

Memorandum 2020-4

**Alternatives to Incarceration Generally:
Overview and Panelist Materials**

At its March 2020 meeting, the Committee on Revision of the Penal Code¹ will address the general topic of alternatives to incarceration. The Governor and Legislature specifically directed the Committee to examine that topic.²

The purpose of this memorandum is to provide general background on alternatives to incarceration. A supplement to this memorandum, which will be released shortly, will present written submissions from persons who were invited to make presentations at the meeting.

Background

Alternatives to incarceration are programs that can help someone avoid serving a sentence of incarceration in jail or prison. The Committee should explore these programs with the aim of identifying statutory reforms that would enable or support alternatives to incarceration that promote public safety, ensure justice, reduce recidivism, and grow healthy communities. Available data suggests that many of these programs, when implemented right, may do just that.³

1 All Committee memoranda and reports can be downloaded from the Committee's website: <www.clrc.ca.gov/CRPC.html>.

2 Gov't Code § 8290.5(a)(3).

3 See, e.g., National Institute of Justice's Multisite Evaluation of Prosecutor-Led Diversion Programs: Strategies, Impacts, and Cost-Effectiveness (October 2017) at viii ("Across five programs in three sites, diversion participants benefited from a reduced likelihood of conviction and incarceration; and in four of the five programs, pretrial diversion participation led to reduced re-arrest rates. In addition, in all four programs where a cost evaluation was conducted, diversion cases involved a lesser resource investment than similar comparison cases."); Judicial Council Report to the Legislature: Recidivism Reduction Fund Court Grant Program: Final Report, 2019 (Dec. 6, 2019) at 1 (data from some collaborative courts notes that "[i]n-program recidivism rates were low: approximately 7 percent of participants received new charges as a result of an arrest, and only around half of those resulted in a conviction."); Latessa and Reitler, *What Works in Reducing Recidivism and How Does it Relate to Drug Courts?*, 41 Ohio N. U. L. Rev. 757 (2015); Yolo County District Attorney, *Neighborhood Court 4-Year Report* (July 17, 2017) ("When compared to existing recidivism rates for inmates who reoffend, NHC participants are about nine times less likely to reoffend after completing the program, than those who are convicted and sentenced to jail time. While not a perfect comparison, these numbers seen in the first three years of program operations are extremely promising."); Baliga, Henry, and Valentine, *Restorative Community Conferencing A study of Community Works West's restorative justice youth diversion program in Alameda County* (2018) at 1 ("[O]f 102 young people who completed the [Restorative Community Conferencing] program, after 12 months only 18.4% of the RCC youth were subsequently

The panelists that the Committee will hear from will address four topics: diversion, collaborative courts, restorative justice, and probation.⁴ Each of those topics is briefly described below, followed by a list of items for further discussion.

Diversion

Diversion programs are opportunities for people accused of offenses to avoid accruing a criminal conviction. For example, instead of facing a trial or pleading guilty, someone enrolled in a diversion program may instead complete a course of treatment, classes, or other specific programs and then have their case dismissed. Most diversion programs are set up by local prosecutors and they decide who can enroll in a program.⁵

There are approximately a dozen separate diversion statutes in the Penal Code. They address specific kinds of circumstances, including drug offenses,⁶ military veterans,⁷ and primary caregivers (a law authored by Senator Skinner)⁸. There is no uniform diversion scheme in the Penal Code, though many of the programs share common elements, such as not requiring an admission of guilt,⁹ prosecutorial approval of the program,¹⁰ and the confidentiality of any statements made during the program.¹¹

A discontinued pilot program in Los Angeles allowed a judge — over a prosecutor’s objection — to decide whether someone should receive diversion for a misdemeanor offense, with some exceptions.¹² This program was in place from

adjudicated delinquent — that is, determined by the court to have committed another delinquent act — compared to 32.1% of the control group of youth whose cases were processed through the traditional juvenile legal system.”); Martin and Grattet, *Alternatives to Incarceration in California*, Public Policy Institute of California (April 2015) at 6 (“Given that custodial placements are substantially more expensive than placements in the community, the implication is that widening the use of community-based punishments can conserve resources without necessarily worsening recidivism.”); Bird, Goss, and Nguyen, *Recidivism of Felony Offenders in California*, Public Policy Institute of California (June 20, 2019) at 13 (post-Prop. 47, recidivism rates “declined for those sentenced to jail and probation or probation only”), 14 (also noting that “[m]ore and better data are needed”).

