

AMERICAN BAR ASSOCIATION
ADOPTED BY THE HOUSE OF DELEGATES
AUGUST 3-4, 2020

RESOLUTION

RESOLVED, that the American Bar Association urges prosecutors, defense attorneys, judges, probation officers, parole authorities, legislators, policymakers, and community partner organizations to consider using a restorative justice response to crime as one effective alternative, or adjunct to, a criminal adjudicatory process in appropriate cases, which contains the following elements:

1. Has a victim-centered approach;
2. Requires the informed consent of the victim or victim surrogate and the offender, that either party may withdraw;
3. Is facilitated by a trained specialist who can determine if the victim and the offender can be safely brought together and who can protect the interest of both;
4. Seeks to produce, if feasible, a voluntary agreement between the victim and the offender designed to acknowledge and repair the harm caused by the offender; and
5. Maintains data on the effectiveness of restorative justice practices to ensure that they are evidence-based and effective;

FURTHER RESOLVED that the American Bar Association urges federal, state, local, territorial and tribal governments to develop grant and funding streams to enable prosecutors, defense attorneys, judges, probation officers, parole authorities, legislators, policymakers, and community partner organizations to develop, maintain, and assess the effectiveness of restorative justice programs in a data-driven manner; and

FURTHER RESOLVED that the American Bar Association urges the National Institute of Justice to prioritize and make publicly available an evaluation of restorative justice practices nationwide that includes data on the underlying crime and eligibility criteria, the percentage of cases in which restorative justice was chosen by victims, victims' satisfaction rates, recidivism rates, collection of restitution, evidence of racial or other bias, and effect on post-traumatic stress symptoms in victims.

REPORT

This resolution urges criminal justice stakeholders to develop restorative justice processes and make them available, where appropriate, to crime victims interested in participating in them. It does not argue that restorative justice should supplant the existing criminal justice process. It does not argue that restorative justice processes should relieve the prosecutor or court from the duties, obligations and authority to manage, process and marshal criminal cases within the criminal justice system. It argues that, in some cases, restorative justice processes may provide the best path forward for healing victims' pain, repairing harm caused by the offending behavior, and preventing its recurrence.

Native American and indigenous communities have long used restorative justice practices to resolve harms.¹ Currently, there is a nascent but growing movement to use restorative justice in pockets of the United States within the traditional criminal justice system or as an adjunct to it. Often these programs are an alternative to sending juveniles through a delinquency process.² A few states offer restorative justice as an alternative in misdemeanor cases.³ A program run by a federal district court in Boston since 2015 has offered a diversion program for serious, non-violent felonies in which restorative justice is a key component.⁴ And a program run by the Office of the Attorney General (OAG) in Washington, D.C., "is now referring some of the most serious cases on [the] docket into [a restorative justice] program."⁵ Robert "Roman" Haferd, who is the restorative justice

¹ Leena Kurki, National Institute of Justice, Office of Justice Programs, U.S. Dept. of Justice, *Incorporating Restorative and Community Justice into American Sentencing and Corrections, Sentencing and Corrections Issues for the 21st Century*, 4 (Sept. 1999), <https://www.ncjrs.gov/pdffiles1/nij/175723.pdf>; Amy B. Cyphert, *The Devil is in the Details: Exploring Restorative Justice as an Option for Campus Sexual Assault Responses under Title IX*, 96 *Denver L. Rev.* 51, 67 (2018).

² The Oakland, California-based Restorative Justice Project, directed by 2019 MacArthur "Genius" Grant Fellow Sujatha Baliga, partners with prosecutor offices to provide restorative justice alternatives to the school-to-prison pipeline. See <https://impactjustice.org/impact/restorative-justice/> (visited March 20, 2020); Rebecca Beitsch "States Consider Restorative Justice as an Alternative to Mass Incarceration," PBS NEWS, July 20, 2016 (describing restorative justice programs as alternatives to delinquency proceedings in Colorado, Vermont, and West Virginia). In Florida, there is a statute authorizing restorative justice for first-time, nonviolent juvenile offenders. Fl. Code Crim. Pro. Section 985.155, http://www.leg.state.fl.us/Statutes/index.cfm?App_mode=Display_Statute&Search_String=&URL=0900-0999/0985/Sections/0985.155.html. Florida prosecutors have also used the "pre-plea conference" as a way of using restorative justice. See, e.g., Paul Tullis, *Can Forgiveness Play a Role in Criminal Justice?* NYT Magazine, Jan. 4, 2013, <https://www.nytimes.com/2013/01/06/magazine/can-forgiveness-play-a-role-in-criminal-justice.html>. In the case profiled in the *New York Times Magazine*, a young man killed his girlfriend. He was charged with first-degree murder. The victim's family sought the use of restorative justice practices through a pre-plea conference. During the facilitated conversation, the victim's family recommended 10-15 years. The assistant state attorney attended the pre-plea conference and, after speaking to other stakeholders, he offered two options: (1) 20 years plus 5 years probation or (2) 25 years.

