MAKING SPACE FOR GOOD THINGS TO HAPPEN: A RESTORATIVE APPROACH TO THE SCHOOL-TO-PRISON PIPELINE

Jon Powell*

I. INTRODUCTION

Marquis was new in the high school. He had just moved to North Carolina from New York City. Marquis had a rough life there. He was one of five kids in a poor black family with no stability. His aunt, who had ties to North Carolina and a heart of gold, took Marquis and his siblings in because she thought the kids would have a better chance in a rural environment.

It did not take long for the rumors to fly. Associates started telling Marquis how a big, white, redneck kid in the next-door middle school named Kyle was talking about him. Throwing around the “N” word and talking about showing him “how things are done around here.” “You ain’t gonna let that stand are you?” Word gets back to Kyle that “New York” is ready to fight. The fight is arranged by the instigators: “Meet right after school in the field beside the high school.” Kyle showed up and Marquis met him with a heavy metal necklace wrapped around his fist. This was the first time they had actually ever seen each other. Kyle and Marquis said a few choice words, and Marquis “popped” Kyle in the mouth. Because of the commotion, the school administrator was already on his way, but the fight was broken up before Kyle could throw a punch—he just stood there cussing and bleeding. Marquis was suspended from school and charged with assault

* Jon Powell is a Clinical Professor of Law and Director of the Restorative Justice Clinic at the Norman Adrian Wiggins School of Law at Campbell University in Raleigh, North Carolina. The author would like to acknowledge Devon Karst for her assistance with the publication of this Article. Ms. Karst is a third-year law student at Campbell University, where she is the author’s research assistant and has participated in the Restorative Justice Clinic, serving as the student assistant for a year and a half.

1 Interview with Marquis, Participant, in Buies Creek, N.C. (Feb. 2005). The names have been changed for confidentiality purposes because the cases involve minors. Each case referenced in this Article comes from the author's North Carolina program.
with a deadly weapon inflicting serious injury—a felony.\(^2\) Marquis was sent into the juvenile justice system.\(^3\)

Tyrone was a little kid in sixth grade and was smaller than most boys his age.\(^4\) For weeks, every morning when he got to school he was bullied by some bigger and older kids. One morning he was sick of it, and when the bullying started, he took off his shoe and threw it at one of the kids. He missed, and the shoe skittered down the hall toward one of Tyrone’s teachers who heard the commotion and stuck her head out in the hallway to see what was going on. All she actually saw was Tyrone throwing his shoe. She motioned for Tyrone to come to her, and in his anger he yelled “I’ll pop a cap in you!” She reported this to the school resource officer who promptly charged Tyrone with “communicating threats.”\(^5\) Tyrone was suspended from school and sent into the juvenile justice system.\(^6\) At trial, he was convicted by a judge who lectured him that this kind of behavior would not be tolerated in the school system.\(^7\) The judge placed him on probation. Because Tyrone did not have a family to help him succeed with his probation, he was brought back in front of the judge on four more occasions with conditions of probation increasing each time. Finally, the State removed Tyrone from his family and placed him in a therapeutic foster home.\(^8\)

James lived in a poor, rural, eastern county in North Carolina.\(^9\) He was in touch with his mother but he was raised mainly by his

---

4 Interview with Tyrone, Client, in Buies Creek, N.C. (2001). The names have been changed for confidentiality purposes because the person being interviewed is a minor. This situation comes from the author’s North Carolina program.
5 See § 14-277.1.
6 Owen et al., supra note 3.
9 Interview with James, Participant, in Burgaw, N.C. (May 1, 2014). The names have been changed for confidentiality purposes because the person being interviewed is a minor. This situation comes from the author’s North Carolina program.
grandmother. He did “okay” in elementary school, but in middle school he started acting out and began to get into trouble. Office visits turned into suspensions and suspensions turned into involvement with the juvenile court. All of that turned into James dropping out of school at the age of sixteen.\textsuperscript{10} That turned into hanging out with the wrong crowd, which lead to his first conviction for a marijuana charge. He was placed on probation. James said that in his neighborhood when someone “catches” their first conviction they just say, “Oh well. It’s all over now and you just go down that road.” That road led James to start carrying a gun, and at age eighteen, during a fight in the street, he shot a man through the chest. That man died. James pled to second-degree murder and is now in prison.\textsuperscript{11} What is largely forgotten is that there are two families and two communities who have lost two young men: one to prison and the other to murder.

