

REMARKS ON RESTORATIVE JUSTICE

Chief Justice Kimberly S. Budd

Flaschner Judicial Institute Program

April 12, 2022

Thank you, Justice Agnes and Judge Bernard. Thank you to all the members of the planning team who have put together this terrific program. And thank you to the Flaschner Judicial Institute, to its President and Dean – my colleague Justice Kafker, to CEO Justice Agnes of course, and to the entire staff for presenting it. I know the amount of effort that went into preparing for this event was large. I am so glad to be a part of it, and I am really grateful Flaschner has undertaken this effort.

I also want to say thank you in advance to our moderator, Judge Krupp, and to all of our distinguished panelists who are taking the time to be with us here today to share their insights and experiences. And finally, thank you to all of you in the audience for joining us as well. It's great to see how many of you are here to discuss restorative justice.

I will be the second to admit, behind Judge Bernard, that I am not an expert on restorative justice. I am here to learn today, as well. But I would like to share with you some thoughts about why I believe restorative justice can and should play a role in addressing some of the challenges we face in our criminal justice system. And while I am focusing on the criminal side of our work for today's remarks, I don't mean to suggest that restorative justice should be limited to only criminal matters. Just as Judge Bernard mentioned, there is so much potential for its application across many courts and cases.

The 2018 Criminal Justice Reform Act and the Limitations of Incarceration

Thanks to the leadership of one of our panelists – Senator Jamie Eldridge – along with Representative Sean Garballey and their colleagues, the Legislature was able to take the 2018 Criminal Justice Reform Act across the line and add a new chapter to our General Laws – Chapter 276B – that specifically authorizes the use of restorative justice.

For the first time, Chapter 276B explicitly empowered district attorneys and judges to use restorative justice as an alternative to prosecution and as a feature of sentencing. The statute provides that "[a] juvenile or adult defendant may be diverted to a community-based restorative justice program pre-arraignment or at any stage of a case," including as "a final case disposition," with the consent of the district attorney and the victim. If the defendant successfully completes the program, "the charge shall be dismissed."¹

To understand why the enactment of Chapter 276B was such an important step, and why we need to take advantage of this opportunity to develop restorative justice programs in the courts, it helps to recall some of the problems in our criminal legal system that led to passage of the 2018 Reform Act.

Like the federal government and many other states, Massachusetts relied for decades on increased incarceration as a primary response to violations of the law. Between the early 1980s and 2012, the percentage of the Massachusetts population confined in the state's prisons and jails tripled.²

As a result, although our incarceration rate in Massachusetts was among the lowest within the United States, it was nevertheless one of the highest in the world as compared with

¹ G. L. c. 276B, § 2.

² Benjamin Forman and John Larivee, [Crime, Cost, and Consequences](#), MassINC, March 2013, at 8.

other nations. Many people – including my predecessor, the late Chief Justice Ralph Gants – questioned whether it was necessary or useful for Massachusetts to imprison its residents at a rate that was 2½ times higher than the incarceration rate in the United Kingdom, for example.³

Chief Justice Gants and other leaders were also troubled by the fact that post-incarceration recidivism rates remained persistently high. You may recall that in 2015, he joined with Governor Baker, House Speaker DeLeo, and Senate President Rosenberg to request technical assistance from the federally supported Justice Reinvestment Project to better understand how to reduce recidivism.

The consultants who worked with us through the Justice Reinvestment Project pointed out some startling statistics. They reported that two-thirds of individuals leaving houses of correction, and over half of those leaving state prison, had new criminal legal system involvement within three years of their release.⁴ If the purpose of incarceration was not merely to punish offenders and get them off the streets, but also to rehabilitate them and deter them from reoffending, we were failing.

Why was that? The consultants explained that incarceration alone, without adequate programming and post-release support and supervision, increases the risk of recidivism.⁵ Community-based rehabilitation and support, by contrast, have been shown to be much more effective at reducing recidivism and promoting long-term public safety.⁶

Not surprisingly, the way we used incarceration was also having a devastating impact on communities of color. Most of you are familiar with the Harvard Law School study of racial

³ Ralph D. Gants, [Annual Address: State of the Judiciary](#), October 20, 2015, at 9.