4 Terminology in this area is difficult. Different practitioners use different terms to refer to the same type of program and the same term to refer to different programs. This memorandum describes the basic aspects of each of the four programs addressed by the panelists, in order to provide some common vocabulary for the Committee. However, that vocabulary is not universally used throughout the state.

5 See, e.g., Penal Code § 1001.81(e) (repeated theft crimes diversion program).

6 Penal Code §§ 1000–1000.65.

7 Penal Code § 1001.80.

8 Penal Code § 1001.83.

9 See, e.g., Penal Code § 1000.2.

10 See, e.g., Penal Code § 1001.70(a).

11 See, e.g., Penal Code § 1001.24.

12 See 2014 Cal. Stat. ch. 732 (creating former Penal Code Sections 1001.94-1001.99).

2015 to 2017. It required a guilty plea. One of the panelists for the upcoming meeting, Judge Daniel J. Lowenthal, will address his experience with this program. The impact that judge-controlled general misdemeanor diversion could have state-wide could be large. In Fiscal Year 2018, there were 463,486 non-traffic misdemeanor filings in California.¹³

California is also experimenting with another type of diversion program, Law Enforcement Assisted Diversion (LEAD).¹⁴ While the Committee may eventually examine LEAD, it is not on the agenda for the March meeting.

Collaborative Courts

Collaborative courts — also known as “problem solving courts” — are special courtrooms that develop subject-matter expertise and offer treatment instead of incarceration. In a collaborative court, prosecutors, defense attorneys, and treatment professionals typically work together with the judge to figure out the best course of treatment for someone. According to the Judicial Council, “California currently has more than 400 collaborative courts in all but three small jurisdictions, with many jurisdictions having four or more court types.”¹⁵ Common subject matters include drug court and mental health court.¹⁶

Collaborative courts are widely accepted as a pragmatic attempt to solve the underlying causes that lead to criminal-system involvement. For example, in 2017

¹³ Judicial Council of California, 2019 Court Statistics Report, Statewide Caseload Trends, at 97.

¹⁴ In a LEAD program, a police officer will send someone to receive treatment or services instead of arresting them and beginning criminal proceedings. In 2016, the Legislature helped create two LEAD pilot programs in Los Angeles and San Francisco. See Penal Code §§ 1001.85-1001.88. Early data from the San Francisco program is promising. After the first year, participants “had significantly lower rates of misdemeanor and felony arrests, and felony cases. Felony arrests were about two and a half times higher (257%) for individuals in the comparison group. Misdemeanor arrests were over six times higher (623%) for the comparison group. And felony cases were three and a half times higher (360%) for the comparison group.” Malm, Perrone, and Magaña, *Law Enforcement Assisted Diversion (LEAD) External Evaluation Report to the California State Legislature* (Jan. 1, 2020) at 9. Data for the Los Angeles pilot program is not yet available, but should be soon.

But the Penal Code’s ability to further positively interact with LEAD at this point is not clear: many of the decisions about how LEAD operates are made by consensus of the relevant stakeholders and the success of the programs seems to turn on relationships and access to referrals to treatment providers. Given the very much in-progress nature of the study of the pilot projects and the uncertain role for the Penal Code to play, it would be better to focus on LEAD at a later date.

¹⁵ Judicial Council of California, Fact Sheet, Collaborative Justice Courts, Updated January 2019.

¹⁶ The Judicial Council lists these collaborative courts as the most numerous in California: “adult drug courts (85), juvenile drug courts (33), dependency drug courts (37), adult mental health courts (44), juvenile mental health courts (12), veterans’ courts (34), homeless courts (13), reentry courts (18), DUI courts (16), community courts (12), and peer/youth courts (72).” *Id.*

President Trump’s Commission on Combatting Drug Addiction and the Opioid Crisis “urge[d] states to establish drug courts in every county.”¹⁷

One emerging critique of collaborative courts is that there is insufficient data on their effectiveness and that people who do not complete treatment end up with a worse sentence than if they had not tried treatment at all.¹⁸ The scalability of the collaborative court model is also a vexing question because of the amount of resources they require. Supporters of collaborative courts point to their compassionate and non-adversarial nature as an effective solution to the substance abuse, mental health issues, and other root causes that may lead people to commit criminal offenses.

