

Admin.

July 15, 2020

First Supplement to Memorandum 2020-9

Materials Related to April 2020 Meeting

The Committee on Revision of the Penal Code met by teleconference on April 23-24, 2020.

The Committee has received materials related to the matters discussed at the April meeting. They are attached.

The sole purpose of this supplement is to place those materials in the Committee's record. **No Committee action is required with regard to this supplement.** This supplement will be posted to the Committee's website and distributed to its electronic mailing list, but will not be part of the materials considered at a future meeting.

Respectfully submitted,

Brian Hebert
Executive Director

From: **Judge George Eskin, Ret.**
Date: Fri, Apr 10, 2020 at 5:19 PM
Subject: Penal Code Revision
To: Michael Romano

Mike,

When the Judicial Council adopted its emergency orders regarding bail, an associate justice of the Court of Appeal shared with me the following comment: "What reason, logic and fairness could not accomplish, sheer terror has achieved."

This sentiment is consistent with the observation of a Superior Court Presiding Judge, who suggested that incarceration should not be required as a punitive consequence for the vast majority of misdemeanor offenses.

I urge consideration of both in the work of the Committee....

The coronavirus pandemic will leave us with a world much different from the one we have known, and criminal justice reform may be a beneficiary.....

Judge George Eskin (Ret.)



American Friends Service Committee

1730 Franklin St. Oakland CA 94612

Committee on Revision of the Penal Code
Attn: Thomas Nosewicz

April 23, 2020

Re: Recommendations on Restorative Justice Programming

Dear Members of the Committee on Revision of the Penal Code:

On behalf of the American Friends Service Committee, I am pleased to submit this memo for consideration by the Committee regarding alternatives to incarceration and, in particular, restorative justice (RJ) diversion programs.

Founded in 1917, the American Friends Service Committee (AFSC) is a Quaker organization that promotes lasting peace with justice, as a practical expression of faith in action. AFSC works to promote healing – instead of punishment – in the US criminal legal system. We advocate for alternatives to incarceration, better reintegration for people after prison, an end to the privatization of prisons, more humane conditions of confinement, and ultimately, the abolition of all prisons. AFSC's California Healing Justice program has a long history of working to shift conditions within prisons in California while promoting healing approaches as alternatives to violence and punishment.

In my role as program coordinator of the California Healing Justice program, I bring personal knowledge and experience in restorative justice practices. I have been involved in mediation for a decade and for the past five years have held restorative circles in a variety of settings. This includes holding circle in Alameda and San Francisco counties as part of a diversion program for pre-adjudicated youth. Through my work with AFSC, I have traveled across California to advocate for restorative justice programming and am currently supporting the San Joaquin county District Attorney's office in the creation of a new restorative diversion program for adults.

In this memo, I want to share recommendations from the AFSC regarding how restorative justice could and should show up in California's Penal Code, and summarize some key lessons I have learned through my years of practical experience as a circle keeper on what makes a successful restorative justice program.

How Does This Relate to the Penal Code

As your committee knows, there is very little in our current Penal Code relating to restorative justice. However, various attempts to insert RJ into the Penal Code have been made. Just last year, SB 678 was authored and introduced to the Senate by State Senator Steve Glazer. This bill would have replaced Chapter 2.96 of Title 6 of Part 2 of the Penal Code, starting with section 1001.100.

In short, SB 678 sought to establish five-year grants to up to three counties to create and operate restorative justice diversion programs. The bill laid out a vision for what RJ diversion could look like in our state. For eligible cases, criminal proceedings would have been suspended for up to 36 months while a restorative process took place. After careful counseling and preparation, circle would have been held between the responsible party and the victim or a surrogate chosen to stand in for the victim, in which the full impact of the harm could have been expressed by both sides. A restorative justice plan would then have been created and both parties supported in realizing this plan, the goal of which would have been to bring amends to the victim and their community and ensure that responsible party had the support necessary to prevent the commission of future harm.

