (Archibald, 2013). Other legal authors have discussed the interactions of RJ and the rule of law principles of legality and right to a fair trial.¹ There is compatibility between the rule of law and restorative justice.

To institutionalize RJ in the criminal justice system, and provide people with opportunities to engage in restorative practices, it may be necessary to adopt a thicker definition of the rule of law. Providing people harmed by crime and people who commit crimes with the opportunity to participate in restorative practices would become a rule of

¹ The right to a fair trial would be a “thicker” definition of the rule of law according to Tamanha as discussed above.

² Efforts are made here to not refer to people who have been harmed or have harmed others with the labels

law beyond the formal or thin requirements that some scholars believe is minimally necessary (Tamanaha, 2007).

Hawai'i's Restorative Practices For Children and Youth

A variety of restorative practices have been developed and benefited children and youth in Hawai'i for many years. Most of the projects have been evaluated and described in publications including the following.

Child Welfare and Protection

Native Hawaiians have been using *ho'oponopono*, a restorative practice, for centuries to deal with interpersonal conflicts for families and children (Hosmanek, 2012). Modern restorative practices for Hawai'i's children and youth involved in child welfare and child protection have also been used since 1996 through the *'ohana conferencing* model for families (Walker, 2005).

The *'ohana conferencing* model is Hawai'i's version of *family group conferencing*, which is used all over the world today for child protection and family welfare (Asscher, et al, 2014). *'Ohana conferencing* outcomes have been studied and have been shown to be more helpful for children for several reasons. First, children, especially adolescents in foster custody suffer increased risks for health problems, which increase with the frequency of foster placements (Gramkowski, et al, 2009). Second, youth who are placed in foster care with relatives (kinship care) do better than those placed with unrelated families (Id.). *'Ohana conferencing* outcomes showed those children who had conferences stayed in the same placement and were not moved around

as frequently as children who do not have a conference, and that children were more often placed with families than children who did not have ‘ohana conferences (Walker, 2005).

Juvenile Justice Applications

Another restorative justice project in Hawai’i for juvenile offenders was shown to have better outcomes than traditional criminal justice processes (Walker, 2002). In 1999 this restorative pilot project was developed that diverted 102 juvenile offenders from the criminal justice system. Instead of sending youth to traditional diversion programs or to court, they were diverted to restorative conferences like the one our family participated in. A total 405 people including youth and adults participated in the project, which used an experimental design to show it was more helpful for participant satisfaction (healing), obtaining restitution when it was requested by victims (only a small number requested restitution and most wanted only an apology), and youth who had conferences had a significantly lower rate of escalating to commit violent crimes. Additionally, the restorative conference intervention benefited even a harmed child and his family where the juvenile offender denied accountability for his wrongdoing (Walker, 2002).

Hawai’i’s restorative juvenile justice study was reviewed as part of a meta-analysis of 28 experimentally designed diversion programs for youth, which looked at other interventions including family therapy and youth/teen court (Schwalbe, et al., 2011). “Results of this study recommend against implementation of programs limited to case management and highlight the promise of family interventions and restorative justice” (Id. p. 26). Other experimental research on teen or youth court has shown that intervention increases youth criminality. Researchers in that study warn: “The results of

this evaluation should signal practitioners and funders to use caution when implementing TC [teen court] programs and to make rigorous evaluation a priority (Stickle, et al, 2008, p. 154).

Hawai'i's restorative diversion project has been cited by the United Nations' UNICEF organization as a resource for the restorative diversion of youth from the criminal justice system (UNICEF, 2012).

Foster Youth Emancipation and Transition Planning:

In 2004 Hawai'i began applying a transition planning process for youth emancipating from state custody and foster care (Walker, 2005). Restorative Justice scholar John Braithwaite wrote about the concept of youth making their own plans for emancipation and transition out of state custody (Braithwaite, 2004), and the idea was applied to develop a specific model for foster youth in Hawai'i (Walker, 2005).

In Hawai'i, youth who are in foster custody can begin having transition planning circles with their invited supporters and make plans for how they will become independent after exiting foster care, while they are still in state custody. The process is provided by the non-profit agency that provides 'ohana conferencing (EPIC, 'Ohana, Inc, 2014). The youth circle model is strength based and goal oriented, and results in a neatly prepared written plan for the individual youth having the circle. Follow up transition circles are also encouraged so youth can learn about planning and understand goals may not be met as quickly as planned or that their goals may change. Ten years since the youth transition planning process was developed in 2004, over 1000 transition circles have been held for youth in Hawai'i.

Homeless Youth

The *Waikiki Youth Circle* was developed and piloted for groups of homeless youth in Hawai'i who suffered serious social injustices and victimization, along with a few youthful offenders. The project provided a number of circles over a four-month period with an average of five youth participating at each circle. Forty-four percent (44%) of the youth who participated succeed in meeting goals that they set for themselves at the circles including finding employment and housing (Walker, 2008).

Restorative Reentry Planning Processes for Incarcerated Youth:

In Hawai'i incarcerated youth, and youth with incarcerated adult parents, have also benefited from a reentry planning process. The *Huikahi Reentry Circle* has been provided for youth in correctional institutions, and for youth whose parents are incarcerated (Walker & Greening, 2010). The process for adults is being replicated in other states including New York and California.

The reentry circle planning process for youth and adults, addresses reconciliation and other needs for a life desisting from crime and substance abuse (Walker, 2009). The circles also address victimization that the children and family members have suffered and have been evaluated to show healing can result (Walker, Tarutani & McKibbon, in press).