These kinds of scenarios are very frustrating when defending clients in the juvenile court system. So many juvenile cases start with an incident in school. The greatest frustration is that it seems in so many cases, once a kid gets into the juvenile court system they cannot get out.\textsuperscript{12} It is so sad to watch juveniles, like Tyrone, come back to court time after time and ultimately be separated from their family.\textsuperscript{13} Especially when, as in Tyrone’s case, it all started with an incident that could have easily been handled in the school, perhaps with some conversation between he and the boys who were picking on him and then between Tyrone and the teacher whom he threatened out of his own feeling of victimization.\textsuperscript{14} The phrase that has since become popular to describe the frustration with these punitive measures is the “School-to-Prison Pipeline.”\textsuperscript{15}

\begin{itemize}
\item \textsuperscript{10} \textit{Losing Your Driver’s License}, \textsc{Pitt County Sch.}, http://www.pitt.k12.nc.us/page/101 (last modified May 30, 2013).
\item \textsuperscript{11} N.C. GEN. STAT. § 15-172 (1994).
\item \textsuperscript{12} \textsc{Tamara Flinchum & Ginny Hevener, North Carolina Sentencing and Policy Advisory Commission, Juvenile Recidivism Study: FY 2006/07 Juvenile Sample 39} (2011) (finding that recidivism rates are much higher when individuals are incarcerated in the juvenile justice system prior to their reaching the age of majority).
\item \textsuperscript{13} Advocates for Children’s Servs., \textit{supra} note 8.
\item \textsuperscript{14} \textsc{Owen et al., supra} note 3.
\item \textsuperscript{15} \textsc{See generally What is the School-to-Prison Pipeline?}, \textsc{Am. Civ. Liberties Union}, https://www.aclu.org/fact-sheet/what-school-prison-pipeline?redirect=racial-
II. THE SCHOOL-TO-PRISON PIPELINE

One definition of the School-to-Prison Pipeline is “the set of policies and practices that make the criminalization and incarceration of children and youth more likely and the attainment of a high quality education less likely. It is the emphasis of punitive consequences, student exclusion and justice system intervention over students’ right to an education.”

The School-to-Prison Pipeline operates both directly and indirectly. Through the misapplication of zero-tolerance school discipline, schools directly send children and youth into the juvenile and criminal system by criminalizing a wide variety of student behavior. The dramatic increase in the use of these extremely severe disciplinary practices has resulted in hundreds of thousands of arrests and referrals of students to the juvenile and criminal justice system each year. Many—and perhaps most—of these school-based arrests are for misdemeanor offenses that do not pose a serious, ongoing threat to school safety and would once have been addressed by a teacher or principal but are now falling to the police and juvenile courts.

“[A]nd while it is affecting more students in more communities than ever before, it continues to fall hardest on students of color and students with disabilities.”

This definition and explanation describes the three scenarios laid out in the beginning of this Article. In each of those cases, there were incidents in school that ended up in the court system, and the person

---

17 Id.
18 Id.
19 Supra pp. 83-84.
charged was a person of color.\textsuperscript{20} There is a growing body of evidence to show that once students are removed from school they “experience decreased academic achievement, further fueling negative attitudes and leading to increased dropout rates.”\textsuperscript{21} Because of the belief that punitive practices “will create safer school environments,” schools rely upon them.\textsuperscript{22} Thalia González argues that “[t]his is simply not true.”\textsuperscript{23} “[T]he 2006 American Psychological Association ten-year evidentiary review of zero-tolerance polices concluded [that] the presence and use of exclusionary zero tolerance policies did not improve school safety.”\textsuperscript{24} In addition, the study concluded that the overall school climate had less than satisfactory ratings in school with higher suspensions and expulsions of their students due to zero-tolerance policies. This is because suspensions and expulsions have little correlation to future student misconduct.\textsuperscript{25} So, if punitive practices do not make schools safer, are actually detrimental to future development of our young people, and deteriorate school climate, it makes sense to look for a better way of doing things.\textsuperscript{26}

\textbf{III. Restorative Justice}

For many situations, restorative justice seems to offer a better way.\textsuperscript{27} One way to understand restorative justice is to contrast its theory to the theory of retributive justice by looking at the questions that each theory asks.\textsuperscript{28} Retributive justice asks three basic questions: what crime has been committed, who did the crime, and what do they

\begin{thebibliography}{99}
\bibitem{20} Supra pp. 83-84.
\bibitem{22} \textit{Id.} at 297.
\bibitem{23} \textit{Id.}
\bibitem{25} \textit{Id.}
\bibitem{26} \textit{Id.} at 297-98.
\bibitem{27} \textit{Id.} at 281.
\bibitem{28} \textit{Id.} at 282.
\end{thebibliography}
These questions assume that a law has been broken; therefore, the offense is against the State and not another person, and the focus of the State’s response is on who did it and what kind of punishment they deserve.\textsuperscript{29} Restorative justice asks three very different questions: who has been harmed by criminal behavior, how have they been harmed, and what needs to be done to address the harm?\textsuperscript{30} These questions assume the offense is against another person and focus on how that person has been affected and on what they need.\textsuperscript{31} Howard Zehr writes about both theories in his book, \textit{Changing Lenses, A New Focus For Crime and Justice}.\textsuperscript{32} He states,

\begin{quote}
Crime is . . . at its core a violation of a person by another person, a person who himself or herself may be wounded. It is a violation of the just relationship that should exist between individuals . . . Crime is not first an offense against society, much less against the state. Crime is first an offense against people, and it is here that we should start.\textsuperscript{34}
\end{quote}

Zehr lays out four basic dimensions of harm: (1) to the victims, (2) to interpersonal relationships, (3) to the offenders, and (4) to the community.\textsuperscript{35}

