ALTERNATIVES TO PROSECUTION:

A SURVEY OF THE PRACTICE OF DIVERSION

by
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This project was supported by Grant Number NI 71-067 awarded by the Law Enforcement Assistance Administration, U.S. Department of Justice, under the Omnibus Crime Control and Safe Streets Act of 1968, as amended. Points of view or opinions stated in this document are those of the authors and do not nece-sarily represent the official position or policies of the U.S. Department of Justice

CHAPTER ONE: AN OUTLINE

INTRODUCTION

Diversion involves the disposition of criminal charges without a conviction.[1] The disposition does not imply a finding of not guilty; rather it often assumes guilt.[2] It is conditioned on the defendant's performance of specified obligations. These may include any of the following--to make restitution to the victim, to be on good behavior for a specified period, to accept pre-conviction probationary supervision, to accept counseling, or to enter and complete a treatment program. Most diversion programs are created under discretionary power, but a few are established by statute.

Although diversion has recently become popular,[3] the practice of diversion has existed for many years. The earlier programs, many of which continue in operation, are informal and rely on scarce, already available resources to provide minimal supervision for the defendant. Informal diversion practices occur in virtually all criminal justice systems.

Much of the current enthusiasm for diversion centers on the newer programs which are more structured.[4] These programs are supported by grants or statutes providing resources for intensive services to the defendant. Structured programs exist in more than 40 cities.

This is the final report of an American Bar Foundation study of the practice of diversion. Its objective is to illuminate through a single report the variety in the practice of diversion. The intention is explication of the bases and rationale of diversion in action, not evaluation of specific programs.

RATIONALE OF DIVERSION

The theoretical structure of the criminal law is defined by a series of competing philosophical positions.[5] There are unresolved conflicts between contrasting sets of rationales such as punishment and treatment. These conflicts are mediated by statutes and judicial rulings which, while seldom establishing a midpoint, commonly adopt compromise positions.

These conflicts of theory may appear irrelevant to the practitioner. In its delivered form, criminal justice only vaguely resembles formal principles and is shaped

by strong factors in addition to the philosophical positions. The practitioner deals with a real world that includes inadequate resources and time, political pressures and imperfect programs.

The researcher often avoids the philosophical debates because his research tools cannot resolve the value conflicts and his function is to describe the law in action in the real world. However, in a discussion of the practice of diversion a brief examination of the underlying theories is necessary. The use of diversion is expanding, but the topic is relatively new to social science and legal literature, and its theoretical bases are not generally understood.[6] These bases cannot be ignored because to do so would leave unanswered the threshhold questions of why diversion exists and why there is increasing interest in it. Criminal justice practice provides some answers to these questions. These will be discussed shortly. However, there are also more abstract answers and familiarity with this part of the pheonomenon of diversion is essential to an understanding of the whole.

Diversion provides an alternative to prosecution and, more importantly, to traditional correctionsl programs.[7] Although some diversion programs offer mediation or arbitration instead

of prosecution, the correctional perspective is dominant, and focuses attention on those programs which offer counseling or treatment.

The debate between the view of criminal justice as primarily a social service process and the view of it as primarily a punishment process is relevant. The social service model assumes that deviant acts result from social or psychological problems and that the appropriate response is to solve these problems. The punishment model assumes individual moral responsibility and directs attention to asserting public reprehension of the specific act, thereby deterring future crimes or exacting retribution for the current offense.[8] The debate is commonly waged at the correctional level, and seeks to define the purpose of post-conviction services. This focus of debate is, in itself, a compromise, allowing at the minimum for punishment in the form of labeling the offender as a criminal and depriving him of various aspects of liberty.

Diversion moves toward complete obeisance to the social service paradigm by providing counseling and treatment without conviction. Diversion's current popularity is largely attributable to the growing dominance of the social service model in intellectual and policy discussions. Under that model conviction is only marginally relevant to any goal of

the system and may be inconsistant with the primary goals.

One benefit flowing from diversion is that the defendant avoids a conviction. Occasionally this is discussed in context, of the concept of over criminalization,[9] a theme which, in part, asserts that the criminal law extends too far into regulation of moral conduct. The over criminalization argument is an element of the punishment-social service debate, defining punishment (criminalization) as inappropriate for some acts currently defined as crimes. Diversion provides a selective and intermediate adjustment of this over extension, and often occurs without the protracted debate and uncertainties attendant on legislative action.

More commonly, however, avoidance of a conviction is viewed as a benefit on the assumption that it encourages the defendant to avoid future criminality. As a result of this view; diversion extends to crimes and defendants who are beyond the limits of the overcriminalization theme. Conviction is thought undesirable or unnecessary and competing social costs such as decreased specific deterrence are seldom discussed. The primary relevant public policy is assumed to be prevention of future deviance by the defendant and the appropriate approach is treatment or counseling.

Within this rationale, the dominant contemporary theme is to provide affirmative assistance to the defendant, rather

than to assist him merely through avoidance of conviction. Contemporary interest centers on the structured, not the informal diversion programs. One distinction between these formats lies in the quantity and quality of services given to the defendant. Both informal and structured programs allow the defendant to avoid a conviction. However, the informal programs leave the defendant virtually unsupervised and unaided, while the structured programs provide intensive service. Avoidance of a conviction is conditioned on the defendant's acceptance of and satisfactory participation in these services.

Diversion rejects the traditional compromise between the punishment and social service models in order to achieve more effective counseling. Most contemporary literature asserts that a criminal conviction places a psychological burden and social stigma on the offender.[10] This creates obstacles to successful counseling and eventual re-integration of the individual into society. Diversion counseling is not forced to overcome these obstacles and has, allegedly, a higher probability of success.

In theory, diversion involves two other elements which are lacking in traditional correctional practices. First, since the defendant is reached shortly after arrest or the

filing of criminal charges, the counseling program can take advantage of his unsettled state of mind and disrupted personal defense mechanisms to begin effective counseling or therapy. The delays attendant on proving or obtaining acknowledgement of guilt are avoided; the issue of guilt or innocence becomes secondary or irrelevant. Second, the opportunity to avoid conviction or, otherwise stated, the threat of prosecution on failure to cooperate, provides added incentive to cooperate with the counselor. In contrast to traditional practices where conviction is a precondition to counseling, counseling failure is a precondition to prosecution and conviction.

In addition to these theoretical improvements over traditional correctional care, most diversion counseling programs are compatible with the contemporary correctional trend toward community treatment of offenders. The community treatment rationale posits that removing an offender from the community to a correctional institution creates an artificial barrier which must then be overcome on his return to the community.[11] Also, institutional treatment leads the offender into association with other criminals, potentially further socializing him into a deviant lifestyle. Community treatment lessens

these problems by providing services to the offender while he is at-large or in residence at a half-way house located in the community.

The purpose of this discussion is not an evaluation of the diversion concept, but an explication of it. For that reason, extended discussion of the arguments that might define social costs resulting from diversion programs is not necessary. Many of these relate to the proposition that there is a social loss resulting from the non-conviction of persons charged with proveable criminal offenses. The social loss involves a weakening of the general or specific deterrence effects of criminal law or of the performance of its function as a moralizing influence on society.[12] However, as the preceding discussion implies, diversion adheres to a general position that regards these factors as secondary, if not inappropriate objectives.

In defining the rationale of diversion it is helpful to note one possible cost of a diversion process. This concerns the argument that state control of an individual's conduct should not be asserted under the criminal law in the absence of proven guilt. Since the diversion counseling programs restrict the individual's freedom of action and require his participation in a service program, the fact that they occur without conviction is relevant. The argument

is often misstated as a question of coercion, and the rebuttal argument of the proponenets of diversion is that participation is voluntary.

The more telling argument concerns the appropriate limits of state power, conviction on a specific offense being one defining or limiting factor. To proponents of diversion, this position is regarded as disingenuous. Diversion is construed as offering the defendant a "break," and is considered a lesser disposition than would occur under full prosecution. Since diversion often requires extensive control of the participant for periods of up to one year, this characterization of diversion is valid only in terms of formal labels and on the assumption that conviction is invariably the result of prosecution. In the absence of these assumptions, the availability of prosecution rather than the fact of conviction becomes the precondition for state control and an obvious extension of that control has occurred. The counterargument that diversion counseling is acceptable because it functions in the defendant's best interests, appears disallowed in light of recent developments in juvenile court law. However, it often is implicitly assumed to be persuasive by proponents of diversion.

To this point our comments about the conceptual bases of diversion have been limited to the programs which involve counseling or treatment. In view of the focus of contemporary interest, this emphasis is appropriate. However, diversion also includes programs which provide mediation and arbitration rather than counseling. The rationale of such programs is similar to that of the counseling programs. Arbitration or mediation occurs when the basis of the criminal complaint is a dispute and the assumption of diversion that the appropriate policy is resolution of the dispute, not punishment of the wrongdoer. The threat of prosecution provides incentive for a settlement, and settlements are described as less severe dispositions for the defendant.

PRACTICE OF DIVERSION

While a social service perspective dominates diversion theory, a prosecution perspective dominates diversion practice. The prosecution perspective contains important elements of the belief that the function of the criminal justice process includes the appropriate labeling of deviant behavior. The prosecution perspective is characterized by a necessity to establish priorities among criminal cases

and is often defined by individualized perceptions of justice and fairness.

In order to understand the manner in which cases are selected for diversion, it is necessary to discuss the criminal justice discretionary system. This term has been used elsewhere.[13] It refers to the informal interaction of all parties involved in the disposition of a criminal case, and suggests that this informal interaction, rather than solely the discretionary judgments of criminal justice officials, is determinative of the nature and timing of the disposition. In the practice of diversion, the relevant parties are the prosecuting attorney, the police, the criminal court judge, the defense (defendant and/or his attorney), the victim and, to a lesser extent, the legislature (through criminal statutes). Additionally, when the diversion program involves a staff of persons other than those named above, the staff also participates in the eventual decision.

Diversion is applied to cases regarded as non-serious by prosecuting attorneys and judges. The views of these officials do not necessarily conform to statutory definitions, but are influenced by the imbalance between caseloads and time requires them to establish priorities among criminal complaints.

Early and efficient disposition of recurring, low priority complaint-types is favored and leniency induces efficient disposition.