As with diversion programs, there is no uniform statutory scheme in the Penal Code that applies to collaborative courts. At least one state — Washington — does have such a statute. It specifies such things as evidence-based practices.¹⁹

Restorative Justice

Restorative justice, in its purest form, is an alternative to the traditional criminal legal system. It functions in many ways like mediation in a civil case: a trained facilitator will lead a conference between a victim, the person whose behavior caused harm, and others harmed by the behavior. Some prosecutors have set up programs along these lines, such as the Neighborhood Court program in Yolo County. And some advocates for restorative justice point to its potential to handle even the most serious cases.²⁰

The Penal Code does not currently address restorative justice, with one exception. In 2017, the Penal Code was amended to reflect that “the purpose of

¹⁷ President’s Commission on Combatting Drug Addiction and the Opioid Crisis, 10 (Nov. 1, 2017).

¹⁸ Erin Collins, *The Problem of Problem-Solving Courts*, 15, 41 (Nov. 22, 2019) (awaiting publication) (available at <<https://ssrn.com/abstract=3492003>>) (noting that “drug court evaluations seem to demonstrate that some drug courts modestly reduce recidivism for some individuals, some of the time.”).

¹⁹ See RCWA 2.30.030 (“therapeutic court” must “regularly assess the effectiveness of its program and the methods by which it implements and adopts new best practices”). See also Mississippi Code section 9-23-11(2)(a)(i) (standards for certifying a drug court include “use of evidence-based practices”).

²⁰ See Reza Harris, *Restorative justice is exactly what’s needed in the case of attack on a Bayview elder*, San Francisco Examiner (Mar. 4, 2020) (“Many are under the impression that restorative justice is just an excuse to let criminals off easy. ... [But r]estorative justice is not just a buzzword, it’s a real practice that’s shown real results.”).

sentencing is public safety” and “restorative justice” — along with “punishment” and “rehabilitation” — was an appropriate way to achieve that goal.²¹

There is also a long-standing “civil compromise” provision in the Penal Code, which dates to 1872. It allows, in many misdemeanor cases, a judge to dismiss a case “if the person injured appears before the court” and “acknowledges that he has received satisfaction for the injury” — typically in the form of cash to repair physical damage.²² This statute was last amended more than two decades ago and may be ripe for further revision.

Probation

Probation is supervision in the community by a probation officer, after someone pleads or is found guilty. Unlike a diversion program or collaborative court, a sentence of probation is just that — a sentence imposed by a judge as part of a criminal conviction, but one that largely avoids incarceration in a jail or prison. (Someone may also serve a “split” sentence that includes a period of incarceration followed by “mandatory supervision” overseen by a probation department.)²³

A person on probation will be required to follow court-set terms of probation,²⁴ which can include significant intrusions into their right to privacy.²⁵ Failure to abide by the conditions can, in some cases, result in incarceration.²⁶ A probation sentence can also be an opportunity for increased access to services and treatment, as the work of the Los Angeles Office of Diversion and Reentry (led by Committee member Peter Espinoza) demonstrates.²⁷

Probation supervision may last as long as the maximum sentence allowed for the felony offense at issue,²⁸ but is typically three to five years. For a misdemeanor, a term is capped at three years.²⁹ In 2018, 166,745 people were on probation in

21 Penal Code § 1170(a)(1) (“The Legislature finds and declares that the purpose of sentencing is public safety achieved through punishment, rehabilitation, **and restorative justice.**”) (emphasis added).

22 Penal Code §§ 1377-1379.

23 Penal Code § 1170(h)(5)(B).

24 Penal Code § 1203.1(a).

25 *United States v. Knights*, 534 U.S. 112, 119 (2001).

26 Penal Code §§ 1203.3(a) & 1203.2(b).

27 Rand Corporation, *Estimating the Size of the Los Angeles County Jail Mental Health Population Appropriate for Release into Community Services* (2020) at 1 (noting that “an estimated 61 percent of the [Los Angeles] jail mental health population (about 3,368 individuals) were determined to be appropriate candidates for diversion” programs run by ODR).

28 Penal Code § 1203.1(a),

29 Penal Code § 1203a.

California for felony offenses and 43,018 for misdemeanor offenses.³⁰ Misdemeanors usually do not require active supervision by a probation officer.

Probation is not an option for offenses that are defined in the Penal Code as “serious” or “violent;” nor can someone who commits a new offense while on probation receive an additional probation sentence.³¹ Legislation — which had no reported opposition — was introduced last year to remove certain drug-related crimes from the list of offenses that could not receive probation. It was held on suspense in the Assembly Committee on Appropriations.