The retributive lens focuses primarily on the latter, social dimensions. It does so in a way that makes community abstract and impersonal. Retributive justice defines the state as victim, defines wrongful behavior as violation of rules, and sees the relationship between victim and offender as irrelevant. A restorative lens identifies people as victims and recognizes the centrality of the interpersonal dimensions. Offenses are defined as

\begin{flushleft}
\textsuperscript{30} \textit{Id.}
\textsuperscript{31} \textit{Id.}
\textsuperscript{32} \textit{Id.}
\textsuperscript{33} HOWARD ZEHR, \textit{CHANGING LENSES: A NEW FOCUS FOR CRIME AND JUSTICE} 1 (3d ed. 2005).
\textsuperscript{34} \textit{Id.} at 182.
\textsuperscript{35} \textit{Id.}
\end{flushleft}
personal harms and interpersonal relationships. Crime is a violation of people and of relationships.36

As of June 2015, the world is still reeling from the tragic event in Charleston, South Carolina, where a white man attended a bible study at Emanuel African Methodist Episcopal Church with the intention of killing black people and, after an hour, began shooting.37 Nine people died.38 Listening to the news and reading the newspaper, one cannot help but see the need for both our traditional retributive justice system and restorative justice. From a retributive standpoint, we are beginning to answer the questions asked above.39 We know the law against murder has been broken, we have arrested the man we believe broke that law, and now we will decide what he deserves.40 The governor of South Carolina and other politicians involved are calling for the death penalty.41 Will that punishment meet the needs of all of those harmed, especially family members of the nine individuals slain? Maybe, but so far no family member has called for the ultimate punishment.42 As a

36 Id.
37 See Nick Corasaniti et al., Church Massacre Suspect Held as Charleston Grieves, N.Y. TIMES (June 18, 2015), http://www.nytimes.com/2015/06/19/us/charleston-church-shooting.html.
38 See Funerals Begin for Three Men, Six Women killed during Bible Study at Emanuel AME Church in Charleston, FOX NEWS (June 25, 2015, 10:11 PM), http://fox6now.com/2015/06/25/funerals-begin-for-three-men-six-women-killed-during-bible-study-at-emanuel-ame-church-in-charleston/ [hereinafter Funerals Begin for AME Charleston Church].
39 See ZEHR, supra note 33.
42 See Charleston Church Shooting Suspect to Face Death Penalty, Prosecutor Says, CBS NEWS (Sept. 3, 2015, 1:43 PM), http://www.cbsnews.com/news/charleston-church-shooting-suspect-to-face-death-penalty-prosecutor-says/ (discussing the debate as to what is the appropriate punishment for the criminal offenses at hand, as those
matter of fact, the first responses from those family members do not even mention punishment.\textsuperscript{43} The front-page headline from the day after the shooting in the Charlotte Observer reads, "Raw Emotions and Forgiveness."\textsuperscript{44} The story reads,

In an extraordinary display of grief and forgiveness, relatives of people killed in a shooting at a storied black church here addressed the suspect in court on Friday, one after another offering an emotional mix of blessings and pleas for peace.

"We welcomed you Wednesday night in our Bible study with open arms," Felicia Sanders told Dylann Roof, the suspect in the mass shooting that officials have called racially motivated. She was in the church when the gunman fatally shot nine people, including her son, Tywanza; Sanders survived by pretending to be dead.

"You have killed some of the most beautiful people that I know," she said. "Every fiber in my body hurts, and I'll never be the same. Tywanza Sanders was my son, but Tywanza was my hero."

But like some of the others, she added, "May God have mercy on you."

Nadine Collier, the daughter of another victim, Ethel Lance, her voice choked with sobs, said: "I will never talk to her ever again. I will never be able to hold her again. But I forgive you. And have mercy on your soul. You hurt me. You hurt a lot of people, but God forgive you, and I forgive you."\textsuperscript{45}

\textsuperscript{43} Knapp, \textit{supra} note 40.
\textsuperscript{45} \textit{Id.}
So, as family members who are most closely tied to the harm are expressing their deep hurt and loss, they are beginning to answer the questions that are asked by restorative justice. They are beginning to tell us who has been hurt, how they have been hurt, and what they need to begin to heal.

IV. CHOOSING BETWEEN THEORIES OF JUSTICE

So, in this case, how do we decide which theory of justice to choose? Retributive justice and restorative justice theories are helpful when dealing with heinous crimes that have enormous levels of harm and risk. One way to get the most comprehensive resolution is to ask not only what does the offender deserve, but as Zehr asks,

If crime is injury, what is justice? . . . If crime harms people, justice should be a search to make things right to and between people. When a wrong occurs, the central question ought not to be, “What should be done to the offender?” or “What does the offender deserve?” Instead, the primary question ought to be, “What can be done to make things right?”

Instead of defining justice as retribution, we will define justice as restoration. If crime is injury, justice will repair injuries and promote healing. Acts of restoration—not further harm—will counterbalance the harm of crime.