In establishing priorities, these officials seek to express appropriate public policy. Necessarily their decisions reflect personal attitudes. Decisions are influenced by their perceptions of the social context from which the complaint arose, the defendant's social status and personality, the likelihood of repetitive or increasingly severe criminality, the availability of alternatives to conviction, the alleged act's potential of causing physical injuries and a variety of other factors.

An instructive illustration is the administration of statutes dealing with marijuana. Historically, penalties for possession and sale of marijuana have been severe. There is a current movement toward leniency in statute law and judicial rulings,[14] accompanied or preceded by leniency in the administration of the statutes. Marijuana is increasingly accepted as an element of the lifestyle of many persons and marijuana possession charges are frequently dismissed outright or diverted. Charges involving sale are less commonly diverted or dismissed. When leniency is indicated in sale cases, it is more often expressed in

lenient sentences after conviction. In general, major sale activity is viewed as seriously criminal and is dealt with harshly.

The victim and the defense both play important roles in the diversion decision. If he expresses a strong interest in a criminal disposition, the victim can often prevent diversion or dismissal. On the other hand, the victim may induce a noncriminal disposition even if the prosecutor views the alleged act as serious. This occurs frequently in criminal complaints involving consumer fraud where a settlement between victim and defendant obviates prosecution.

In some programs, diversion is initiated on motion of the defendant. More often, only the defendant's acceptance of an offer to participate is required. Since the defense interest is in obtaining the least confining disposition possible, the opportunity to avoid conviction by diversion is usually accepted. In certain instances, however, the obligations imposed by diversion are regarded as more onerous than other likely dispositions, and the defendant resists diversion.

Criminal statutes play a limited role in the practice of diversion. Disproportionately high statutory penalties may induce diversion or other discretionary adjustments

(e.g. dismissals or guilty pleas to reduced charges).[15] Also, some diversion procedures are created by statutes establishing limits and conditions for diversion. In practice, however, these statutes are invoked only when the discretionary system defines diversion as appropriate.

In the absence of diversion, there is a dilemma in cases defined by the discretionary system as requiring leniency. Two alternative actions are available. The first is to dismiss charges or to refuse to prosecute (a response that we label "screening"). Screening is more frequent than diversion. It minimizes the impact of a criminal complaint on the defendant and reduces to a minimum the time spent on the case by the system. However, screening involves no attempt to deal with the factors leading to the defendant's act and provides no supervision over his future conduct. It may encourage the defendant to believe that his actions have been condoned.

The second alternative is to convict and impose a suspended sentence, minimal probation or fine, a response that we label "sentence leniency." Sentence leniency may be achieved through plea negotiation,[16] the entry of a guilty plea serving to minimize the time spent by the system on the case. Although sentence leniency avoids the potential reenforcement effect of screening, it leaves the

defendant with a conviction. In many cases this is viewed as inappropriate. Also, since most correctional programs are over-worked, sentencing offers little likelihood of real assistance for the offender, but merely increases correctional caseloads.

The informal diversion programs are direct expressions of the dispositional dilemma. They are implemented by concerned individuals or agencies as a reaction against the absence of realistic alternatives and the pressure of large caseloads. Their effectiveness is limited by the general lack of resources within the criminal justice system. In practice many such efforts are virtually indistinguishable from screening. The obligations imposed on the defendant are often vague (e.g. "good behavior") and supervision or counseling is minimal. However, some enlist the cooperation, via referral, of non-criminal justice agencies to provide services to the department. Also, in complaints arising from a dispute, the mediative skills of criminal justice officials are often sufficient to resolve the immediate problem.

The structured service programs introduce a new element into the discretionary system. Offenders can be diverted with the knowledge that they will receive substantial

services and supervision. Typically the services are more intensive than traditional correctional systems. The grants which establish these programs allow for low counselor-client ratios and make a variety of testing and other procedures available. Program personnel participate in decisions concerning diversion of individual cases, promoting a treatment perspective within limits which they regard as necessary to maintain credibility. As a result the service programs can promote expanded use of diversion.

Areas in which Diversion Occurs

Although diversion seldom occurs where a case is defined as seriously criminal, it is not always a routine disposition for marginally criminal cases. Sentence leniency and screening are more common dispositions, and the fact that diversion is routine in one jurisdiction for a specific crime type does not imply that all jurisdictions use it for this type of offense.

The existence of a diversion program appears to be a highly individualized phenomenon.[17] Informal programs are characterized by the presence of one or more concerned officials who are cognizant of the dispositional dilemma and

are willing to exercise their discretionary power to establish quasi-legal responses to it. In the structured programs, the concerned party is often an organization. Sufficient motivation has existed to complete the often complex task of marshalling available grant funds or of persuading a legislative body to enact authorizing statutes and to provide funding.

As a result, the existing programs differ in the nature of the offenses or the offenders addressed and in the obligations imposed on the defendant. The programs combine in differing measure a desire to rid the criminal justice system of marginally criminal cases, a wish to accommodate victim and defendant interests, and an effort to provide the defendant an opportunity to avoid a criminal record and later criminality. Among the types of service provided by the programs are referral to vocational counseling and placement services, intensive pre-conviction probation, referral to non-criminal treatment agencies, professional arbitration of disputes, dismissal after a period of minimally supervised "good behavior," referral to medical detoxification centers, referral to family counseling services and commitment to treatment programs.

Diversion occurs with frequency in three areas; complaints deriving from personal disputes, charges against

defendants whose underlying problems are in the border between public health and criminal justice, and criminal charges against offenders who do not have an extensive prior criminal record.

A variety of disputes reach the attention of the criminal justice system. These include disputes over consumer transactions (occasionally amounting to fraud) and cashing checks with insufficient funds, as well as assaults between husband and wife and disputes between neighbors (often involving assault).

Common to these situations is the tendency of complainants to be satisfied by a disposition short of conviction. Restitution is often preferred to conviction in disputes involving money. In assaults the passage of time frequently leads to forgiveness or at least to a lessening of animosity.

Disputes often involve a misunderstanding and lack the indicia of underlying criminality. Criminal justice officials tend to regard the event as nonserious or even noncriminal. However, certain circumstances can lead to an emphasis on prosecution (e.g. serious physical injury in assaults). Property disputes may be prosecuted if there are clear indicia of fraud, but prosecution is limited by a scarcity of the necessary resources to prove fraud, and by the victims' willingness to accept restitution.

Informal diversion settles the current dispute. However, intra-family and neighbor disputes are typically repetitive and may have a potential for serious injury. The short term remedy may appear inadequate, leading to attempts to seek more lasting adjustments. In some informal programs, dismissals are conditioned on good behavior during a specified period; in others, referral procedures bring family disputants into contact with counseling services. Professional arbitration is employed for disputes between neighbors.

The second area is the interface between public health and criminal justice. Minor crimes symptomatic of an underlying illness appear only marginally criminal and diversion may be employed to place defendants in contact with treatment programs. Diversion of alcoholics charged with public drunkenness, mentally ill persons and drug addicts is frequent. Drug cases reflect not only the conception of addiction as an illness but, especially in marijuana charges, the growing social acceptance of its use. Charges involving possession are often diverted.

When the relationship between the crime and the illness is more remote, or the act is itself considered seriously criminal, diversion is infrequent. Sales of narcotics and crimes of violence are illustrative. If

diversion occurs for these more serious acts, it typically involves commitment procedures and the objective is not leniency, but often to obtain lengthier confinement. Often, especially for drug addicts, post-conviction treatment is preferred to diversion.

Offenders with minor prior records are frequently diverted. Within this category there is an emphasis on youthful offenders charged with minor crimes involving no serious injury or threat thereof. Informal diversion employs conditional dismissals with limited counseling. It emphasizes avoiding the stigma of a criminal conviction on the assumption that, without the stigma, the defendant is less likely to repeat his criminal conduct. It also effectively removes many low priority offenses from the system without taxing correctional or other services.

Newer service programs attempt to facilitate the individual's return to acceptable conduct by providing intensive counseling. Activity is especially frequent with respect to younger offenders whose acts are regarded as socially motivated and with whom counseling might produce impressive results. Participation is limited to "motivated" defendants who desire to alter their behavior. The most common format provides vocational counseling and referral.

Evaluative Comments

The focus of our study was on describing the practice of diversion and we did not independently evaluate the performance of the programs described. Because of this, any evaluative commentary must be tentative and restricted to the materials, including evaluative studies previously conducted, which were otherwise available to us. Examination of these materials provides the basis for commentary which may serve to place the actual performance of current diversion programs into a realistic context.

Although the experience of both the informal and the structured programs demonstrates the feasibility of diversion, it does not demonstrate the desirability. Even ignoring the theoretical arguments that social costs are incurred as the result of diversion, the data concerning impact on the participants is inconclusive.[18]

The informal programs exist in the absence of even superficial demonstration of their effect on the defendants. No information is available concerning the later criminal record of participants. It is assumed that participants regard diversion as a beneficial disposition, but whether they recognize the nature of the disposition or their obligations under it has never been documented.

Data collection in most of the structured programs is more extensive, but the implications of the various studies of effectiveness that have been conducted are uncertain. It is fairly well-documented that the rate of crime committed while in diversion counseling is low and that, within limits, many prosecutors, judges and defendants will cooperate with the program. Finally, based on currently available data, more than half of the selected participants can be expected to successfully complete the counseling term.

However, data is lacking concerning the comparison between defendants who have received intensive services and individuals diverted without services or simply screened from the criminal process. Because these offenders often have no established pattern of criminality, it is possible that many defendants may avoid future criminality regardless of counseling and other services. The extent to which this occurs is untested.

There are evaluative difficulties in comparing the performance of structured diversion programs to traditional correctional procedures. Data from several such diversion programs suggest lower recidivism rates among successful participants.[19] These differences could flow from the placement of counseling procedures prior to conviction. However,

the differences may reflect the self-selection entry process which is tied to the defendant's motivation for treatment. While age, crime charged and prior record characteristics are controlled for in some of the evaluative studies, in selecting a comparison group, the defendant's motivation could not be controlled.

The recidivism rates might also relate to the quality of the services provided. Diversion caseloads are controlled to maintain counselor workloads which facilitate effective assistance. Program staff are typically highly motivated and perceptive. Supporting services are extensive. None of these characteristics are likely to obtain in traditional, over-taxed correctional agencies.