⁴ [Massachusetts Criminal Justice Review, Working Group Meeting 3 Interim Report](#), Council of State Governments Justice Center, July 12, 2016, at 24.

⁵ [Massachusetts Criminal Justice Review, Working Group Meeting 5 Interim Report](#), aCouncil of State Governments Justice Center, November 15, 2016, at 11.

⁶ See *id.* at 6

disparities in our criminal justice system that was commissioned by Chief Justice Gants, and was published shortly before his untimely death in September 2020. It concluded that:

- Black and Latinx people were less likely than White people to have their cases resolved through less severe dispositions, such as pretrial probation or continuances without a finding; and
- among those sentenced to incarceration, Black and Latinx people received longer sentences than their White counterparts.⁷

But even before the Harvard report came out, there was ample evidence of racial and ethnic disparities in our criminal justice system. When Chief Justice Gants first requested the Harvard study in 2016, he was reacting to data showing that the rates of imprisonment for African-Americans and Hispanics in Massachusetts were nearly 8 times and 5 times greater, respectively, than for Whites, and that these disparities were much worse than the national averages.⁸

The landmark reforms undertaken by the Legislature in response to these problems signaled an important shift in our Commonwealth's approach to crime and criminal justice, recognizing that we sorely needed to reduce our reliance on incarceration. Among other changes, the 2018 Reform Act eliminated some mandatory minimum sentences, lessened other penalties, and created more opportunities for district attorneys and judges to divert defendants from prosecution. Thanks to these changes and a declining crime rate, the number of people in Massachusetts correctional facilities has fallen substantially in recent years.⁹ Just last week, the

⁷ Elizabeth Tsai Bishop, Brook Hopkins, Chijindu Obiofuma, and Felix Owusu, [Racial Disparities in the Massachusetts Criminal System](#), a, Criminal Justice Policy Program, Harvard Law School, Sept. 2020, at 1.

⁸ Ralph D. Gants, [Annual Address: State of the Judiciary](#), October 20, 2016, at 5; Massachusetts Sentencing Commission, [Selected Race Statistics](#), September 27, 2016, at 2.

⁹ Benjamin Forman and Anusha Rahman, [Viewing Justice Reinvestment from a Correctional Officer's Perspective](#), MassINC Feb. 2021, at 3.

Department of Correction announced it will be permanently closing MCI Cedar Junction, after almost 70 years of operation, because it has been operating at only about 2/3 capacity.¹⁰

Clearly, we are heading in the right direction.

But while I celebrate our declining incarceration rate, ours is still one of the highest in the world as compared with other nations,¹¹ and it has not dropped nearly as much as the crime rate has.¹² And as I have discussed, the evidence indicates that incarceration is not very effective in preventing recidivism, and there are glaring inequities in how we use it.

In light of this evidence, we cannot afford to neglect any of the alternatives to incarceration that the Legislature provided in the 2018 Reform Act. We need to redouble our focus on alternative programming that promotes public safety and reduces recidivism. It is time for us to take a closer look at restorative justice and how we can use it effectively in the courts, as envisioned under Chapter 276B.

Restorative Justice and Its Benefits

Chapter 276B defines "restorative justice" as "a voluntary process whereby offenders, victims and members of the community collectively identify and address harms, needs and obligations resulting from an offense, in order to understand the impact of that offense." The statute further provides that "an offender shall accept responsibility for their actions and the

¹⁰ [DOC Announces Plan to Suspend Housing Operations at MCI-Cedar Junction](#). Mass. Department of Correction, April 7, 2022.

¹¹ Prison Policy Initiative, [States of Incarceration: The Global Context 2021](#).

¹² Benjamin Forman and Anusha Rahman, [Viewing Justice Reinvestment from a Correctional Officer's Perspective](#), MassINC, Feb. 2021, at 3-4.

process shall support the offender as the offender makes reparation to the victim or to the community in which the harm occurred."