Instead of the more punitive measures that bring so much harm to the students who experience them, what is the proper way to incorporate restorative practices into processes that schools can use? In my first restorative justice training, I was exposed to a documentary—Meeting With a Killer: One Family’s Journey—about victim-offender dialogue in a murder case. After watching the film I thought it was the

46 See ZEHR, supra note 33; see also Knapp, supra note 40.
47 See Knapp, supra note 40.
48 See generally ZEHR, supra note 33 (discussing how restorative and retributive justice work together).
49 Id. at 186.
most powerful thing I had ever seen and I knew that I wanted to help bring victim-offender dialogue in murder cases to North Carolina. Establishing a protocol in North Carolina is a work in progress; however, over the last couple years, progress was made on a case-by-case basis. The victims’ family members and offenders in murder cases find the process of information sharing very helpful.50

As we work on these cases I am constantly reminded that one reason we work with kids is to try to give them a path that avoids dropping out of school and winding up on a road that leads to murder and the severe trauma that comes along with it.51 The clinical program at Campbell Law School uses the same victim-offender model of facilitated dialogue that is used in the documentary, but in much less serious cases in juvenile court and local schools.52 To date, the clinic has received over 800 referrals since starting in 2003. One purpose of this Article is to help others start similar restorative justice programs. The following pages will lay out where our dream started and how it came to be reality, but first it helps to experience a typical outcome, like when the situation between Kyle and Marquis were referred away from the court and into our program.53

From: Anthony Baker
Sent: Saturday, February 12, 2005 12:43 PM
To: Andrew Baker
Cc: Jon Powell
Subject: Re: mediation case = basketball game

Dear Andrew:

Interesting mediation last night at the law school.

First is a white kid, 14 in middle school (failed). Daddy is dead, mama is handicapped and unemployed (he lives with his little sister).

52 MEETING WITH A KILLER: ONE FAMILY’S JOURNEY (Jackson Films 2001) [hereinafter MEETING WITH A KILLER].
53 See supra Part I.
Mama has had multiple deadbeat boyfriends that have beat her and made life miserable for the kids. Alcohol, drug problems, throughout the family, though the kid seems clean and somewhat responsible. Lived with mama’s father (grandfather), himself an unemployed alcoholic, until the last of a series of fist fights between grandpa and kid drove them out of his house. Lived in lots of places; bad student (who’s surprised). “Not racist!” but finds identity with a group of down and out white kids that love to hunt, fish, and use the “N” word. Likes rap music and sports, especially basketball.

Second is a black kid, 14 in high school (not a terrible student). NO idea who daddy is... in fact, his last name (Samoan sounding) was picked by mama to fill in birth certificate because she liked how it sounded. Harnett County by way of NYC, fairly recently. Mama a drug addict who is “going to get it together” one day (5 kids, none with her). Kid goes from Mama to grandma (died ) to great grandma (died ) to uncle & aunt, uncle left aunt, who kept 5 kids, decided after 30 years that NYC was toxic for black, poor families (to quote post-modern sage, Dr. Phil, “Ya’ think?”) and moved to her ancestral Harnett County. Kid freaks out -- you ain’t in Queens no mo! -- and finds himself regularly in fights, usually with white kids, usually involving the “N” word... Likes rap music and sports, especially basketball.

What are the odds of these kids meeting on some nameless field in some hard scrabble southern county and pounding the heck out of each other?

What are the odds of them meeting over a mediation table because some hard boiled but soft hearted DA saw clearly the absolute futility of the court process in trying to reach these kids?

What are the odds of them talking with each other, listening to each other and finding meeting ground with each other, symbolized by handshakes and sincere apologies?

What are the odds of them meeting together over pizza dinner with their families (happened last night)?

What are the odds of them prosecuting their shared interest in basketball by together being guests of the Campbell basketball program at a Fightin’ Camels’ double header next Saturday (seats right behind
the Campbell bench)?

_No, it ain’t world peace . . . but . . ._

_Strange work I’ve been called to._

_Your camera is in, and waiting for you. Our prayer is that it is filled with wonders, and that you bring out every one . . ._

_Love, as always, and your parents’ sincere prayers in Christ for you, which is the best we have to give . . ._

_Dad_

_P.S._ Basketball game was very cool. Took kids on tour of campus; they asked a lot of questions about college, as though the notion was brand new in their heads, and cool, and growing. Really liked the “college girls” . . . ! Ate together, very warm hugs between them at the end -- Kyle (white kid) said, “Take Marquis home first so I can see where he lives . . .”. No, it ain’t world peace. But . . .

Tony Baker wrote the preceding e-mail to his son shortly after he and I completed a successful mediation between Kyle and Marquis, who had gotten into a fight in Harnett County. Marquis had used a heavy metal necklace, wrapped around his fist, to hit Kyle, busting his lip. A sworn law enforcement officer—who is permanently assigned to the school and is referred to as a school resource officer—investigated the fight and decided to charge Marquis with assault with a deadly weapon inflicting serious injury. Because Marquis was under the age of fifteen, he was considered a juvenile for criminal offenses in North Carolina.