Programs dealing with the settlement of disputes are effective in mediating the current controversy, largely due to the propensity of disputants to desire settlement. Whether long term adjustment is achieved is uncertain.

The Study

Our intention has been to survey the variety of experience with diversion. The approach was descriptive. Research concerning specific programs consisted primarily of visits of varying length to the programs. Evaluations of performance were not attempted.

The study involved over two years of research. The initial phase was devoted to developing, in broad outline, the areas in which diversion commonly occurs. Following this preliminary phase, we turned our attention to an examination of how these crimes are handled in the absence of formal diversion programs. Intensive analysis was made of disposition patterns and rationales in two moderate-sized urban jurisdictions.[20] Additionally, brief visits were made to more than ten jurisdictions to inquire concerning their handling of the crime types in question. The sparse existing literature concerning diversion was surveyed. Some of the results of this second stage research were reported in a prior article.[21]

This phase provided insights into the role played by diversion programs surveyed during the third phase. The third phase consisted of visits to selected diversion programs. Programs were selected which seemed best to

exemplify the various current trends in diversion practice. In operation, the second and third research phases overlapped. Many of the survey visits were made before the second phase was completed.

Our research excluded diversion in the juvenile justice system. Diversion in this area has been extensively discussed in other publications.[22]

The juvenile court is, in itself, the largest and oldest diversion procedure. However, diversion from the juvenile court is also common.[23] The juvenile court process has passed from high expectations to observable failure. This experience provides an impressive cautionary note relative to the current enthusiasm for diversion.

We do not discuss the growing use of volunteers in counseling positions. Several agencies are active in monitering and evaluating the performance of volunteers.[24] In any event, although occasionally used in connection with diversion efforts, the use of volunteers is principally a correction-oriented innovation.

CHAPTER TWO: DISPUTE SETTLEMENT

INTRODUCTION

This chapter discusses diversion of criminal complaints deriving from disputes. Included are complaints resulting from assaults between neighbors, consumer fraud and checks cashed against insufficient funds.

As a result of two characteristics of these complaints, disposition without conviction is common. The first is that the complaints often allege acts which lack apparent criminal intent. Misunderstandings recurrently underlie the complaints and both parties are frequently at fault. The second factor is that all relevant interests often coalesce in the direction of a non-criminal disposition. Police, prosecutors and judges are reluctant to devote much time to these offenses and may prefer settlement of the dispute to conviction of one disputant. The defendant may repent, albeit under the threat of prosecution, while victims are willing to accept a disposition short of conviction.

Diversion typically involves settlement of the immediate dispute. When the parties have no continuing

relationship, this settlement is a final solution. However, since husband and wife and neighbor disputants remain in contact with each other, arguments recur and resolution of the current dispute is insufficient. Since criminal justice officials have little time or training to deal with the basis of the continuing problems, some diversion programs involve referral of the disputants to other agencies.

Although noncriminal disposition is the norm, prosecution occurs under special circumstances. In crimes involving the transfer of property, criminal justice officials regard the alleged crime as seriously criminal if apparent fraudulent intent is present. In such cases they prefer a criminal disposition. In disputes causing physical injury, serious injury or the use of a deadly weapon by the aggressor may lead to a similar characterization and preference for prosecution.

MONETARY DISPUTES

Complaints alleging the taking of property by deception are diverted by restitution or performance on a contract by the defendant. In most cases the victim and the defendant share compatable interests which move toward informal settlement. The victim's primary interest is adjustment

of his monetary or other losses. The defendant desires to avoid prosecution in order to adjust a misunderstanding or, more pragmatically, to avoid the uncertainties and costs of prosecution.

Prosecuting officials often desire settlement, but their position varies according to the answers to two questions: Is this defendant a criminal? Does the complaint allege an apparent, fraudulent act? Both questions require a subjective judgment and, although they may be analytically distinct, the distinction is seldom drawn in practice. Among the factors considered are the nature of the act alleged, the economic and social status of the defendant, as well as the defendant's reputation and prior conduct. For example, prosecution of a reputable businessman for a misunderstanding resulting from inefficient bookkeeping practices is unwarranted. Similarly, conviction of an individual with no prior criminal record for the act of cashing a small check on insufficient funds is undesirable.

In making the necessary judgments, prosecuting officials commonly act on superficial information. The available information consists of the allegations of the victim and, frequently, a brief conversation with the defendant. Extensive investigation is seldom possible due to limited prosecutorial resources.

Even if prosecution is desired, two factors limit the extent to which the prosecutor is able to exercise this option. The first is the recurring theme of inadequate resources. With respect to consumer fraud complaints, the resource problem is created by a necessity for more extensive investigative work than is required to establish other criminal charges. The second constraining influence is that the victim and the defendant often reach informal settlement. Although a prosecutor may view an alleged crime as part of a continuing pattern of fraud, the victim views the problem in terms of his damages only. Informal settlement removes the victim's willing testimony and makes prosecution difficult or impossible.

Worthless Checks

Knowingly cashing a check on insufficient funds is a criminal offense in most states. The penalties are low, and are graduated according to the amount of the check.[25]

Diversion practices are handled by lower criminal courts or assistant prosecutors. The process typically involves a complaint, a summons (or warrant for arrest), an appearance, and an almost immediate offer and acceptance of restitution.[26]

A coalescence of all relevant interests directs the process towards disposition by restitution. Victims often file a complaint primarily to obtain payment. Prosecutors and judges view the complaints more as nuisances than as criminal matters. Defendants desire to avoid prosecution, a tendency which is enhanced by the ease with which the crime can be established; the returned check makes a strong prima facie case.

The frequency and ease with which restitution occurs gives the criminal justice system the appearance of a collection agency. Regarding this as inappropriate, courts or prosecutors may require that the complainant make a written demand for the money prior to filing a complaint. If not complied with, this demand further establishes criminal intent. More important, the demands dispose of many controversies without criminal complaints.

Worthless check cases may be prosecuted to conviction when there are indications that the defendant acted with criminal (i.e. fraudulent) intent. Among the factors considered are the frequency of prior complaints against the defendant and the amount of the check in comparison to the defendant's apparent ability to pay.

A number of jurisdictions have statutes requiring dismissal of worthless check charges if restitution is offered within a specified period after the complaint is filed. Statutory diversion is available if the check is under a specified, small amount.[27]

On the surface, the statutes apparently do no more than codify already prevalent diversion practices. In the absence of statute, the distinction between a quasi-criminal complaint in which restitution is the preferred disposition and a complaint in which prosecution is justified is a discretionary decision. The statutes attempt to place rigid form on this decision.

A common prosecutorial reaction to such statutes is to evade their provisions in a manner designed to re-inject the discretionary element. The practice in one jurisdiction is illustrative. The implementation of the diversion statute was to be accomplished by the distribution of restitution demand forms to potential and actual victims. The prosecutor avoided the statute by failing to distribute the forms and by failing to inform victims of the statute's provisions.[28]

Consumer Fraud

Unlike worthless check cases, consumer fraud complaints are often handled by special prosecutor units whose formal policy is to prosecute all complaints. This policy statement conforms to public pressure against consumer fraud and minimizes the use and characterization of the unit as a collection agency.

Regardless of formal policy, restitution is the customary disposition. As in worthless check cases, victims of consumer fraud are interested primarily in return of their property and defendants, threatened by prosecution, are willing to offer restitution. These interests, coupled with an inadequacy of prosecutorial resources override the formal policy.

The victims of consumer fraud are often individuals who may be unaware of the crime, or of their potential recourse to the criminal justice process. The initial policy question is, therefore, whether the prosecutor should encourage victims to present grievances. In some jurisdictions, there is no effort to encourage complaints. This may reflect either disinterest or a lack of resources for enforcement of fraud statutes. Elsewhere, lack of publicity enables a fraud unit to concentrate its limited resources on

investigation and prosecution of selected, questionable enterprises.[29]

Other offices generate complaints through public speeches and general publicity. An innovative approach was adopted in Cook County. Under an LEAA grant, the prosecutor established a mobile fraud unit. The mobile unit was expected to stimulate the filing of consumer complaints by its presence in various communities. However, response to the unit was low, perhaps as a result of an absence of advance publicity.[30]

Many consumer complaints are groundless and are routinely screened by the fraud units. Occasionally, complainants are referred to civil courts to pursue their claim. The distinction between a complaint alleging a civil law claim and one alleging criminal fraud is difficult to make. The standard is subjective, with a requirement of intent to defraud as the difficult distinction.

Prosecution of all consumer fraud complaints having some merit is beyond the resources of most prosecutors' offices. Unlike other forms of crime, fraud prosecutions require substantial investigation and interpretation.[31] Also, many fraud statutes are outdated and irrelevant to current practices.[32]

Diversion of consumer fraud complaints commonly occurs in special prosecutors' units. Often the unit encourages mediation and restitution. In other offices the formal policy is prosecution, but restitution is the most frequent disposition. The practices of the Philadelphia District Attorney's Fraud Unit are instructive.

Consumer fraud complaints in Philadelphia are handled by a Fraud Unit within the District Attorney's Community Rights Division. The Philadelphia District Attorney's Community Rights Division (CRD) was established to provide an accessible forum for citizens to present complaints and obtain information. It receives complaints concerning a variety of minor crimes. Minor assaults and consumer fraud complaints comprise a major portion of the caseload.

Possibly due to its connection with CRD and to an extensive publicity campagin, the complaints received by the fraud unit are diversified. Of a sample of more than 400 complaints, the fraudulent acts alleged included alleged poor repair work on automobiles, televisions and homes, alleged misrepresentation of actual repair costs in an estimate, failure to deliver purchased goods within the time interval specified by the sale agreement, obnoxious bill collection practices and misrepresentation of the

quality of a purchased item.[33]

Complaints are received by police detectives assigned to the District Attorney's Office. Approximately 100 complaints are received each month and written statement of facts is taken from the complainant. Complaints considered frivolous are rejected by the detectives and the complainants may be advised to obtain a private attorney if they wish to pursue the matter.

An illustrative rejected case involved the purchase of a used automobile. The purchase price was $700. The complainant alleged that the purchase price was fraudulently high. His evidence consisted of the fact that another dealership offered an auto of the same make and year for $500.