Despite the massive incarceration rates in the United States, the criminal justice generally fails at preventing wrongdoing and assisting victims. Additionally, without parental rehabilitation and reentry efforts, the children of incarcerated parents suffer (DHHS, 2007). Criminal justice experts commonly believe that the system provides a “criminal process [that] has become notorious for ‘revictimization’ or ‘secondary victimization,’ for many child victims” (Gal, 2011, citations omitted). The reentry circle

model helps children and families heal from the shame of incarceration and to also make concrete plans for how to desist from crime and substance abuse (Walker & Greening, 2013).

Application of Solution-Focused Methodology to Restorative Practices

In 2002 *solution-focused brief therapy* (SF) methodology was first used and applied with a restorative intervention in Hawai'i for people harmed by crime² where the person responsible for causing the crime does not participate in the process (Walker, 2004). Most criminal cases go without anyone ever being identified or arrested in the United States. Only about 21 percent of all reported crimes result in an arrest or with anyone identified sufficiently for an arrest as the person responsible for causing the crime (U.S. Department of Justice, 2009).

Solution-focused brief therapy co-founder, the late Insoo Kim Berg, assisted me in developing SF applications to our restorative processes in Hawai'i, including the youth circle transition planning model for foster youth described above, and our reentry process for people in prison (Walker, 2005; Walker, 2013).

Following Ms. Berg's assistance we have also applied the SF model of optimism and goal orientation in a 12-week cognitive course for people in prison (Walker & Sakai, 2013). Many people in prison do not know who they hurt, e.g. burglaries, thefts, etc. The 12-week training helps imprisoned people find ways to make reparations and amends for their harmful behavior to their unknown victims without requiring personal contact with

² Efforts are made here to not refer to people who have been harmed or have harmed others with the labels victims or offenders and in the event the labels are used it is only for expediency purposes only.

them. To date over 400 imprisoned adults have participated in this solution-focused restorative justice training program. There is also an effort to apply aspects of the adult cognitive program to incarcerated youth in Hawai'i (Walker, 2014).

In addition to successfully applying the solution-focused approach to restorative justice programs, the SF approach is used frequently by *therapeutic jurisprudence* courts (King, 2009). "Therapeutic jurisprudence is the study of the role of the law as a therapeutic agent" (Wexler, 1993, p. 280).

Hawai'i's Juvenile Justice Law Reform

In 2013 the Hawai'i Legislature amended its juvenile justice law to provide for the "informal adjustment" of juvenile law violators to include "restorative justice programs" (Hawai'i Revised Statutes, 2013).

Later in 2013, the State analyzed the almost \$200,000 it spends in 12 months to incarcerate one juvenile (Hawai'i Juvenile Justice Working Group, 2013). It was determined that this cost was unjustified because imprisonment, and the expenditure of these funds, did not prevent seventy-five percent of the youth imprisoned from repeating crime after their release (Id.) Also juveniles who committed minor offenses, non-violent offenses, and status offenses were being incarcerated at an alarmingly high rate when imprisonment itself can lead to criminality (Department of Justice, 2014). These concerns lead to a working group being convened in August 2013, of which I was a member. We met with the help of the PEW Foundation, a non-profit "global research and public policy organization" (PEW, 2014).

“The Working Group was charged with analyzing Hawaii’s data, policies, and practices; reviewing research on evidence-based principles and national best practices; and recommending policies that will move Hawaii toward a more effective, equitable and efficient juvenile justice system” (Hawai’i Juvenile Justice Working Group, 2014 p. 2). The working groups efforts resulted in a new juvenile justice law in Hawai’i reflecting “justice reinvestment” (Hipp, 2014, p. 1).

The policies contained in H.B. [house bill] 2490 advance priorities in three areas:

- Reduce the use of secure confinement and protect public safety

Limiting space in expensive secure facilities to the most serious juvenile offenders will help Hawaii produce the greatest public safety benefit from the juvenile justice system. In addition, providing certain youth adjudicated for low-level crimes with the opportunity from early interventions will ensure that they are held accountable and that resources are put to their best use.

- Strengthen community supervision and probation practices

Effective community supervision will allow Hawaii to maximize the public safety return on taxpayer investments in juvenile justice. By grounding probation practices in data and research, the state can better hold lower-risk youth accountable while reducing recidivism.

- Sustain effective practices and cultivate stakeholder collaboration

Regular collection and analysis of data and outcomes are necessary to continue improving and maximizing public safety returns. By increasing avenues for collaboration across agencies, H.B. 2490 allows for efficient system management and case planning, enhancing decision-making and resource allocation (Hipp, 2014, p. 1-2).

The new law prevents juvenile incarceration for status offenses unless the juvenile is on probation for a felony (something that I argued against). The new law also provides for more community-based services. It does not specifically mention restorative

justice, but during the working group meetings, we discussed RJ, and the state Office of Youth Services is promoting it with community service providers.

Restorative practices have been shown to be more healing for people than current punitive practices that focus mainly on offenders. Restorative practices can help people harmed, and those who did the harming too, to develop resiliency. Unfortunate things happen to people including being assaulted at school as our son was. Engaging in harmful behavior is also unfortunate. The opportunity to look at these events and outcomes in terms of how it might strengthen a person, compared to how it can diminishes a person, has been shown to be successful educational strategy (Hollister, 1967). Further, restorative processes as a whole help promote resiliency (Walker, 2000). It is my hope that further advancements will be made in Hawai'i to inform people about restorative practices, and to provide them for all people harmed by crime, for juveniles in the justice system, and for the community.

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