³ See, e.g., Restorative Justice Alternative, City of Montpelier (describing the Restorative Justice Alternative Program (RDAP) for "[p]eople who commit certain lower level offenses." <https://www.montpelier-vt.org/797/Restorative-Justice-Alternative>

⁴ Lara Bazelon, "Redemption for Offenders and Victims," AMERICAN PROSPECT, Jan. 18, 2018.

⁵ Carrie Johnson, *D.C. Prosecutors, Once Dubious, are Becoming Believers in Restorative Justice*, NPR NEWS, July 2, 2019, <https://www.npr.org/2019/07/02/735506637/d-c-prosecutors-once-dubious-are-becoming-believers-in-restorative-justice>.

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coordinator in the OAG, stated that: “We are embarking on phase of our program in which victims and respondents of virtually all violent crime, including gun crime, are offered restorative justice in conjunction with trauma-informed cognitive behavioral therapy for involved youth. This program is being evaluated by outside researchers to measure improvements in public safety, victim satisfaction and procedural justice.” Haferd noted that, “the program is mostly limited to juveniles, although we do accept a handful of adult cases (including with serious injuries) through the US Attorney’s Office and our adult criminal section.”⁶

Mr. Haferd stated that, as of October 3, 2019:

- The Restorative Justice Program [in the OAG] has received 259 referrals from prosecutors for restorative justice as an alternative to prosecution.
- 110 restorative justice conferences ended successfully.
- Of over 200 surveyed victims, charged youth, and their respective parents and supporters that participated in a restorative justice conference facilitated by the AG’s office, 94% reported that they would recommend the restorative justice process to others, and 89% reported that they would use the restorative justice process again.
- 7 cases were returned to the prosecutor as not successful. Of those, in three cases the group did not come to agreement at the conclusion of the restorative justice conference, in two cases the critical parties did not attend the restorative justice conference and it was abandoned, and in two cases the respondent did not complete all the terms of the Agreement post-conference.
- In 53 cases the victim declined to participate in restorative justice.
- 53 cases did not go to Conference for “Other” reason, including that the respondent chose to go to trial, respondent was arrested on a new charge and the RJ offer was withdrawn, respondent absconded, or the facilitator determined that restorative justice was not appropriate for the case.
- 25 cases are currently pending conference
- The remaining cases represent matters with more than one co-respondent.⁷

Chesa Boudin, the newly elected District Attorney of San Francisco, ran and won on a platform that included a promise that “[e]very victim who wants to participate in restorative justice will have the right to do so.”⁸ During the campaign, he spoke about the role that

⁶ Email correspondence between Robert Roman Haferd and Lara Bazelon dated April 22, 2020.

⁷ Email correspondence between Robert Roman Haferd and Lara Bazelon dated November 7, 2020. OAG’s statistics are mainly limited to juvenile cases. Email correspondence between Robert Roman Haferd and Lara Bazelon dated February 24, 2020.

⁸ See Chesa Boudin’s Plan for a Survivor-Centered Approach to Harm, Using a Restorative Justice Program to End the Cycle of Incarceration through Healing and Accountability, at: https://www.chesaboudin.com/restorative_justice (visited on Dec. 8, 2019).

restorative justice had played in his own life.⁹ Noting that his parents' crimes claimed many victims—two police officers and an armored guard were killed¹⁰—he also pointed out that as their 18-month-old son, he too, suffered from their sudden, prolonged absence from his life.¹¹ His mother was not released until 2003, when Boudin was finishing college; his father remains in prison. “But restorative justice saved me,” he wrote, “and did more to rehabilitate my parents than any number of years in prison ever could.”¹²