Once an officer decides to charge a juvenile, he sends a complaint to the local office of juvenile justice. The first person to

---

54 E-mail from Tony Baker, Mediator, to Andrew Baker, Son (Feb. 12, 2005, 12:43 EST) (on file with author).
55 Interview with Marquis, _supra_ note 1.
58 See generally id. § 7B-2100(3) (stating that the officer must “select the most appropriate course of action to the situation, the needs of the juvenile, and the
receive this complaint is a juvenile intake counselor.\textsuperscript{59} A juvenile intake counselor evaluates the case for proper jurisdiction and determines whether the case can, and should, be diverted away from the court or whether the facts warrant petitioning the case into the juvenile court.\textsuperscript{60}

Marquis’s case was scheduled for court. Because the charge was a felony and Marquis was fourteen years old, the prosecutor could petition the court for a hearing and ask that Marquis be prosecuted as an adult.\textsuperscript{61} But because several years before, District 11 saw fit to support the Juvenile Justice Project ("JJP")—a restorative justice clinical program at the Campbell Law School\textsuperscript{62}—the prosecutor chose to divert Marquis away from the traditional criminal justice system. Instead, Marquis entered the JJP program, where kids and their families can come together to talk, to understand why they had gotten into conflict in the first place, to identify how they and others had been hurt, to take the appropriate amount of responsibility, and to make amends.\textsuperscript{63}

I first met Tony in 2001 at a symposium hosted by Leary Davis, founding dean of the Campbell Law School. I graduated from that law school three years earlier in 1998 as a thirty-nine-year-old man, married with three children, who had quit a great job and moved his young family out of a beautiful home to go to law school. Why? That was the million-dollar question. The only answer I had at the time was, "I don’t know why I am going to law school. I only know one thing for sure, I will never practice criminal law.” I have since learned to never say “never.” In my first-year criminal law course, I noticed that criminal law is based on whether elements of the crime can be proven beyond a reasonable doubt. These elements are organized in a list, and it is fulfilling to cross things off the list after they are done. It is even fulfilling to accomplish something that was not originally on the list, and then add it just to cross it off. The academic theory of criminal law

\textsuperscript{59} Id. § 7B-1501(18a).
\textsuperscript{60} Id. § 7B-1700.
\textsuperscript{61} Id. § 7B-2200.
\textsuperscript{63} See supra Part I.
made sense to me.

But as I began to work as an attorney in the criminal justice system, the way we went about doing things did not make much sense. The system seemed to ask the same limiting questions in every case: what law was broken, who did it, and what should be done to them? This approach leaves a lot of questions unanswered. For example, where is the victim in those questions? What needs does he or she have that are not being met? Does the offender even know how his or her actions have affected another human being? Will he or she keep on offending because he or she does not understand how his or her actions are affecting him or herself and others? I learned the answer to the last question was an emphatic “yes.” I kept representing the same clients over and over until sometimes the young people I represented in juvenile court would be taken out of their homes and sent away. The adults I represented would continue to reoffend until they were excluded from society and sent to prison. For a guy who became a lawyer to help people take responsibility for their actions and get on the right path, this work was very frustrating.

It was this frustration that I shared with Tony at that symposium in 2001. I had heard of Tony from others in my community who had met his wife, as she arrived ahead of Tony from California, where he served as a law professor at Pepperdine. He came to the Campbell Law School to teach criminal law and legal history. At our first break on that first day, I sought him out. We talked over a cup of coffee, and he learned of my interest in, and frustration with, the criminal justice system. He also learned that I was a mediator at heart and that I was newly certified as a civil Superior Court mediator. Tony asked if I had ever considered using mediation in a criminal context. I must admit, with that question I began to doubt his credibility. Surely, a learned scholar like Tony would understand a defendant’s constitutional right not to incriminate themselves. Surely, he would know that

64 ZEHR, supra note 33, at 191.
anything they said would be used against them in a court. Any defense attorney worth their salt would advise their client not to talk about their crime, especially in a room with the person they had offended against. Surely, he must be joking.

But Tony was not joking and his credibility was fully intact. He had worked in parts of the world where dialogue was happening between victims and offenders in criminal cases, and he called this “thing” restorative justice. He had facilitated meetings between victims and offenders and had seen firsthand the power of the interaction where victims and offenders can come together, with the help of a trained facilitator, to address the harm done by crime and then come to a resolution on how to address the harm. In juvenile cases, these meetings often occur pre-adjudication with the use of local rules of court to ensure confidentiality so offenders can freely admit their wrongdoings and move beyond denial and more towards acceptance and accountability. Additionally, the victims of the wrongdoings can help the offender better understand the effects of his or her actions resulting in the offender sympathizing with the victim and feeling remorse to the point where the offender wants to do something positive to address the harm he or she caused.

With Tony’s desire to start a clinic at Campbell Law School and with my frustration working in the criminal justice system, we resolved to explore the possibilities of creating a restorative justice clinic to mediate juvenile cases. Tony’s e-mail to his son is an example of the partial fulfillment of our dream. The clinic is a place where different questions can be asked. When bad things happen, restorative justice asks who has been harmed, how have they been harmed, and what are

---

67 See generally Folb v. Motion Picture Indus. Pension & Health Plans, 16 F. Supp. 2d 1164 (C.D. Cal. 1998) (holding that federal privilege against statements made during mediation are limited, and if the statement or mediation does not fall under the rules, the statement may be used in court against the defendant).