Rejection of frivolous complaints is only one aspect of the discretion exercise by the detectives. Since few cases are immediately rejected, it is not the most important aspect. An additional discretionary decision is in distinguishing between cases to be directly referred to an assistant prosecutor and cases to be initially investigated by the detectives.

Most complaints are initially investigated by a detective. The typical investigation involves a telephone conversation with the defendant. Overall, two-thirds of

the complaints are settled as a result of these investigations.

Some complaints involve no more than a misunderstanding and are readily settled by the telephone conversation. One such complaint alleged that a seller had failed to deliver $1200 of furniture five weeks after the purchase price had been paid. During a telephone conversation, the owner of the store claimed that the sale contract specified delivery within eight weeks, depending on when delivery was obtained from the factory. The detective verified that this provision was in the sale agreement and informed the complainant that, if delivery did not occur within three additional weeks, the District Attorney's office would examine the complaint in greater detail.

A more important result of the preliminary investigation is the settlement of disputes involving more than a misunderstanding. The investigation represents an intervention by the prosecutor's office and carries the implicit threat of criminal prosecution. This intervention, itself, is often sufficient to induce a settlement, and most complaints do not result in formal charges.

Under threat of prosecution restitution is the preferred disposition from the view of both the con man and the honest merchant. The con man will offer restitution to avoid the cost of prosecution, the collateral effects of prosecution on his continuing activities and the possibility of conviction.

The honest merchant will readily do the same in order to protect his business reputation. In either event, the complainant often accepts restitution because this was his objective in initiating the complaint.

An example of such a settlement involved the purchase of an $8,000 diamond ring. After several days the ring required repairs. The repairs were made by the merchant who originally sold the ring. When returned to the purchaser, he noticed that the ring did not resemble the original one. The purchaser had the ring appraised and it was of substantially lesser value than the initially purchased ring. Investigation of the resultant complaint revealed that a different ring had been returned after the repairs. The merchant claimed that this resulted from an inefficient record-keeping system and when the merchant and buyer agreed to a $4,000 reimbursement, the complaint was dropped.

It is unclear whether these settlements are incidental or direct effects of the investigators' activities. While the unit's prior policies favored restitution, the current formal policy favors prosecution. However, daily practices remained largely unaffected with respect to both their content and the results achieved.

Consistent with the formal policy, an offer to make restitution does not automatically terminate prosecution. Restitution does, however, weaken the prosecution case by removing the testimony of the victim. Prosecution may be continued only if other sufficient evidence and, in fact few are prosecuted.

Occasionally, failure to make restitution is the reason that formal prosecution occurs. For example, one series of complaints involved several consumers who had purchased tombstones from a local memorial company. The purchase prices ranged from $150 to $600. The complaints alleged that after periods of from one to three years following payment of the purchase price, the company had not placed the monuments. The company refused to refund the money to the purchasers and, following an investigation, warrants charging fraudulent conversation were obtained and the defendant was prosecuted.

Complaints not settled and involving criminal characteristics are referred to the prosecutor's staff after the preliminary investigation. In determining criminality the investigators rely heavily on the number of complaints previously filed against the defendant. Prosecution seldom takes place unless a sufficient number of complaints are on file against the merchant, but exceptions occur where the fraud is blatant. A rough standard is ten prior complaints.

The prior complaint standard serves several functions. The prosecutor's office is capable of prosecuting only a limited number of fraud cases and in-depth investigation of all complaints would be impossible. The standard limits the need for extensive investigation prior to the decision to prosecute and serves to focus unit resources on serious, repetitive conduct. From the standpoint of potential defendants, the prior complaint standard protects against prosecution for a single, inadvertent act.

However, in Philadelphia the standard rejects prosecution where prior complaints have been made against a merchant but are unavailable to the prosecutor's unit. There is little communication between the District Attorney's Office and private consumer groups. While the fraud unit emphasizes prosecution, the consumer groups emphasize settlement and refer to the prosecutor's office only the complaints they cannot settle. As a result many complaints filed with these private groups never come to the prosecutor's attention and cannot be used in applying the prior complaint standard.[34]

After initial investigation, an undetermined number of complainants are referred to civil courts. Other cases not rejected or settled are referred to the prosecutor's office for advice or review. If the prosecutor determines that the complaint alleges a criminal act an additional, detailed investigation occurs.

After investigation by the prosecutor's office restitution may be offered by the defendant. However, once charges are filed in court, the complainant is deterred from dropping charges by a fine of $100. This fine ensures that the case will not be dropped after the prosecutor's office has expended time and effort in preparing a criminal case.

The prosecutor's office seeks severe sentences in the cases it prosecutes, but Philadelphia judges take a contradictory position. They believe that the consumer is best served and the businessman best protected if restitution is emphasized. As a result, convicted defendants usually receive probation conditioned on restitution. The length of the probation is contingent on the amount of restitution and the rate at which it can be paid. Incarceration is seldom imposed.

DISPUTES INVOLVING ASSAULTS

Husband-wife and neighbor disputes resulting in criminal complaints frequently involve physical violence. Despite the physical violence, such acts are not considered seriously criminal unless they involve deadly weapons or serious injury. Instead they are regarded as the product of built-up, inter-personal tension and are commonly screened or diverted.

As in property dispute cases, noncriminal disposition of disputes involving assault is often favored by the disputants. The passage of time may produce forgiveness or, at least, a lessening of animosity. In intra-family assaults, the victim is often primarily interested in immediate protection and later, desiring to preserve the family relationship, withdraws the complaint.

Recurring incidents of violence typify these disputes. Personality or environmental tensions between the parties are not transient and calming the current conflict does not alter the pre-existing conditions. A current trend of diversion is to refer disputants to agencies who can structure a longer-lasting resolution.

Intra-family Disputes

Complaints concerning intra-family assaults are among the most frequent calls for service received by metropolitan police departments.[35] Most complaints do not result in an arrest and relatively few reach the prosecutor or the criminal courts. Those cases that do are routinely disposed of by dismissals, lenient sentences or diversion.

The rationale underlying enforcement practices is that prosecution and conviction will further disrupt the marital relationship. An equally important consideration is the high volume of complaints in this area. Cases are screened or diverted from the process because not all nor even most can be prosecuted with current resources.

Informal diversion involves resolution of the immediate conflict and a limited attempt to produce a lasting effect on the participants. Dismissals conditioned on good behavior are common. Informal hearings before assistant prosecutors allow the spouses to discuss their grievances and encourage them to seek counseling. In some jurisdictions special courts have been established with counseling and referral capacities.

The currently dominant diversion theme is the use of police family crisis units. Special training provides selected units of police officers with additional skills in settling violent disputes on the scene. The crisis unit officers also receive information concerning available referral resources and this training enables the officers to refer more families to local counseling agencies. However, information concerning the original New York crisis unit suggests that such referrals are infrequently complied with. Referral agencies are overcrowded and focus on clientele from different economic levels than those encountered by the police. Disputants often do not following through on the suggested referral.

Traditional Practices

Victims of intra-family assaults, most often wives, are concerned with ending the current fight, but are reluctant to pursue prosecution. In two cities examined in depth, refusals to arrest and out-right dismissal of charges after arrest were more frequent than diversion. Estimates were that less than one-fourth of the incidents to which the police responded resulted in arrest and in

one city, the wife withdrew charges in 30% of the family assault cases in which an arrest occurred.[36]

Intra-family assaults arise in a basically disrupted family relationship and recur frequently. This is recognized by the officials in the system. One officer expressed both a factor which prevents routine prosecution, and the frustration which results from repetition: "They'll probably be back at it tomorrow, but you can't arrest them all."[37]

Hearings and Special Courts

Informal hearings before prosecutors are common. Involvement in the basic family problem varies, but the hearings typically consist of little more than a discussion of the implications of prosecution. They are terminated by a reprimand or a threat of prosecution should the incident be repeated.

> On occasion, the office will exercise great care in judging the case and will guide the parties to a settlement of their dispute. Usually, however, lack of time in which to consider the case, lack of knowledge of existing community services, and lack of expertise in dealing with complex interpersonal problems all combine to prevent effective action.[38]

Similar factors limit the judicial response. Many large jurisdictions handle domestic matters in special courts. Because the courts often lack recourse to effective counseling programs, only the threat of criminal sanctions is available to influence the defendant's future behavior.

Over half of the cases in the Chicago Domestic Relations Court involve intra-family assaults. In those cases in which the complainant does not withdraw charges, the court commonly imposes a peace bond which stipulates that the husband maintain good behavior during a specified period. The peace bond is extra-legal, and is not recorded in court records. Apparently, however, it does have at least a temporary effect on some defendants.

> Asked what he [the defendant] thought a peace bond was, he said that he had never "been on one" before, but he assumed that if he bothered his wife again and was brought back to court he'd have to come up with the $1,000 or go to jail.[39]

Peace bonds are illustrative of a variety of informal devices used by many courts. Frequently, dismissal of the charges occurs, but explicit or implicit conditions are placed on future behavior. Most often the dismissal is conditioned on a period with no further complaints. Occasionally,

defendants are referred without conviction to the probation department or to the social service department of the court. However, lack of resources often means that such referrals are literally no more than an outright dismissal without supervision.

In some jurisdictions family courts have been established with counseling resources enabling them to provide a more effective response to the underlying family problem. These programs emphasize counseling by probation officers prior to court appearances. The counseling procedures act as both a screening mechanism and a diversion procedure. Acceptance of counseling brings a continuance or termination of the complaint.

In the New York Family Court, 80% of the complaints are self-referred and do not derive from an arrest. Many of the complaints proceed past the probation screen, but are dismissed due to a change of attitude on the part of the wife. For cases not dismissed, the most frequent disposition is a "protective order."[40] This disposition is similar to the peace bond imposed in Chicago.

These courts represent a step forward from the almost total lack of family counseling services available through the criminal justice process. However, the lack

of resources which afflicts the criminal process generally is also operative in these courts.

The most interesting impact of such courts may be on the discretion exercised by patrolmen. Data from two New York police precincts suggests that referrals to family court without an arrest are frequent; the existance of a family court apparently providing patrolmen with at least one readily identifiable referral resource.

Crisis Units

Intra-family assault complaints require immediate intervention by the police and most complaints are screened by individual patrolmen. The most important element of the system response to intra-family assaults is, therefore, the nature of the police reaction.