Restorative justice is also gaining traction in rural jurisdictions that are less racially and ethnically diverse. In 2019, Natasha Irving, a criminal defense lawyer, was elected to serve as district attorney in Maine's District 6. As DA, she oversees four counties with a combined population of less than 150,000 people, and she won after pledging to broaden the use of restorative justice. Prior to Irving's election, restorative practices were employed in District 6 principally in cases involving juveniles and young adults. Promising to “implement a system of community-based restorative justice for [adults'] nonviolent misdemeanor offenses,” she explained: “Community-based restorative justice, it holds the offender accountable, makes the victim whole, keeps our community safe, and it costs less in taxpayer dollars than the system we are using now, which is ‘lock em’ up.’ Lock them up for any nonviolent offense that we can get jail time for.”¹³ In the past few two years, other candidates who are part of the progressive prosecution movement¹⁴ have taken a page from a guidebook for 21st century prosecutors, which lists restorative justice among its 21 principles.¹⁵

While existing programs that use restorative justice in cases of interpersonal violence in the United States are limited, the few that exist show promise. Danielle Sered's organization, Common Justice, was created in 2008 by the Vera Institute in partnership with the Kings County District Attorney's Office in Brooklyn.¹⁶ As Sered explains, Common Justice, “[g]uided by restorative justice principles [offers] a survivor-centered accountability process that gives those directly impacted by acts of violence the

⁹ John Nichols, *Chesa Boudin Wants to Bring Restorative Justice to San Francisco*, THE NATION, Oct. 22, 2019.

¹⁰ In 1981, Boudin's parents, Kathy Boudin and David Gilbert, drove the getaway car in a robbery planned by members of the Black Liberation Army—a black power organization. A guard was killed in the course of the robbery. When the vehicle Gilbert was driving was subsequently stopped by police, BLA members shot and killed two police officers. Both Boudin and Gilbert were convicted under New York State's felony murder rule. Boudin received a sentence of 20 years to life and was paroled in 2003. Gilbert, who received a sentence of 75 years to life, is still in prison. Dana Goodyear, *How Far Will California Take Criminal Justice Reform*, NEW YORKER, Oct. 5, 2019.

¹¹ Chesa Boudin, *San Francisco Deserves Restorative Justice*, THE APPEAL, Aug. 30, 2019.

¹² *Id.*

¹³ Jessica Picard, *DA Candidate Focuses on Restorative Justice*, THE LINCOLN COUNTY NEWS, Sept. 10, 2018, at: <https://lnme.com/currentnews/da-candidate-focuses-on-restorative-justice/> (quoting Natasha Irving).

¹⁴ See generally Jeffrey Bellin, *Defending Progressive Prosecution*, at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3479165; Angela J. Davis, *Reimagining Prosecution: A Growing Progressive Movement*, at: <https://escholarship.org/uc/item/2rq8t137>.

¹⁵ Fair and Just Prosecution et al., 21 PRINCIPLES FOR THE 21ST CENTURY PROSECUTOR 12-13 (2018).

¹⁶ DANIELLE SERED, UNTIL WE RECKON 133 (2018).

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opportunity to shape what that repair will look like, and in the case of the responsible party, to carry out that repair instead of going to prison.”¹⁷

Many of the participants have committed serious crimes including shootings, stabbings, and other violent assaults. Common Justice does not, however, accept cases involving sexual assault, domestic violence, or intimate partner violence. The program is limited to young adults ages 16-26. If, and only if, the victims agree to participate, they will come together—or use a surrogate to represent them—with the perpetrator “and family and community members with a stake in the outcome.”¹⁸ The victims are free to reject the Common Justice alternative, in which case the offenders will go through the court process, and if convicted, serve prison sentences.¹⁹

One might expect that most victims would reject what Common Justice offers them.²⁰ But the statistics provided by Haferd from the OAG’s office mirror those of Common Justice: ninety percent of victims choose the program over the traditional criminal justice process. They make this choice knowing that the people who hurt them will not be sent to prison and will have their felony conviction removed following successful completion of the program. By 2018, Sered wrote, the number of offenders who engaged in her program had a recidivism rate of only six percent. From 2012-2018, Common Justice expelled only one person from the program for committing a new crime.²¹

To offer another example: RESTORE, a federally-funded program that operated in Pima County, Arizona from 2004-2007,²² worked collaboratively with local prosecutors to offer victims of felony and misdemeanor sexual assaults the opportunity to choose a restorative justice alternative over the traditional criminal process.²³ RESTORE “excluded repeat sexual offenders, persons with police reports for domestic violence, or individuals with arrests for any crimes involving non-sexual forms of physical assault.”²⁴ Sexual offenses within accepted categories ranged from rape to indecent exposure.²⁵ The majority of victims offered this choice accepted the opportunity to participate in RESTORE. Participation in RESTORE required victims and offenders to participate in a restorative justice conferencing process overseen by program personnel and a facilitator, together

¹⁷ *Id.*

¹⁸ Danielle Sered, *A New Approach to Victim Services: The Common Justice Demonstration Project*, 24 FEDERAL SENTENCING REPORTER 50, 50 (2011)

¹⁹ *Id.*

²⁰ SERED, UNTIL WE RECKON 42.