Other vital provisions included in the bill were an assurance that any information shared during the RJ program be inadmissible in any action or proceeding and that, upon successful completion of the program, the responsible party would have had all charges cleared and the arrest upon which the diversion was based would have been deemed never to have occurred.

Unfortunately, SB 678 died on the appropriations suspense file in May 2019.

Our Recommendations

We strongly suggest that this committee include the creation of a similar program, via amending Cal. Pen. Code § 1001.100, in your recommendations to the legislature. We offer some important insights into what makes a successful restorative justice program, for inclusion in any such recommendations.

1 Eligibility & Inclusion

Currently, many current RJ programs across the US focus solely on youth. While we strongly believe in the power of restorative justice for youth, we also believe in the power of RJ for people of all ages. In establishing a pilot program in California – especially one that we hope would be studied and evaluated to demonstrate the potential for RJ programs statewide – we believe that adults must be included.

We likewise strongly recommend that serious and violent cases be considered eligible in any future RJ program. Rather than carve out certain offense types, we

recommend that any situation where the harmed party consents to engage in restorative justice be considered eligible.

We believe that all victims of harm should have the ability to guide their own healing process – including restorative justice. Too often, RJ is applied only to low-level or “non-violent” offenses. By not allowing RJ to be applied to a wide variety of offenses, it takes agency away from people harmed to access the full range of possible remedies. It also holds the whole domain back by not examining the potential application and breadth of its impact. We point the committee to the resources and studies named by sujatha baliga and Impact Justice in their memo to this committee, that show the impact of RJ in a wide range of case types to support this point.

2 Who Runs the Program

It is vital that any RJ diversion program be run independent of law enforcement by a community-based organization (CBO). There is a long-standing legacy of distrust between many communities – in particular communities of color – and law enforcement. A program run by law enforcement would immediately render an RJ diversion program ineffective.

That said, it is vital that any CBO chosen to run an RJ program have both the deep trust of the community and the District Attorney’s Office, with whom there will necessarily be close contact. Clear channels of communication between the CBO and the DA’s office are imperative.

The decision of which CBO gets to run an RJ program should be made by a joint committee, made up of representatives from both the DAs office and the community. This committee could also play a role in overseeing the evaluation and funding mechanisms of the program, to ensure that community stakeholders are involved in both of these processes.

When it comes to the circle keepers themselves, choosing people who are a reflection of the community in which they hold circle - with deep networks, trust, and connections in the community - is vital. In addition to developing trust with both the participants in the circle and the DA’s office, the circle keeper is often expected to provide the some if not all support necessary to ensure the success of the aforementioned RJ plan. Having a strong personal and community network of counselors, mentors, internship opportunities, tutors, and more is paramount to the success of each case.

3 Proper Resourcing

RJ programs must be agile to address unexpected hurdles and meet the needs of participants and the community at large in real time. For this to be possible, consistent, unrestricted funding is important. It is likewise important that this funding flow through an independent body – for example the joint committee mentioned above – rather than a DA’s office, so that unnecessary power structures don’t form between the DA’s Office and the CBO.

Beyond the RJ program itself, it is vital that counties have strong, ongoing funding for supportive programming like affordable housing, therapy, job training and vocational programs, education, substance use disorder and mental health programming and more. It is devastating to see program participants not being able to succeed in their RJ plans because of a lack of community resources and support. Indeed, restorative justice is only as effective as the supports available to help people heal.

4 Cases Should be Diverted Pre-Charge

Many RJ programs require the responsible party to plead guilty before being diverted into an RJ program. While taking responsibility for the harm caused is a central tenant of RJ, we strongly suggest that cases be diverted pre-charge. This is because so much of what makes restorative justice effective is the ability to understand people as their whole selves and understand the nuance of their circumstances. By forcing people to plead guilty before the RJ process, a binary situation is created that eliminates the ability to see things in this nuanced and whole way. Diverting cases pre-charge also removes the hurdle of having to get charges dropped after the successful completion of the program.