The police response is shaped by two factors. The first is the frequency with which these complaints are received. The high frequency suggests the need for, and promotes the fact of, extensive screening on the part of responding officers. The second shaping influence is a lack of expertise in dealing with family problems and a lack of knowledge of and contact with available

neighborhood resources for family counseling. A result of this second factor is that much of the police response is devoted solely to settling the immediate dispute and little or no attention is paid to the underlying family problem.

The Family Crisis Intervention Unit (FCIU) in New York City is the most frequently discussed response to intra-family violence. The FCIU experiment was conducted in a single precinct in New York City. A squad of 18 officers was specially selected for the experiment.[41] These officers received intensive training in methods of dealing with crisis situations and also received information concerning available counseling resources in the precinct.

FCIU functioned for approximately 22 months. Extensive data was collected from both the experimental precinct and a selected comparison precinct. Nevertheless, it is difficult to assess the effectiveness of the experimental unit.

Comparisons between the FCIU and the comparison precinct are of questionable validity. In addition to possible random variations, changes in administrative,

record keeping and reporting practices make it difficult to identify real changes in performance. For example, while the comparison precinct was selected because of apparent similarities to the FCIU precinct, during the 22-month period, it recorded one-third the number of intra-family assaults recorded in the FCIU precinct. Further, thirty percent of all FCIU interventions were repeat responses to given families, while the recorded repetition rate in the comparison precinct. Since the FCIU was not less effective than traditional practices, these rates apparently reflect a greater tendency to record events as they occurred.[42]

The data suggest that, as a result of the FCIU training, the officers were better able to refer families to counseling programs. Arrests in both the comparison and the FCIU precinct were low (2.5% in the FCIU precinct). The significant impact occurred with respect to situations in which no arrest was made. Seventy-five percent of all families visited by FCIU were referred to some agency and only 35 percent of these were referred to family court. On the other hand, there was only a 55 percent referral rate in the comparison precinct and 89 percent of the comparison precinct's referrals were to family court.

The project report suggests that only 20 percent of all referral families from the FCIU precinct applied for assistance at a recommended agency. It further notes that applications for assistance were most frequent when concrete services were expected of an agency (e.g., referrals to hospitals--50 percent; to welfare agencies--67 percent; whereas only 26 percent to the psychological center and only 11 percent to family court.[43] Again, however, the data is unreliable. The reference is to 20 percent of the families about whom information was received from referral agencies. Data about referrals were collected by means of a follow-up form, but no information was received concerning over 50 percent of all referred families. Personal follow-ups with families visited by FCIU were precluded by police departmental policy.

The use of referrals by FCIU was concentrated in the early stages of the project. It was, in part, a result of unrealistic expectations of the potential performance of the other agencies. In the latter stages of the experiment, FCIU members grew disenchanted with the referral agencies and the referral rate declined.

> [T]he realities [are that] the agencies are geared to serve the middle class who will travel to the office, go through an application process, accept and keep appointments, sometimes after long waiting periods . . . With minor exceptions, the agencies could not [would not?] adapt their policies and practices to the demands made on them by FCIU.[44]

The FCIU was allowed to terminate after the grant expired. Financial and resource allocation considerations were central to its demise. The only continuing implementation of the program is the addition of instruction on crisis intervention techniques in the general training of police recruits. The project report predicted this reaction:

> If past experience is any guide, there will be a tendency to legitimatize family crisis intervention as a police function by curriculum insertions in present training programs . . . . and by developing, a "how-to" instructional manual. Such an approach while both predictable and understandable, represents a rejection of the basic contribution of the present demonstration and implies the illusion of change where no change in fact occurs.[45]

Nevertheless FCIU has had a major influence upon the activities of police departments throughout the United States. Many departments have adopted similar programs, usually reducing the intensive training aspects to save costs.[46]

The Oakland police department instituted a family crisis intervention program (FCIP) which was inspired by the New York project. This program was also a reaction to the heavy burden that domestic disputes placed on the time of the average patrolman. During one six-month period Oakland officers responded to more than sixteen

thousand family disturbance calls resulting in an expenditure of more than eight thousand man hours.

There were two field teams in the experimental phase of the Oakland program. Each was assigned to one of the areas in the city from which a large percentage of domestic dispute cases originates and patroled the areas during the time intervals of highest incidence of family complaints.

Officers on the Oakland experimental unit did not receive extensive training in crisis intervention techniques. Instead they merely attended a one-day seminar with representatives of local social service agencies. The prior police experience of the unit's officers was relied on to calm the immediate dispute. This reduced costs and was consistent with the program's emphasis.

The emphasis of the program in Oakland is referral. Appointments at referral agencies were made by the staff coordinator. After making the appointment the coordinator informed the disputants of its time and place. The persons involved usually spoke to an agency social worker within one or two weeks. Police involvement in the appointment process was designed to motivate disputants to keep the appointments and preliminary assessment of project results does suggest a slight improvement over FCIU completion rates.

Unlike the New York experiment, the Oakland program was extended beyond the experimental phase and expanded. From the standpoint of giving patrolmen special skills in dealing with crises, the Oakland program is a definite step back from the FCIU approach. However, in the area of successful referrals, the Oakland approach is at least as effective as the FCIU program and by carrying the referrals to the point of an actual appointment, it may be more effective.

Neighbor and Community Disputes

The relationship between neighbors is more superficial than that between members of the same family. As a result these disputes are both easier and more difficult to settle. The parties are already separated, albeit by a small distance, and contact on a daily basis can be avoided. On the other hand, since the close emotional ties found within families are absent, the complainant is less likely to forgive the defendant.

In the absence of serious physical injury, criminal justice officials regard neighbor disputes as nuisances and noncriminal matters. The actions of the parties may be viewed as the product of misunderstanding or of reasonable dispute over rights. Frequently, charges flow from the complainant's desire to harrass the defendant.

Counseling programs for disputing neighbors are inappropriate and ineffectual. Counseling implies a close relationship on which to build a settlement and this relationship is absent in most neighbor quarrels. For disputes between neighbors, the dispositions emphasize avoidance, placing minimal restraints on the defendant and, more recently, professional arbitration.

Traditional Practices

As in the family assault, police do respond to many calls for assistance and end the immediate dispute without an arrest. However, the underlying animosity continues and complainants in such cases frequently resort to private complaints against the other party.

The most common charges arising from neighbor disputes are simple assault, disorderly conduct, harrassment, defamation and criminal trespass or damage to property. All of these are handled within the lower criminal court

structure. A common dispositional device is the peace bond or similar "conditional" dismissal.[47] Screening is frequently accomplished by delaying court proceedings until the complainant relents.

Court dispositions often fail to structure a reasonable settlement and, faced with extremely large caseloads, the courts have insufficient time and often lack inclination to permit the complainant to fully discuss his problem. Both parties may leave the courtroom bearing the same or perhaps greater animosity toward the opposing party and further disputes and complaints are a predictable result.

Although mostly minor acts, neighbor disputes do have a potential for serious violence. When the dispute involves the use of weapons or serious injury to the victim, the tendency is to impose a conviction and a term of probation. Incarceration is infrequent, except where the injury to the victim is great.

Dispute settlement centers

Although they account for a substantial portion of the lower court caseload, disputes between neighbors are of low visibility to observers of the criminal justice system

and have not attracted much attention in terms of structured diversion programs. The one series of programs directed at such disputes and other minor complaints involving members of the same community was initiated by the American Arbitration Association. The concept is labeled the Community Dispute Settlement Center and is currently employed in three cities with programs planned in at least two additional jurisdictions.

The function of the Philadelphia Community Dispute Center is illustrative of the approach. The Philadelphia Center is staffed by an administrative staff of five persons and draws on the services of approximately 45 professional arbitrators.[48] The program was begun under a grant from the Ford Foundation and has recently received funds from LEAA.

In Philadelphia most neighbor dispute complaints are taken initially to the District Attorneys Community Rights Division. Unlike fraud complaints, the CRD screens few of these private complaints. The remainder go to the Municipal Court.

The acknowledged purpose of the Municipal Court is to screen and divert private complaint cases from the criminal court system. It accomplishes this result in 86% of the cases that it receives. The most frequent

dispositions are conditional dismissals and outright discharges, but more than 10% of the cases are referred to arbitration.

When the Dispute Center was initiated, plans called for referral of cases directly from the CRD. Initial estimates were that 40-60 cases per month would be received from this source, but referrals averaged less than 10 per month. CRD referrals were infrequent because only one party was present at the unit's office for the filing of the complaint and submission to arbitration requires consent of both parties.[49] The CRD officers had neither the time nor incentive to seek out the other party to obtain consent for arbitration.

Under current practices virtually all referrals to arbitration come from the Municipal Court. The court is presided over by a trial commissioner. The arbitration program maintains a liaison staff in the courtroom.

The initial referral decision is made solely by the Trial Commissioner. Although the Commissioner, pressed for time to handle her large caseload, may ask brief questions of the parties, the referral decision is typically premised on the facts alleged in the written complaint. If she views the complaint as appropriate

for arbitration, she will order arbitration without describing the procedure to the disputants and, therefore, without obtaining their consent.

The parties ordered into arbitration are taken to an office adjacent to the court where the liaison staff describes the nature of the program and obtains their written consent to arbitration. A major problem encountered in obtaining consent is that the parties often do not understand what arbitration involves. The liaison staff explains to the defendants that arbitration will permit them to avoid prosecution, complainants are informed that arbitration gives them an opportunity to fully explain their grievances and, if appropriate, to obtain awards for the damages sustained.

In a small number of cases, either or both parties object to participating in the arbitration program. Under such circumstances the disputants may be taken directly back to court to explain their objections. The Commissioner, however, is reluctant to permit cases to be taken out of arbitration and few are. A second possibility for reluctant disputants is to file a letter of appeal with the Presiding Judge of the Municipal Court. This letter results in a review of the case by the Presiding Judge who may then order the case removed from arbitration.

However, few letters are actually filed, and fewer withdrawals are permitted.