²¹ SERED, UNTIL WE RECKON 134.

²² “The program operated from March, 2003, to August, 2007, and closed at the end of federal funding.” Mary P. Koss, *The Restore Program of Restorative Justice for Sex Crimes: Vision, Process, and Outcome*, Journal of Interpersonal Violence (2013) at 10, <https://publichealth.arizona.edu/sites/publichealth.arizona.edu/files/14%2004%2024%20RESTORE%20n-line%20published.pdf>.

²³ Quince et al., *Applying Restorative Justice Practices*, at 301–02 (explaining that RESTORE was “funded by a \$1.5 million grant from the Centers for Disease Control”).

Certain offenders were excluded, including juveniles, those accused of domestic violence, those with arrests for violent crimes excluding sexual assault, and those with repeated histories of sexual assault.

²⁴ Koss, *The Restore Program* at 10.

²⁵ Koss, *The Restore Program* at 4.

with family and supporters.²⁶ Victims described how the assault had impacted their lives and the lives of their friends and family.²⁷ Offenders took responsibility for committing the assault and also participated in active listening by putting the victims' story into their own words, with the victims correcting them when necessary.²⁸ Offenders were held to account through mandatory participation in sex offender therapy, substance abuse treatment where warranted, regular meetings and check-ins with case managers, community service, and restitution.²⁹

A study of the program found that of the 22 cases accepted over a three-year period, “[t]wo thirds of felony and 91% of misdemeanor” offenders successfully completed the program. Two offenders were terminated from the program because homelessness, substance abuse or financial problems prevented them from complying with the requirements; one offender withdrew after reversing himself and denying responsibility.³⁰ More than 90 percent of the victims who participated stated that they “were satisfied that justice was done.”³¹ The percentage of victims suffering from PTSD dropped from 82% to 66% after completing the program.³² The percentage of participants who “felt safe, listened to, supported, treated fairly, treated with respect, and not expected to do more than they anticipated” exceeded ninety percent.³³

RESTORE and Common Justice are just two programs in two counties, but their results teach important lessons. First, the under-utilization, selective application, and limited funding of restorative justice practices should be re-examined. Traditionally, restorative justice has been reserved as an alternative only in cases involving juveniles or only for low-level non-violent offenses.³⁴ Studies and successful programs such as Common Justice and RESTORE have demonstrated that restorative justice programs—when founded on principles of victim-centeredness and offender accountability with a focus on accountability, repair, and community involvement—can be used in a range of felony cases, including cases involving violence.

Moreover, it is possible to implement a restorative justice alternative with the cooperation and support of prosecutors who recognize that restorative outcomes promote public safety and serve victims. RESTORE’s partnership with a willing Pima County District Attorney’s Office, and Common Justice’s partnership with the King’s County District Attorney’s Office, which is now more than a decade-old, demonstrates that such partnerships are not only possible but successful and durable.

This resolution purposefully does not define when a restorative justice response is appropriate and the types of offenses and eligibility criteria to use when developing

²⁶ *Id.* at 8

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at 9

³⁰ *Id.* at 25

³¹ *Id.* at 32

³² *Id.* at 19.

³³ *Id.* at 22.

³⁴ Quince et al., *supra* note 22, at 300–01.

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restorative justice programs. These decisions should be made by the stakeholders in each jurisdiction so long as the restorative justice program is geared toward public safety, victims' healing, and offenders' accountability.

The consent of the participants throughout the restorative justice process should be informed and voluntary. The victim and the offender should provide written consent after reviewing the procedures and practices of the program and having the opportunity to ask any questions. Before any in-person meeting, victims and offenders should have an opportunity to meet with the restorative justice facilitator and counsel to review safety concerns, go over the rules and the process so that they know what to expect, go over what they would like to say during the in person meeting and what they hope to achieve at the end of the process regarding in terms of repair of harm, redress, and restitution. Any agreement reached between the victim and the offender at the conclusion of the restorative justice process should be in writing and should be informed and voluntary. Before signing any such agreement, both parties should have the opportunity to consult with the restorative justice facilitator and counsel to go over any questions or concerns. If there is a deadline, the deadline should be extended if either side needs additional time.