There are also offenses where probation is *presumptively* not allowed. However, a judge may impose a probation sentence after making special findings.³²

Following Proposition 36 in 2000, many people “convicted of a nonviolent drug possession offense shall receive probation.”³³

The Governor’s 2020–21 budget (and related trailer bill language) include changes to probation: a maximum two-year term for all probation sentences, a pathway to terminating probation after one year, and expansion of active supervision for some misdemeanor offenses.³⁴ The two-year limit on probation terms is supported by the Chief Probation Officers of California.³⁵

Finally, there is a pending bill, AB 1950 (Kamlager), which would provide a two-year limit for misdemeanor probation.

Issues for Further Discussion

The principal question for the Committee when addressing alternatives to incarceration is what role the Penal Code should play in structuring these programs. As noted above, most diversion programs and collaborative courts operate with sometimes tenuous connections to the Penal Code and rely entirely on the priorities and relationships of local prosecutors, defense attorneys, judges,

30 This is the most recent data provided by the California Department of Justice. It can be accessed at <<https://openjustice.doj.ca.gov/exploration/crime-statistics/adult-probation-caseload-actions>>. In addition, The Chief Probation Officers of California report that on June 30, 2018, “there were 356,952 adults with supervision cases with California’s county probation departments, most of whom were on formal probation, as opposed to realigned populations such as Post Release Community Supervision (PRCS) and Mandatory Supervision.” CPOC 2018 California Probation Summary available at <https://www.cpoc.org/sites/main/files/file-attachments/california_probation_executive_summary.pdf?1555517616>.

31 Penal Code § 1203(k).

32 Penal Code § 1203(e).

33 Penal Code § 1201.1(a).

34 Governor’s Budget Summary — 2020–21 at 141; RN# 20 08867 (2/6/20) (trailer bill language).

35 Karen A. Pank and Lenore Anderson, *Gov. Newsom’s probation plan can reduce crime, make California communities safer*, Sacramento Bee (Mar. 6, 2020).

and treatment providers. The Committee should discuss whether the current state of play — which has allowed the flowering of innumerable diversion programs and collaborative courts across California — should be left as is or whether the Penal Code should include a uniform set of guidelines for collaborative courts and diversion programs to ensure consistency throughout California and to promote public safety, ensure justice, reduce recidivism, and grow healthy communities. Similarly, the Committee should consider whether the Penal Code should contain uniform standards for restorative justice programs to accomplish these same goals.

In addition to this fundamental question, there are a number of other issues that the Committee may wish to consider:

- Should a guilty plea or other admission of guilt be required? Some diversion programs, collaborative courts, and all probation sentences require such a finding. But other programs do not require this. This choice is important because requiring an admission of guilt limits who may be willing to engage in these programs. And a guilty plea can also have life-altering immigration consequences by serving as the basis for removal or other changes in immigration status.
- Should giving up other procedural rights be necessary? For example, some programs require waiver of the right to a speedy trial.
- What is the appropriate role for prosecutors? For example, should the consent of a prosecutor be required before anyone can enroll in one of these programs?
- For diversion programs and collaborative courts, how much discretion should be given to a judge in admitting people to a program? Should there be mandatory or presumptive admittance to some of these programs for some classes of offenses or people accused of offenses? Similarly, how much discretion should a court have in setting conditions of a program, monitoring those conditions, and enforcing consequences?
- Should the list of mandatory probation offenses be modified?
- To what extent do these programs “widen the net” and unnecessarily increase the criminal legal system’s involvement in people’s lives or make people worse off if they fail to complete the program?

- How much does it cost an individual to participate in one of these programs? Do the programs realistically accommodate someone’s job, family, or school obligations? Though study of these programs in California did not identify cost-to-participants as a large issue, the Penal Code does allow participants to be charged fees for diversion programs.³⁶ And a recent study from Alabama examined how the cost and structural obstacles of alternative to incarceration programs prevented many people from enrolling or completing these programs.³⁷
- What protections are in place to protect confidential or incriminating information revealed during one of these programs? For example, if a restorative justice conference involves someone accused of an offense taking responsibility, can that admission be used against them if the matter ends up in court?
- For someone who successfully completes a diversion program, collaborative court, or restorative justice program, what should happen to the records of their arrest and prosecution? Along those same lines, should there be a way for people who have completed a probation sentence to have their arrest and conviction made confidential?
- For all of these programs, what data exists addressing whether they promote public safety, ensure justice, reduce recidivism, and grow healthy communities?

Respectfully submitted,

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³⁶ Penal Code §§ 1001.15–1001.16.

³⁷ Alabama Appleseed Center for Law & Justice, *In Trouble: How the Promise of Diversion Clashes with the Reality of Poverty, Addiction and Structural Racism in Alabama’s Justice System* (2020).