There are a variety of reasons for reluctance to participate in arbitration. In some cases the arbitration referral is viewed as another delay in the proceedings and both parties wish to dispose of the case at this court appearance. The complainant expresses a desire to tell his side of the dispute immediately while the defendant desires to avoid the bother of further, formal appearances. However, since the Municipal Court can only dispose of cases by agreement or dismissal, unless the complainant is ready to drop the complaint, a second appearance is necessary in any event. Another point of difficulty arises in cases in which one or both parties are represented by attorneys and the attorneys object to informal disposition. These are more serious cases and often involve civil suits against the parties in addition to the criminal charges.

The pattern of referrals to arbitration indicates an increasing use of the program by the Municipal Court. Initially referrals averaged 40 cases per month, but the current average is over 70 cases per month. This expanded use reflects growing certainty as to when

arbitration is potentially effective and increasing judicial confidence in the program.

Currently the Trial Commissioner refers most community dispute cases to the arbitration program. An important, but not always followed, criterion for referral is that the parties have a continuing relationship, if only due to geographic proximity. The bulk of the cases referred involve assaults.

The referral process proceeds with a number of exclusions. These describe the role of the program as viewed by the Trial Commissioner and the program personnel. Few consumer fraud complaints are referred since most are settled within the Fraud Unit of the District Attorney's office.

The arbitration program is not used in complaints arising from domestic quarrels. This limitation was established by the program personnel who regard arbitration as ineffective in such complaints because it does not reach the underlying personal problems. Although this exclusion is generally complied with by the Trial Commissioner, she expressed no strong viewpoint that arbitration is inappropriate and occasionally does refer domestic disputes to arbitration.

Both the court and the program personnel regard arbitration as inappropriate in cases in which serious physical injury has occurred or where a weapon is used. Such cases are characterized as true criminal acts, and are sent forward to the criminal courts.

An additional exclusion is also based upon the apparent criminality of the conduct alleged in the complaint. Illustrative of this exclusion, which focuses on the prior record of the defendant, is one case observed during our visit to Philadelphia. The complaint alleged that a woman's son had beaten her. Injuries were not serious and preliminary questioning revealed that the assault arose from arguments concerning the son's employment. Initially the case was referred to arbitration, but the referral was withdrawn when the Commissioner learned that the defendant had a prior criminal record involving several drug violations. The case was set for trial.

Although all of these exclusions are commonly followed by the Commissioner, occasionally cases beyond the informal guidelines are referred to arbitration. This occurs when the Commissioner has been forced to base referral on incomplete facts about the case, or when she

believes that, despite the seriousness of the alleged offense, arbitration is a preferrable disposition. In such cases, the program may return the case to court, but more often, proceeds with arbitration and disposes of the case.

Cases referred to arbitration are continued on the court's calendar for a period sufficient to arrange for and hold an arbitration hearing. Within two to three weeks following referral, the parties are notified by mail of a date for the hearing. Continuances of scheduled hearing dates are not uncommon, but are deterred by the imposition of a fee for the delay. Since the hearing officer's fee and the administrative expense of the program are paid by the grant, no other charges are imposed on the parties for the arbitration hearing.

Approximately 20% of all cases referred to arbitration never hold a hearing.[50] This drop-off occurs when complaints are withdrawn or the defendant fails to appear for the scheduled hearing. The withdrawn complaints occur as the animosity of the complainant lessens and, occasionally, as a result of a prior settlement between the parties. No further action is taken in such cases. However, when the defendant repeatedly fails to appear,

the case is returned to the Municipal Court's criminal docket.

The arbitration hearings are both informal adjudications of fact and occasions for the parties to air grievances perhaps reaching a consent agreement. The length of the hearing varies--some last for over two hours. The cost per case, including the administrative expenses of the program, is roughly $100.

As noted previously, most of the complaints allege assault and battery incidents. For most, the arbitration hearing uncovers a prior pattern of growing animosity between the parties.

> Charge was assult and battery. Complainant (C) lived across the street from defendant (D). C and witnesses describe D and his friends as nuisances. D repairs auto on street, leaves it parked in front of other's homes for as long as two weeks. D's friends disrupt neighborhood by racing the engines of their noisy cars. C alleges that he was twice almost hit by rocket fired by D. Confronted D on street and fight ensued. D claims rocket incident was accidental. No physical injuries claimed by C.

The awards in such cases appear, on their face, to be trivial. In the cited incident, the defendant was ordered to stay away from the complainant and to confine his auto repairs to his garage during specified time

periods. However, the trivial awards apparently have some impact on many of the parties. Few cases are returned to court because the elements of the award have been violated. Equally important the complainant is mollified by having had the opportunity to complain formally and having received some redress of his grievance.

The award given in the case noted above might be described as structural. The hearing identified an underlying problem and set up rules which, if followed, would minimize the friction. This is the result in many cases. Often the award is reached by agreement of the parties. In other cases, prior to the hearing, the irritating contact has already ended because one party has left the neighborhood, or no longer has contact with the other.

Although the bulk of the arbitration caseload is similar to the case described above, the program does receive cases in which a monetary award is necessary. The awards are limited to damages incurred.

> Complaint alleged assault and battery. The incident involved a bar room fight. Complainant received severe dental damage. Defendant alleged that he had not struck complainant, but that the damage was caused by others involved in the fight. After an adjudication of fact, award was $250 for dental bills and an order that the defendant avoid future contact with the complainant.

In such cases, a principle benefit of the arbitration program is that, unlike the criminal courts, it can award damages to the injured party. The awards are enforceable in court. Further, the award is made after a full hearing of fact, an occurrence which is infrequent in many small claims courts.

Unlike other diversion processes, the guilt of the defendant continues to be an issue during arbitration. The arbitration hearing is an impartial factual inquiry and occasionally, the claim is found to be without merit and the defendant is exonerated.

> Complainant alleged that respondent had taken over two hundred dollars in bar receipts and rental deposits while employed at complainant's tavern. Respondent claimed no knowledge of the missing tavern proceeds and claimed that he had returned the rental deposit to the tenant when he discovered that a portion of the deposit was counterfeit. Complainant was an absentee owner of the tavern, and his only evidence about the alleged crime was hearsay with neither supporting witnesses nor documentation. The hearing officer informed the complainant that an award could not be made in his favor unless additional evidence was presented. The hearing was concluded when the complainant abruptly left the room.

During the interval between the filing of the complaint and the arbitration hearing, animosities frequently subside. The disputants agree that the incident has grown out of proportion and that no

coercive award is needed. In such cases consent awards are drafted after the hearing. Occasionally, the hearing produces this recognition. Several arbitrators commented that the hearings may have a cathartic effect for the disputants, resulting in withdrawal of the complaint. However, since many of the hearings deal solely with factual issues and the arbitration staff is untrained in psychology and related skills, it is unlikely that this result is common.[51]

On completion of the hearing, the award is transmitted to court and the case is conditionally dismissed pending compliance with the award for a stated period--often as long as two years. A violation permits the reopening of the original charges. Although fewer than ten percent of the cases involve later, reported violations, the lack of formal supervision of the awards leaves unanswered the question of their long term effect on the parties.

Summary

The most important characteristic of the crimes discussed in this chapter is that both the victim and the defendant are commonly interested in a noncriminal

disposition. Criminal justice officials who regard these offenses as not seriously criminal and who are hampered by a lack of time and resources, build upon these mutual interests to achieve efficient, noncriminal dispositions.

The diversion dispositions vary in the depth of their response to the underlying problems. In property disputes, restitution and related remedies are a complete response to the problem between the two parties, but the resolution of isolated disputes does not deter the recurrence of similar disputes where one of the parties has changed. In family assaults, the on-going relationship is a complex problem which is only superficially affected by the diversion methods currently in use. The efficacy of peace bonds and similar devices used for neighbor quarrels is unclear. The effect of arbitration awards on long term relationship is also uncertain.

The practice of diversion in these areas is distinguished by the central role of the victim. Victims can and often do shape informal settlements which terminate prosecution despite the policies of prosecuting officials. In the next two chapters the victim's role recedes to the background of diversion practice. Although the victim can influence prosecutorial views of the desirability of diversion in these other areas, his influence on diversion decisions is indirect.

CHAPTER THREE: INTERFACE BETWEEN CRIMINAL JUSTICE AND PUBLIC HEALTH SYSTEMS

INTRODUCTION

Diversion of alcoholics, mentally disturbed persons and drug addicts or users is frequent. Diversion of such defendants serves to place the individual into a treatment or counseling program. The transference of the defendant from criminal justice to a treatment program may occur under formal commitment procedures or through informal referrals in which prosecution is deferred pending successful completion of the treatment program.

Diversion is common when the offense is minor and there is a close relationship between the crime and the illness. For example, chronic drunkenness is symptomatic of alcoholism and persons charged with public drunkenness are often diverted. On the other hand, when the act is more removed from the illness or is otherwise regarded as serious, diversion is less likely. Addicts who sell

drugs or commit robbery to obtain money to support their habit are seldom diverted. While they may receive treatment, it is likely to occur after conviction. Generally, when diversion occurs for more serious offenses, it involves commitment. Treatment is obtained, but the defendant is not left in the community.

Diversion is also limited by the extent to which the criminal justice officials perceive the presence of an underlying illness and by the practical availability of referral resources. Lacking diagnostic assistance, perception is largely dependent on personal experience with and awareness of the symptoms of mental disorder, alcoholism or addiction. Practical availability of resources, on the other hand, is shaped by the willingness of officials to institute referral procedures and the willingness of treatment programs to accept criminal justice referrals. A fear of civil liability or public recrimination and a lack of time may limit the use of referrals by criminal justice officials.

An additional limitation on diversion in this area concerns the willingness of the defendant to submit to treatment. Although, in the abstract, referral to treatment may appear to be preferrable to prosecution and conviction, diversion is

abstract, referral to treatment may appear to be preferrable to prosecution and conviction, diversion is frequently resisted by the defendant. A key factor is that many treatment programs require lengthier confinement under more strenuous supervision than is likely under a criminal conviction.

Public Drunkenness

Arrests for public drunkenness average over one million per year. Most of the arrests involve skid row men suffering from alcoholism and other personal and social disabilities.

Although public drunkenness arrests are frequent, the arrestees are seldom viewed as serious criminals. Instead, the arrests are commonly justified as necessary to protect the arrestee and to avoid the disagreeable effect that his presence on the streets has upon the community.