69 See What is Restorative Justice?, supra note 29.

their needs? The following Part describes how the clinic was originally formed to address juvenile crime, how it expanded to address school disciplinary issues, and, more recently, how it works in cases of severe violence, such as murder, and how it runs restorative circles in prison.

V. FORMATION OF THE CAMPBELL CLINIC

Timing is everything. Back in 2001, Chief District Court Judge Ed McCormick was working on a court improvement project for the juvenile court in Harnett, Lee, and Johnston counties of North Carolina. When Tony and I met with Judge McCormick to discuss our idea for mediating juvenile cases, he was immediately excited. The mediation process seemed like a perfect fit for court improvement. Judge McCormick enthusiastically joined us for a follow-up meeting with the dean of Campbell Law School, Willis Whichard. Originally, this meeting was supposed to be purely for informational purposes, however the meeting resulted in an order drafted by Judge McCormick. The order created a task force within the district, comprised of half law school faculty and half court personnel, to study the idea of creating a clinic in Campbell Law School that would receive referrals from the courts in juvenile criminal cases. A year and a half later, with funding from the Governor’s Crime Commission, the clinic was born. The dean named Tony as the faculty member in charge of curriculum and teaching, and the task force asked me to serve as part-time administrator in charge of working with law students to mediate live cases.

The court created and adopted several documents, allowing the program to begin operations. Local rules of court set out the procedure and confidentiality requirements of the process. Letters to participants

---

71 ZEHR, supra note 33, at 191.
73 Id.
informed them that their case had been referred to mediation. The JJP created a court-approved template to aid facilitators in crafting any agreement the parties reached during the mediation process. The parties sign a “Consent to Mediate and Confidentiality” form when they enter into the process. A “Report of Mediator” form was created to be sent back to the referring party at the conclusion of the process.

For the classroom portion of the program, the philosophy is that students cannot have a full appreciation for the theory of restorative justice without first having the backdrop of the current criminal justice system. Therefore, the design of the class is very experiential. Students begin by looking at the traditional criminal justice system by completing a juvenile code assignment based on a fact pattern involving a juvenile who participated in an armed robbery. The theory becomes realistic as the students travel to the courthouse and observe the manner in which courts handle juvenile cases. Then, the court personnel come back to the law school to have lunch with the law students and discuss what they observed in court that week. Also during the semester, the students go on a field trip to a juvenile facility where they talk personally with the young people housed in the facility. The students may tour a youth development center, which is a locked facility where youth have been court ordered to stay, or maybe a wilderness camp, where the kids are there voluntarily. Either way, law students get to see what is at stake as they ponder taking on representation of juveniles in their future careers as attorneys. Then, the semester turns toward restorative justice. Law students see recorded interviews from former participants in the Campbell Law School clinical program who resolved a juvenile criminal or school case. They watch documentaries and study cases where people have completed a restorative process in a murder case. They hear from speakers who have lost loved ones to murder and who are currently working with the clinical program to facilitate dialogue with their offenders. Finally, students participate in several classroom meetings where they experience the power of talking

76 See Consent to Mediate and Confidentiality form (on file with author).
77 See Syllabus for Campbell Law School Juvenile Justice Project Clinic (on file with author).
VI. VICTIM-OFFENDER DIALOGUE

Early in the process of forming the clinic, the work of Mark Umbreit became instructive. Mark is the founder and director of the Center for Restorative Justice and Peacemaking at the University of Minnesota and an early pioneer in restorative justice. The only models of mediation available to observe at that time in North Carolina were models used in civil cases. In civil cases, parties start together in the same room with attorneys speaking for them. The attorneys make opening statements, and then the attorneys and clients go into what is called “caucus,” where the parties divide into separate rooms and the mediator begins a form of “shuttle diplomacy” between the parties, carrying information and offers until the parties reach settlement or impasse. This is a transactional model, which is designed to reach a dollar amount that all parties can live with in order to take the case off the court docket.

In criminal cases, this transactional model does not meet the needs of the parties. Victims need to be able to talk face-to-face with offenders. They need to know that the offender sees them as a real

80 See id. at 251, 260-70, 273, 275, 276, 277 (discussing the different types of restorative justice dialogues and examining the fairness of each).
83 Id.
85 Umbreit et al., Restorative Justice in the Twenty-First Century, supra note 79, at 255, 269 (explaining that those who are the victims of crime need to be active in resolving the harm or loss that occurred, and the focus needs to be on working to find a solution).
86 Id. at 269.
person who has been hurt.\textsuperscript{87} The victims do not want lawyers to speak for them, and they certainly do not want lawyers speaking in place of the person who has brought them harm.\textsuperscript{88}