So, what does this mean in practice? There are a few key tenets to restorative justice that inform our understanding:

- Voluntariness;
- Offender accountability; and
- Protection and support for victims throughout the process.

The voluntary component of restorative justice is critical. Participating offenders must willingly accept responsibility for the harms they have caused. And participation by victims must be voluntary. This approach is patently different from our traditional legal system, which typically requires relatively little direct engagement from offenders, and little if any agreement from victims, for most outcomes.

The principle of offender accountability is also fundamental. There may be a misperception that restorative justice gives a "break" to criminal defendants at the expense of victims. But in fact, restorative justice demands more accountability from offenders. It requires them to confront and acknowledge and understand the harm that they have caused in ways that a guilty verdict, or even a plea bargain, may never accomplish. If you have ever participated in a restorative justice circle, or heard defendants speak about their experiences in restorative justice programs, you know what I mean.

In light of this principle of offender accountability, it's not surprising that the preliminary data on restorative justice programs suggest that these programs can be remarkably effective in reducing recidivism.

Communities for Restorative Justice, which is a program that works with many police departments and several district attorneys here in Massachusetts, reported in a 2010 study that over the previous decade, only 16 percent of participating offenders had been cited for subsequent offenses.¹³

Another leading proponent of restorative justice, Danielle Sered, runs a program in Brooklyn, New York, called Common Justice. She reports that only 7% of program participants were terminated due to picking up a new offense.¹⁴

And other restorative justice programs in Brooklyn and Chicago have reported similarly low recidivism rates.¹⁵

These results are encouraging. They suggest that, in appropriate cases, restorative justice programs can play a useful role in rehabilitating offenders and putting them back on the path to productive lives.

And finally, but just as importantly, support and protection for victims are fundamental to the restorative justice process. Restorative justice gives victims an opportunity to meet with the person who harmed them, to give voice to the trauma that they have suffered, and to play a role in shaping the offender's reparation.

Now I want to be clear, restorative justice is not appropriate for many, or even most, victims of crime. Many victims will never want to encounter the person who harmed them. The voluntariness component protects those victims who do not wish to participate in such a

¹³ Christy Barbee, ["In-depth Analysis of C4RJ's 2010 Recidivism Study,"](#) Communities for Restorative Justice, January 4, 2011.

¹⁴ Michelle Alexander, ["Reckoning with Violence,"](#) New York Times, March 3, 2019.

¹⁵ Cynthia Lee, et al., [A Community Court Grows in Brooklyn: A Comprehensive Evaluation of the Red Hook Community Justice Center](#) (National Center for State Courts, November 2013), at 9; Daniel Daponte, [Justice and Inclusion: Lessons for Boston from New York and Chicago](#), Boston University Initiative on Cities, March 3, 2021.

program. In some restorative justice programs a surrogate may be substituted for the actual victim.¹⁶ I also note that Chapter 276B automatically excludes certain serious cases from coverage – sexual offenses, offenses involving family or household members, and offenses resulting in serious bodily injury or death.¹⁷

But in an appropriate case, restorative justice may give victims a greater sense of gratification than more traditional modes of punishment.¹⁸

Communities for Restorative Justice, for example, reports an 89 percent satisfaction rate among victims and their supporters.¹⁹ And one national survey found that, by a margin of 3 to 1, victims of crime actually prefer alternative forms of holding perpetrators accountable outside of prison.²⁰

Restorative justice can also give victims a greater feeling of safety because they have more confidence that the perpetrator who harmed them has been rehabilitated and is less likely to commit future crimes. In her book Until We Reckon, for example, Danielle Sered tells the story of a mother whose 14-year-old son had been beaten and robbed. Sered asked the mother whether the young man who committed the crime and was facing a three-year prison term should be given the opportunity to participate in a restorative justice program instead. The mother agreed because of her concerns about her younger son's future safety. She said: "three years from now, when my nine-year-old son is twelve, he is going to be coming to and from his aunt's house, ... to and from the corner school alone. And one day he's going to walk by that young man. And I

¹⁶ Kristen Blankley, [Expanding Options for Restorative Justice: When a Victim Decides Not to Participate, the Use of Surrogates Can Bring Cases to the Table](#), DISPUTE RESOLUTION MAGAZINE, March 31, 2020.