In many instances, an arrest is the only formal response to the skid row inebriate. After spending one night in jail, many men are returned to the streets and no formal criminal charges are pursued. The objective

of clearing the city's streets has been accomplished for one night and the arrestee has received the benefit of shelter and food.

Despite the frequent release of such arrestees, the number of men processed through the lower criminal courts on public drunkenness charges is, in many cities, extremely high. For most courts, the routine response is either an outright release or a conviction with no sentence, returning the defendant to the streets on the morning following his arrest.

In a limited number of jurisdictions, jail sentences are routinely imposed. These sentences commonly do not reflect an intention to punish the defendant, but are more appropriately described as increasing the length of time that the man is off of the streets and lengthening the period in which he dries out from his over-usage of alcohol.

Informal Diversion

Although there is a generally recognized need for social services and medical attention, no services of this nature are available within the criminal justice

process and few are available through noncriminal programs. The lack of services within the criminal process is an extension of the over-all inadequacy of resources within the system. The unavailability of noncriminal resources is a function of both, an absence of a sufficient number of programs and the disinterest of existing programs in servicing a skid row clientele.[52]

A number of informal diversion formats exist. Several police departments follow procedures under which skid row arrestees routinely receive medical attention prior to formal booking. The medical attention commonly involves little more than first aid care of obvious physical problems. Admission to the hospital occurs if the physical problem is severe.[53] The fact that these procedures represent an improvement over traditional practices illustrates the typical lack of services available.

Many lower criminal courts have adopted informal programs to assist the skid row arrestee. One approach, labeled the court school, provides dismissal conditioned on the defendant's attendance at a series of lectures concerning alcoholism and treatment programs in the local area.[54] Other courts have established treatment programs to which a limited portion of their skid row

caseload can be referred. For example, a program in Miami, Florida established a treatment facility providing defendants with medical attention and counseling over a period of up to one month of confinement.[55]

These informal court programs arise from the presence of a single judge or other official and the procedures respond to their frustration at handling this complex problem with limited resources. As a result of their individualized nature, the court programs commonly terminate when the official leaves the court.

No reliable data exists to determine the effect of any of these informal court programs on the individual defendants.

Structured Diversion

Newer diversion programs for public drunkenness offenders provide medical attention and counseling without judicial intervention. The diversion format is labeled a detoxification center.

Since the detoxification process has been discussed in a prior Bar Foundation publication, we will only outline

its structure here.[56] The approach is premised on the complementary ideas that the skid row inebriate requires long range counseling and medical attention for current physical problems and that this attention should be delivered under a noncriminal format. Detoxification centers may be attached to the police arrest function or may receive patients as a result of the activities of civilian rescue units.

In police-initiated detoxification programs, departmental policies and the inclinations of individual officers determine the program's performance in reaching the skid row population. Attitudes vary, but problems arise from the redefinition of the officer's function. The new social service model under which an officer performs in a detoxification scheme may be disliked by individual officers. The time required to bring the inebriate to the center and the officer's perceptions of the effect of treatment also play a role in determining whether he decides to initiate a detoxification referral, ignore the inebriate, or to handle the man informally. In at least two cities these influences resulted in repeated failure of officers to take inebriates to the detoxification program.[57]

The civilian teams avoid these problems since they function under specified criteria which determine when an offer of assistance should be made. However, to the extent that these programs are designed to end criminal justice involvement, their effectiveness is questionable. In at least one city the civilian-based process co-existed with, rather than supplanted, an arrest process.

The length of time that a patient remains in a detoxification program varies. Although some programs function with patient terms of over one month, most emphasize short terms--three to five days. Referral procedures provide the patient with longer term assistance.

The emphasis of the detoxification centers is to allow the inebriate to dry out from his current bout of drunkenness. Diagnostic and first aid services occur during the initial period to ease the patient into sobriety and to disclose ailments other than intoxication. Following the initial period, most programs provide counseling and referral services. Referrals are made to vocational counseling, housing and treatment programs.

Although there have been several evaluative studies, it remains uncertain whether any lasting benefit accrues as the result of the counseling and referral process.[58]

It is clear, however, that the detoxification programs represent an improvement over traditional criminal justice processes in providing medical attention and that they do reduce criminal justice involvement in this area.

Mental Illness

Police referrals account for a large percentage of the total admissions to mental health facilities.[59] Many referrals do not involve persons charged with criminal offenses, but others deal with persons charged with vagrancy, disorderly conduct and similar minor crimes.

Despite the frequency of police diversion, many persons suffering from mental disorder are not referred. This result is due, in part, to a failure of officers to perceive the existence of a diagnosable mental disorder. This failure is explainable as a function of both a lack of time and a lack of training.

A second important limitation on police referrals is that officers may be unwilling to envoke available referral mechanisms. Most police referrals occur under

emergency detention statutes. These statutes permit the police to initiate the detention, but often require that the officer sign the admission papers. Potential civil liability for signing admission papers on an insufficient basis results in police reluctance to do so.[60] Commonly, emergency detention is accomplished only when a third party is willing to sign admission papers (e.g. friend of the defendant or doctor at the facility), thereby relieving the officer of potential liability.

Many of the more structured diversion programs are a reaction to these limitations on police referral procedures. For example, the Los Angeles Police Department maintains a screening and admissions unit for mentally ill arrestees. Departmental orders require officers to transport all arrestees believed to be suffering from mental illness to this unit. The unit works in close cooperation with the mental hospital's staff.

The input of medical judgment as well as the acquired and shared experience of the unit's members alleviates the fear of potential civil liability. The officers on the unit and the hospital staff must concur before emergency detention is invoked. When the two do concur, the unit's officers sign the admission papers.

Those defendants who reach the unit are initially evaluated by the officers. Although these officers have no professional training, the experience developed by their specialized function on the unit enhances their perception of mental problems. Also, in evaluating individual defendants, they are assisted by an instructional sheet which lists a variety of behaviorial characteristics suggesting that hospitalization is desirable.[61] Emergency detention is initiated for over 40% of the more than 1000 defendants received annually.

A secondary function of the Los Angeles unit is to screen minor complaints from the criminal justice process. Fewer than 20% of the arrestees are processed on criminal charges.[62] Of the remainder, some are referred to other treatment services, but most are simply released.

The Los Angeles unit is only a partial solution to the limiting effect of failure to recognize the existence of mental disorder. The unit's intervention is initiated by the perception of the arresting officer that there is a possible mental disorder present. The availability of the unit and the existence of the departmental orders suggests that most arrestees are taken to the unit when that possibility is apparent. However, there is no data to determine the

frequency with which mental disorder goes unnoticed by the arresting officer.

Cases proceed in the criminal justice system beyond the police level because of reluctance to initiate proceedings, failure to perceive the mental disorder, or because the crime charged is more serious--i.e. is not a victimless, symptomatic offense.

Diversion of mentally ill persons at the prosecutorial and criminal court level is less frequent, but it does occur. A number of prosecutor's offices require that the defendant obtain mental health care as a condition of dismissal. Such practices are informal, and involve no effort to ensure that treatment is obtained.

In some lower criminal courts, psychiatric units evaluate selected defendants for possible commitment under civil proceedings. In Chicago, over 6000 misdemeanor cases are evaluated by the Psychiatric Clinic. Many of the cases referred for evaluation reach the court because, while the arresting officer was reluctant to petition for direct admission to a mental hospital, he was equally reluctant to simply release an individual whose conduct was abnormal and potentially dangerous.[63] In such referrals and the resultant commitments, a judicial commitment procedure substitutes for inadequate police referral mechanisms.

Referrals for evaluation also occur if the judge observes that a mental disorder may be present. These referrals occur when the alleged crime is apparently symptomatic of mental disturbance. Persons charged with conduct that is more typically criminal are seldom referred because their mental problems are seldom discovered in the brief court hearings.

Over one-third of the cases evaluated result in the insitution of proceedings for civil commitment. The evaluations are brief and inquiry into the defendant's background is superficial. Evaluative resources are insufficient for the clinic's caseload.

On the filing of commitment proceedings, civil hearings are held. Most result in voluntary commitment. The process is described in other publications.[64]

Defendants charged with felonies or serious misdemeanors occasionally obtain diversion by raising competency or insanity issues.[65] Successful insanity defenses produce diversion in the sense that criminal charges are defeated, but the defendant is committed to a state mental health facility. Empirical evidence suggests that the insanity defense is seldom used [66] because the commitment terms can be more lengthy than the sentence after conviction.

> [T]he median confinement at Saint Elizabeth Hospital [the receiving hospital for committed defendants] appears to be greater than the median confinement of District [of Columbia] felons in prison in every crime type category with the very important exception of homicide and the less important exceptions of forgery (which includes embezzlement and fraud), 'other felonies', and possibly narcotics . . . . Whereas the maximum prison sentence for a misdemeanor is 12 months or less, the median length of confinement for released misdemeanor patients is 15.8 months. (emphasis added) (67)

Equally important, while a criminal sentence specifies a maximum term, commitment is often indefinite and the length of confinement is at the discretion of the hospital staff. Also, diversion under insanity or competency tests requires the defendant to accept the labels of "insane" or "incompetent." The relative desirability of remaining in the criminal justice system is greatest when the crime charged is one in which screening, informal diversion or a lenient sentence is likely.

As a result, defendants often resist diversion procedures requiring commitment. On the other hand, several case histories cited in a study of insanity defense procedures suggest that prosecutors and judges occasionally seek to obtain the lengthier confinement and the treatment services

available under commitment.[68] The resultant process has been described by one commentator.

> [P]eople with mental problems do not go to Saint Elizabeth with as much frequency as the D.C. Crime Commission would like because, for most accused or convicted offenders, commitment there is worse than being sentenced to jail. Despite attempts by judges, prosecutors and psychiatrists to cut back the accused's options in this regard, many offenders still manage to get hospitalized only if they prefer it to imprisonment.[69]

One non-statute diversion program in Washington, D.C., referred selected defendants to out-patient treatment programs. The District of Columbia program was conducted under a three-year grant from the National Institute of Mental Health. Unlike other programs discussed in this report, the District of Columbia project was experimental in nature. Its projected life span did not extend beyond the period of the initial grant. It was designed primarily to test the feasibility of diversion of mentally disturbed defendants into community based treatment programs and not to establish an on-going diversion program.[70] During the three-year grant period, the project accepted only 163 defendants and, following expiration of the grant, the project was terminated.