To meet these needs, Dr. Umbreit turns the civil model on its head. While Dr. Umbreit’s model has some similar elements, it is opposite from the civil model in almost every other way. For example, lawyers are generally not in the room.\textsuperscript{89} The parties begin separately with a trained facilitator, and only after they have been prepared for a face-to-face meeting with each other do they sit down together.\textsuperscript{90} I read much of what Dr. Umbreit had written about this transformative model of mediation and watched a video series he created about mediation in juvenile cases, but the model really came to life for me in a training with Jan Bellard, where she showed the documentary film mentioned earlier entitled, \textit{Meeting With a Killer: One Family’s Journey}.\textsuperscript{91}

That documentary is about a facilitated dialogue in a murder case in Texas. Cathy O’Daniel was abducted, raped, and murdered by two fifteen-year-old boys. Cathy’s mom, Linda White, learned of restorative justice and decided she wanted to pursue the possibility of meeting with the boys who killed her daughter. Cathy’s own daughter, Ami, joined Linda in the mediation process and ultimately met with one of the boys, Gary Brown. \textit{Meeting with a Killer: One Family’s Journey} documents the process the parties were led through by trained facilitator, Ellen Halbert.

Ellen started by meeting first with Linda and Ami. Because there had not been a trial and there was no testimony to learn from, they talked about what happened to Cathy as best they knew from the police reports. They talked about how Cathy’s death had affected them and

\textsuperscript{87} Id. at 258 (explaining that restorative justice has a different focus than the criminal justice system).
\textsuperscript{88} Id. at 269-70 (explaining the different approaches used for restorative justice and showing that the community is involved in helping the parties, rather than lawyers).
\textsuperscript{89} Id. (explaining that mediators, facilitators, and community members are present during restorative justice).
\textsuperscript{90} See Mary E. Reimund, \textit{Mediation in Criminal Justice: A Restorative Approach}, 46 \textit{ADVOC.} 22, 23 (2003) (explaining that meeting with a facilitator allows the individuals to become comfortable with the process).
\textsuperscript{91} \textit{MEETING WITH A KILLER}, supra note 52.
their family. They talked about who Cathy was. They talked about the unanswered questions: why the boys did this to Cathy, how it happened, and what Cathy might have experienced in the last moments of her life. Then Ellen met with Gary Brown in prison. He told—probably for the first time—what he and his partner did that day to Cathy O’Daniel. Over the course of a year, Ellen went back and forth, meeting with Linda, Ami, and then with Gary, gathering information and preparing them all for an eventual face-to-face meeting. The film was the most powerful thing I had ever seen, and I knew I had to be involved in this kind of process, which has the great potential to address the deep hurt that comes with criminal behavior and can transform people and bring healing. I was hooked.

We adopted this transformative model of mediation for the JJP. The model is a four-step process with a fifth piece that acts as a humanizing thread woven throughout. For step one, in separate meetings with the parties, the facilitator explains to each party what the process is likely to look like and the steps they will experience. Second, the facilitator gives the parties an opportunity to tell their sides of the story. Third, the facilitator leads the parties in a discussion of how they and others have been affected by what has happened. Fourth, the facilitator and the parties discuss what needs to be done to address the ways they and others have been affected. The fifth piece, the humanizing process, is the unifying theme and is the most important work of facilitators. Leading the parties throughout the process in a discussion of who they are as people, the facilitator learns about what they are dealing with. The facilitator learns what motivates them, what they love, what they hope for, and who the most important people are in their lives.

The fifth piece might be the greatest difference between a

93 Id. at 45.
94 Id. at 39.
95 Id. at 42-43.
96 Id. at 163 (explaining that the humanizing process allows victims and offenders to tell their story instead of being just a face in the system).
97 ZEHR, supra note 33, at 244.
98 Id.
A transactional model is working to settle a case. A transformational model is working to create understanding, accountability, and healing. It brings the human element into the room. As information is gathered from the individuals, the facilitator begins to share that information with the other party in an effort to prepare them for a face-to-face meeting. If the parties want to meet with each other and the facilitator believes the meeting can take place in a safe and productive way, then the parties come together. Usually, the first question in that meeting is to ask what the parties hope to accomplish by having the meeting. This allows the parties to set their destination and then everything beyond that point is an effort on the facilitator’s part to help them get there.

Referrals to the program come from two main sources: courts and local schools. When law enforcement refers a case to the juvenile court system, the first person that sees it is a juvenile intake counselor. The juvenile intake counselor has discretion in most cases to defer cases to community resources, such as the JJP, or send the case to court. If the intake counselor sends the case to court, our local rules also give the prosecutor the discretion to refer the case to the JJP. When the JJP receives a referral from either a junior intake counselor or a prosecutor, the parties are contacted by the JJP and meetings are scheduled in the clinic, which is located in the Campbell Law School. In school cases, administrators and school resource officers have discretion to refer cases to the JJP. When the JJP receives a referral from a school, facilitators travel to the local school

100 See supra note 83 and accompanying text.
101 Burgess, supra note 99.
102 N.C. R. WAKE CTY. JUV. MED. RULE 3.
103 ZEHR, supra note 33, at 244.
104 See JUV. MED. RULE 1.
105 Id.
106 Id.
107 See JUV. MED. RULE 3; see also JUV. MED. RULE 2.
108 See JUV. MED. RULE 3.
and meet with participants. Individual meetings usually take between thirty and sixty minutes, with face-to-face meetings lasting about the same amount of time. If the participants are both in school on the day the facilitators arrive, cases usually resolve completely within a couple of hours. A successful mediation occurs when the referred participants meet with the facilitators and the outcome is satisfactory to the participants and the referring parties. At the conclusion of the mediation, the facilitator sends a report to the referring party so they know how the case was resolved and if they need to pay further attention to it. From 2009 through the end of 2014, 297 school cases were referred to the JJP, with 242 resolving favorably for a success rate of 81%. We do not have the re-offense rates of these students, but anecdotally, school administrators tell us that once their students experience the restorative process, they basically fall off their "bad behavior radar screen." 