Lastly, data is key to evaluating the use of restorative justice programs. For that reason, the resolution "urges the National Institute of Justice to prioritize and make publicly available an evaluation of restorative justice practices nationwide." The resolution singled out the NIJ because of its unique role, as an arm of the U.S. Department of Justice, in collecting, evaluating, and disseminating empirical data on effectiveness of criminal justice initiatives to reduce recidivism, rates of incarceration, and promote the cause of justice.³⁵

As seen by the various programs used around the nation, tracking when the programs are offered to victims, when victims choose to participate, recidivism rates, collection of restitution, and reduction of post-traumatic stress symptoms on victims may help criminal justice stakeholders provide victims the justice they require. Collecting data may also help identify ways to address implicit bias in program eligibility.

Respectfully submitted,

Kim T. Parker
Chair, Criminal Justice Section
August 2020

³⁵ National Institute of Justice, About NIJ, <https://nij.ojp.gov/about-nij> (last visited May 23, 2020).

GENERAL INFORMATION FORM

Submitting Entity: Criminal Justice Section

Submitted By: Kim T. Parker, Chair, Criminal Justice Section

1. Summary of the Resolution(s). This resolution urges criminal justice stakeholders to consider the development and use of restorative justice processes where appropriate, to crime victims interested in participating in them. It does not mandate the use of restorative justice, but encourages all parts of the criminal justice system, from pre-arrest to parole, to consider whether restorative justice procedures can be appropriate and helpful to crime victims seeking justice and accountability by an offender.
2. Approval by Submitting Entity. The resolution was approved by the CJS Council on May 1, 2020.
3. Has this or a similar resolution been submitted to the House or Board previously?
Not to our knowledge.
4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?

In 1994, the ABA enacted a resolution supporting victim-offender mediation/dialogue programs, and this resolution on restorative justice improves upon that effort. (94A101B)

5. If this is a late report, what urgency exists which requires action at this meeting of the House? n/a
6. Status of Legislation. (If applicable) n/a
7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

The resolution will be used to advocate for the use of restorative justice programs as one alternative to the criminal adjudicatory process in local jurisdictions, and to collect and report data from these programs so that they can be improved and initiated more broadly.

8. Cost to the Association. (Both direct and indirect costs)
None.
9. Disclosure of Interest. (If applicable) n/a

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10. Referrals. The section will contact the following entities for support:

Coalition on Racial and Ethnic Justice
Commission on Disability Rights
Commission on Domestic and Sexual Violence
Commission on Homelessness and Poverty
Commission on Sexual Orientation and Gender Identity
Commission on Youth at Risk
Division for Public Education
Government and Public Sector Lawyers Division
Hispanic Legal Rights and Responsibilities
Judicial Division
Section of Civil Rights and Social Justice
Section of Dispute Resolution
Section on Family Law
Section on Health Law
Section on International Law
Section on Labor and Employment Law
Section on Litigation
Section on Science and Technology Law
Section on State and Local Government Law
Section on Torts Trial and Insurance Practice
Senior Lawyers Division
Solo, Small Firm and General Practice Division
Standing Committee on Legal Aid and Indigent Defense
Standing Committee on Pro Bono and Public Service
Young Lawyers Division

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EXECUTIVE SUMMARY

1. Summary of the Resolution.

This resolution urges criminal justice stakeholders to consider the development and use of restorative justice processes where appropriate, to crime victims interested in participating in them. It does not mandate the use of restorative justice, but encourages all parts of the criminal justice system, from pre-arrest to parole, to consider whether restorative justice procedures can be appropriate and helpful to crime victims seeking justice and accountability by an offender.

2. Summary of the issue that the resolution addresses.

Restorative justice has been successfully used in juvenile justice systems and in schools as an alternative to criminalizing behavior and zero tolerance disciplinary programs. Reform efforts in the criminal justice system presently focus on programs that similarly reduce incarceration and provide more meaningful responses to victims of crime and better accountability on the part of those who have broken the law, and restorative justice is one alternative.

3. Please explain how the proposed policy position will address the issue.

This resolution urges jurisdictions to initiate and improve use of restorative justice practices and emphasizes the necessary elements of a program, whether used as a way to divert defendants from traditional prosecution and sentencing, or as a way to allow those who are incarcerated to be held accountable and become more successful on parole.

4. Summary of any minority views or opposition internal and/or external to the ABA which have been identified.

Restorative justice programs are widely supported when used in appropriate cases, and when care is taken to ensure that the parties are on equal footing and that their participation is voluntary.