¹⁷ G. L. c. 276B, § 3.

¹⁸ See Center for Victim Research, [The Impact of Restorative Justice Practices: Annotated Bibliography](#) ("Victims who participate in restorative justice typically express higher levels of satisfaction than those whose cases are handled in the traditional justice system").

¹⁹ [Communities for Restorative Justice Success Data](#).

²⁰ [Crime Survivors Speak](#), National Alliance for Safety and Justice, at 5, 15, 20.

have to ask myself: when that day comes, do I want that young man to have been upstate [in prison] or do I want him to have been with y'all."²¹

Challenges

Figuring out how best to incorporate restorative justice into the judicial process can seem challenging, because its approach is so different from the adversarial system that we are accustomed to.

We will need to research alternative restorative justice models and decide which ones might work best in which courts. Fortunately, we already have some successful models here in Massachusetts that we can study, such as the RISE program in the Federal District Court, led by Judge Sorokin and Senior Probation Officer Maria D'Addieco, and the work being done by District Attorney Sullivan in the Northwestern District. And I want to thank Judge Sorokin and D.A. Sullivan for joining us as panelists today.

We will also need to examine and formulate best practices and ensure their fair application across the Commonwealth for victims, offenders, and their communities. We will need to provide education, resources, and support for judges.

And as restorative justice programs expand, we will need to figure out how to develop a sufficient network of trained providers.

Ongoing communication and collaboration among stakeholders, both inside and outside the judiciary, will be essential. Even as we maintain appropriate separation between the functions of the judiciary, prosecutors, and defense counsel, it will be important to coordinate our work with them.

²¹ Danielle Sered, Until We Reckon: Violence, Mass Incarceration, and a Road to Repair (2019), at 44.

Collaboration with the Massachusetts Probation Service will also be critical, as I anticipate that probation officers will play an important role in fashioning and supervising restorative justice dispositions. So I want to thank Commissioner Dolan for joining us today – I look forward to working with you on this project.

We have many valuable services for victims of crime provided through the Probation Service, the Massachusetts Office of Victim Assistance, and the district attorneys' offices, and we should consult with them as well.

We should also confer with the restorative justice advisory committee established by Chapter 276B.²² And finally, since restorative justice under Chapter 276B is by definition "community-based," it will be critical for us to engage with available community resources and program providers such as Communities for Restorative Justice.

Moving Forward

Although Chapter 276B has been on the books for four years now, we are still only at the very beginning of imagining how restorative justice can be used in the Massachusetts courts. I expect that today's event will be the beginning of an ongoing dialogue, as we develop plans for implementing Chapter 276B.

We have already taken a number of steps to launch this work. In the last month I have met with the Massachusetts District Attorneys Association, the Committee for Public Counsel Services, and the Massachusetts Association of Criminal Defense Lawyers to discuss our interest in pursuing restorative justice programs within the courts and to solicit their input.

²² G. L. c. 276B, § 5.

With the support of Trial Court Chief Justice Jeffrey Locke, District Court Chief Justice Paul Dawley has formed a working group with court staff from the principal criminal courts and Probation. They will analyze the applicable law and gather information about existing restorative justice programming and resources in the Commonwealth.

I also envision forming a small interdepartmental committee of judges who can begin to outline a set of guiding principles for implementing restorative justice in the courts, and design one or more pilots to test out those principles in practice. If you would be interested in participating in this work, please let me or a member of my staff know.

And if I may make a suggestion, I hope that one year from now Flaschner will bring us together again so that we may assess the progress that has been made and the challenges that remain.

I know that none of this work will be easy. As with any new enterprise, we are bound to make mistakes and false starts, but we will learn from them. Fortunately, we have a tremendous amount of expertise available to us already among today's panelists and other members of our audience, and I look forward to learning more from all of you.

Thank you.