5 Confidentiality

It is imperative that any and all information shared during an RJ process be protected against admission and discovery in any future actions or proceedings. Participants must feel that they are able to share openly and vulnerably about what occurred and why harm happened. This is only possible with a guarantee that information shared will be protected.

Relevance in this Moment

We submit this memo in a context of uncertainty, economic downturn, and a global pandemic. While recommending a broad-based, well-financed, multi-year restorative justice pilot program might seem out of step with the current reality, AFSC believes the opposite.

This week, the first deaths of incarcerated people in California from COVID-19 were reported. It is indisputable that our prisons are vastly overcrowded, with nearly one-quarter of the state prison population now over the age of 50. This is a direct product of the “tough on crime” era and extreme sentencing that has been in place.

Investing in a restorative justice program that is inclusive of cases of violence and serious harm is imperative to address the perilous conditions in our prisons and jails and ensure that harm can be addressed in a way that avoids the conditions that so many are currently facing. In this moment, we need to see the merit and necessity of rethinking and revisioning how we address harm in our state.

The recommendations put forth in this letter are just a few of the many we have regarding RJ programming. We appreciate the ability to submit these and hope that this marks the beginning of a more fulsome conversation about the potential for restorative justice programming in our state.

Should you have any questions or want to discuss this further, please feel free to reach out to me at fkhan@afsc.org.

Sincerely,

A handwritten signature in black ink that reads "FATIMEH K". The letters are slightly slanted and connected.

Fatimeh Khan
Program Coordinator
California Healing Justice Program
American Friends Service Committee

Subject: comment - Judge Manley

Date: Friday, April 24, 2020 at 10:52:33 AM Pacific Daylight Time

From: Christine Clifford

To: Thomas Nosewicz

Hi Tom

I just wanted to say that in watching Judge Manley yesterday I also got the impression that he was talking about how inappropriate and dysfunctional it was to require people to go to classes if they were mentally ill or had limited capacity to understand the classes – in English or not. I got the impression he was speaking about serious mental illness, TBI, intellectual disabilities, and conditions like Fetal Alcohol Spectrum Disorders (common in the alcoholic community) , - all situations where people cannot really follow the classes, gain anything from attending them, or necessarily generalize what they may or may not learn from a class into daily living. I also think he mentioned they are not generally evidenced based, as in there is no evidence that attending 52 weeks of DV classes or 18 months of AA and mandatory drug and alcohol counseling has any proven impact on the underlying problem. He also mentioned that placing financial penalties on people with no resources is not functional as it just brings them back to jail as violations of their probation terms.

Thanks,

Christine Clifford

Subject: CRPC Response
Date: Friday, April 24, 2020 at 8:20:19 PM Pacific Daylight Time
From: Sheila Pinkel
To: Thomas Nosewicz
Attachments: Restorative justice12 flat.jpg

Dear Tom,

I have been following the committee meetings with rapt attention and have forwarded the materials generated by the committee and participants to people in Los Angeles involved with trying to shift from a carceral system to a community based system to adjudicate and heal social problems. Many of those people were active in developing the ATI protocols, including Justice LA and CURB leaders. I spent last year working on the ATI protocol for restorative justice and so am so pleased that your committee is focusing on it.

You might want to see how the pilot program using restorative justice approach with felons in Sacramento is doing. Below is an article about this program.

<https://sacramento.cbslocal.com/2019/07/08/california-diversion-program-victims-confront-offenders/>

I especially appreciated Senator Skinner's adding to the discussion the necessity to look at the term 'felon' because too often people are lumped into this category without any attempt to unpack individual life histories or circumstances and then they spend the rest of their lives incarcerated.

Thanks so much for all the work that you and the committee are doing. I look forward to the next public meeting. Below is a copy of a 24" x 24" poster I made entitled "Restorative Justice Principles." I will be happy to send one to you if you want.

All the best,

Sheila Pinkel
Emerita Professor of Art, Pomona College