VII. DENVER PUBLIC SCHOOLS

These results are fairly indicative of other programs as well. One example is within the Denver Public Schools ("DPS"). From the 2001-2002 school year to the 2004-2005 school year, DPS reported a dramatic increase in the number of in-school suspensions, from 1,864 to 4,859, and out-of-school suspensions, from 9,846 to 13,487. During the same time period, the number of police-issued tickets and arrests rose by 71%, with the vast majority of those being issued for minor incidents, such as obscenities, disruptive appearance, and minor conflicts. In response to these highly punitive measures, DPS began

109 See generally id. (explaining how an administrator decides when and where a mediation conference will take place).
110 See generally supra pp. 92-94 (illustrating an example of a successful mediation).
111 JUV. MED. RULE 4.
112 See generally infra notes 117-26 and accompanying text (illustrating the results of a similar method of mediation).
114 Id.
115 Id.
116 Id. at 14, 27.
117 Id. at 27.
to implement restorative practices in four middle schools that all had high rates of suspension and arrest.\textsuperscript{118} In the first year of using restorative practices, the schools referred 213 students the Restorative Justice Program and across the four schools, out-of-school suspensions decreased by 29\% and expulsions decreased by 26\%.\textsuperscript{119} In the second year of the program, one high school and two more middle schools were added to the original four middle schools.\textsuperscript{120} A total of 812 students were referred that year with continued dramatic decreases in suspension, expulsion, and arrest.\textsuperscript{121} Participants also showed improvement in attendance and tardiness, and the more restorative interventions they participated in, the better they performed.\textsuperscript{122} In the third year of the program, 1,235 students were referred and showed similar reductions across the board.\textsuperscript{123} Based on these positive results, in 2008, DPS adopted a revised discipline policy with five initiatives to address negative impacts of punitive discipline policies:

Limit the use of suspension and expulsion. Under DPS policy, students can only be expelled for the most serious misbehavior and can only be suspended from school for serious infractions or if misbehavior is repeated.

Limit the use of law enforcement in schools. The DPS policy places express limitations on the use of law enforcement personnel. The policy states that it “is the goal of the District that the juvenile and criminal justice systems be utilized less frequently to address school-based misconduct.”

Focus on eliminating the disproportionate impact of punitive discipline on students of color. The DPS policy states, “In order to serve all students and to prepare them to be members of an increasingly diverse community, school and staff must build cultural competence” and “strive to eliminate any institutional racism and any other discrimination that presents barriers to success.”

\textsuperscript{118} Id. at 27-28.  
\textsuperscript{119} Id. at 28.  
\textsuperscript{120} Id. at 29.  
\textsuperscript{121} Id. at 28-29.  
\textsuperscript{122} Id. at 29.  
\textsuperscript{123} Id. at 30-31.
Outline step-by-step the protections afforded to students and their parents or guardians during suspension or expulsion proceedings. Special emphasis is given to notification, the right to appeal, and the right to a fair hearing.

Require individual schools and the district to evaluate and monitor the effectiveness of the school discipline plan using school disciplinary data disaggregated by race, ethnicity, and sex of student. These reports are required annually from the schools.

VIII. CONCLUSION

Restorative practices offer hope for a better way to interrupt the School-to-Prison Pipeline. In Wake County, the success of facilitated dialogue over the last six years has led to discussion about how to expand that program and how to implement other restorative practices such as peer mediation and talking circles.

For a more comprehensive look at how to use the Circle Method in schools, please see the latest book by Carolyn Boyes-Watson and Kay Pranis titled Circle Forward: Building a Restorative School Community. Conversations here focus on using community volunteers to serve as facilitators for the more serious cases in schools, training students to be peer mediators in less serious cases, and using Circles to strengthen school communities by deepening relationships. The court system and the school system are collaborating to find ways to use less punitive measures in schools with a promising pre-charge diversion program likely to be adopted to keep those kids older than fifteen from entering into the adult criminal justice system for infractions committed in school, thereby keeping criminal charges off their records and making success in the community more likely. Prevention is hard to measure, but with the use of more restorative programs, the behavior that leads to the office visit—which leads to

124 See id. at 26, 29, 31-33.
suspension, which leads to dropping out, which leads to crime, which leads to prison—will be greatly reduced. Perhaps the next "James" will not carry a gun, but will keep carrying a book, and instead of measuring lives lost, we will measure promises gained.