During the course of the three-year project, procedures to identify subjects for diversion varied. Initially, recommendations were made by individual Assistant U.S. Attorneys, members of the Corporation Counsel staff and defense attorneys. Due largely to a lack of knowledge of the program and confidence in it, this procedure produced insufficient referrals. It was supplanted by the assignment of a liaison person to the U.S. Attorney's office. The liaison person screened all complaints and initiated diversion procedures by interviewing potential subjects and discussing the possibility of diversion of appropriate defendants with members of the prosecutor's staff. After several months under this procedure, the prosecutor's staff became aware of the diversion program and gained confidence in its performance. When the liaison position was discontinued and referrals again made by individual attorneys, the referral rate continued at a level acceptable to the experimental nature of the program.

The project accepted persons charged with misdemeanors within four crime groupings: minor sex offenses, minor narcotics violations, intra-family assaults and non-violent property offenses. The limitation to four crime types was made to facilitate recidivism research. Defendants

were accepted when there was an indication of mental disorder. Overall, forty-seven percent of all defendants accepted were charged with minor sex crimes, twenty percent with drug violations, sixteen percent family assaults and the remainder were non-violent property offenses. Because treatment referrals were to community-based programs, only defendants not in custody or likely to be released on bail were eligible.

Eligible crime types were agreed upon by negotiation between the project staff and criminal justice officials.[71] Initially the standards were restrictive. For example, only first offenders were eligible. Also, marijuana charges were initially not referred by the U.S. Attorneys office, because the office regarded possession of marijuana as seriously criminal. The history of the program exhibits limited expansion. The first offender restriction was abandoned shortly after the program began. Overall, 61% of the defendants diverted had a prior arrest or conviction record. Marijuana cases were later referred.[72]

On the other hand, persons addicted to hard narcotics or charged with sale of narcotics were not referred. Both prosecutorial and judicial officials refused to permit diversion of felony or violent crime charges (except intra-family assaults).

Most sex offense cases were referred by the Corporation Counsel's Office. At the close of the project, all minor sex offenses coming to that office were referred. Even before the inception of the project, the Corporation Counsel had informally diverted some sex offense cases. This office was, therefore, more receptive to this element of the new program than was the U.S. Attorney.

Initial screening involved brief interviews with defendants and conferences between defense, prosecution and project representatives. This was followed by a more extensive evaluation of the individual's problem, conducted by the social work and psychiatric staff of the project. The thrust of the second interview was to determine whether mental health referrals would benefit the defendant. Fifteen percent of defendants interviewed were rejected.

Referral and other program activities with defendants accepted for diversion were conducted primarily by the social workers on the project staff. Charges were continued on defense motion for 90 days and individuals were referred into community-based mental care programs. Placements were achieved for 80% of the clients. Although most placements were to mental care facilities, some involved other service programs. The staff also provided group therapy for persons charged with sex offenses.

The project developed a working relationship with a variety of local mental

were initially reluctant to receive patients from the criminal system, a reluctance stemming from prior experience with complicated and time-consuming judicial procedures. Diversion referrals, however, were made with little time-consuming formality.[73]

Defendants will elect diversion only is there is sufficient incentive for them to do so. In Washington the incentive was the virtual certainty that, on entry into the program, referral to a treatment facility and participation in treatment, charges would be dismissed. Only one defendant who completed the program did not receive a dismissal. Dismissals were achieved in 90 days and without the formal label of "insanity" or "mentally disturbed."

The project compared post-program performance of its successful participants to a selection of 100 similar non-participants.[74] The comparison revealed slightly lower recidivism among the participating defendants (3% difference). Comparative costs were evaluated. Over-all, the per client costs of the project were substantially higher than the cost of processing the comparison group. Much of this related to research expenses. Computed for

the period of greatest use of the program and deleting research expenses, the project costs per participant were 12% lower than per defendant costs for the comparison group.

The dispositions of the 100 comparison defendants are significant. These defendants received relatively lenient dispositions without formal diversion. Thirty-eight were either convicted or committed to a mental hospital. Most of the remainder were dismissed by the prosecutors. While 15 of 38 convicted defendants received jail sentences, none of the sentences were in excess of one year.

Drug Offenses

In the current public policy debate relating to drug offenses the polar positions are criminalization, which calls for harsh penalties for all drug offenses, and treatment, which regards the addict and drug dependent person as ill.[75]

Although the debate is unresolved, the outlines of a compromise are apparent in both statutes and the administration of criminal justice. Law enforcement now focuses on drug traffic. Cases involving possession or use, especially of the "soft" drugs, increasingly are screened, diverted or receive lenient

sentences. Widespread use of drugs and questionable current knowledge of the long range impact of soft drugs lead to a perception of possession and use as social rather than criminal.

Informal diversion of defendants charged with possession or use of marijuana and other soft drugs is frequent. Frequently, diversion of drug offenders is one portion of a more general program for diversion of young adults.[76]

In several jurisdictions addict rehabilitation statutes contain diversion provisions. These statutes apply to marijuana and hard drugs and include larger possession cases and even charges involving sale. In operation, however, statute diversion is minimized by the interplay among the judges, prosecutors and defense. Statutory treatment periods, whether by commitment or in a non-institutional setting, are lengthy. In cases characterized as marginally criminal the defendant can expect a shorter term of supervision after conviction than during treatment. For that reason diversion is often avoided by defendants. In more serious crimes prosecutors and judges exercise their discretion to prevent diversion, preferring instead to use post-conviction treatment programs.

Traditional Practices

Historically, drug offense statutes provided severe penalties for all crimes involving drugs.[77] Recently, some jurisdictions have reduced the sentences for marijuana offenses.[78] Others have enacted post-conviction treatment provisions for addicts.[79]

There is increasing leniency of disposition in cases of possession and use. Both sentence leniency[80] and screening are common. For example, in Albuquerque, New Mexico, few drug possession cases are prosecuted to conviction. In a sample of 179 cases, over 80% were dismissed by interaction of the lower court and the prosecutor's office.[81]

In Albuquerque most defendants in possession cases were college students or Chicano youths. They were charged with possession of small amounts of drugs, usually marijuana. Presumably possession was solely for personal use. The prosecutor and judges regarded minor drug usage as a prevalent part of the college and youth culture so that conviction would be inappropriate.

In New York State a recent statute provides that misdemeanant, first offense, marijuana possession cases may receive an adjournment in contemplation of dismissal.[82]

Following a period (90 days) of no rearrest, charges are dismissed. The 90 day period is unsupervised. In Massachusetts, probation is the required sentence for conviction on a first offense of possession of marijuana. By statute, the criminal conviction is expunged from the record following successful completion of the probationary period.[83]

On the other hand, there is increasing pressure typified by recent proposals by the Governor of New York and President Nixon, for harsh dispositions in sales cases. The New York proposal included mandatory life imprisonment for persons convicted of major sales of hard narcotics.[84] Despite this pressure some statutes make diversion available in sales cases.[85]

Informal Diversion

In urban areas there are many non-criminal treatment programs for drug dependent persons. Occasionally criminal justice officials establish working relationships with these programs, and continue criminal charges pending defendant participation in the treatment program. Following successful participation, the charges are dismissed. Success

is either defined as avoiding further use of narcotics, or simply in terms of attending a specified number of meetings and counseling sessions.

One such program is currently in operation in Cook County, Illinois. Initiated with contigency funds of the Cook County States Attorney's Office, it has recently received support from a comprehensive federal grant to the Illinois States Attorneys Association.

The Cook County program diverts minor charges, typically possession, involving soft drugs. The counseling aspects of the diversion program are established by a working arrangement with the Gateway House treatment program in Cook County.

The Cook County Drug Abuse Prevention Program makes initial contact with defendants in the narcotics preliminary hearing courts in Chicago. If a defendant appears potentially eligible, he is informed of the program in court.

Defendants interested in the program are interviewed by a member of the staff who describes the program to the defendant. The staff member also evaluates the extent to which the defendant meets eligibility requirements. The

drug abuse program currently employs law students to conduct these interviews.

The program has five eligibility requirements. The program is limited to persons charged with possession of a "small amount" soft drugs, 30 years of age or younger, without prior convictions on drug-related or serious crime charges, charged with a criminal offenses with no aggravating circumstances, and properly motivated to accept counseling and treatment.

Since the drug abuse program was initiated by the States Attorney's office, these requirements describe those cases which the prosecutor felt to be of marginal criminal status; they are strictly enforced. Over 95 percent of the participants in the program were charged with marijuana possession.

The program seeks only those defendants whose drug involvement is relatively recent. The age and prior record requirements reflect this focus.

The program is open only to defendants not involved in sales of narcotics. The requirement that possession be of only a small amount of drugs is directed toward this distinction. Small amount is not defined, but in practice refers to an amount suggesting possession solely for personal use. Staff members of the drug program note, however, that the standard is imprecise and often inaccurate in distinguishing between seller and user. Especially with respect to soft drugs, the distinction is difficult to draw objectively.

If, after the interview, the eligible defendant agrees to participate, a continuance is granted on the defendant's motion. It is accompanied by waiver of speedy trial, thus protecting the right to prosecute on the original charges.

The program is highly sought after by defendants. The supervisory period is short and there is some potential of receiving valuable assistance. Dismissals are routinely granted to successful participants.

The drug abuse program currently operates 16 counseling groups, each group consisting of 12 participants. There is currently a waiting list of up to six weeks to join a counseling group.[86]

The counseling phase of the program lasts five weeks with one session of group discussion per week. These discussions do not focus solely on drug problems, but encourage general interaction among the members of the group. One of the sessions is devoted primarily to a discussion of the effects of drug usage and the availability of local treatment programs. The participant has only limited contact with the program beyond the group meetings, and individual counseling and follow-up visits after counseling sessions are infrequent.

Following the counseling phase, participants remain in the program for a period of two months with little or no supervision. They are not required to attend counseling sessions or to report to the program. At the close of the period, if the defendant has not violated any of the conditions of the program, he returns to court for dismissal. Charges are dismissed for all successful participants.

Participants must comply with several conditions. The most strictly enforced is that the defendant attend five consecutive counseling sessions. Failure to attend a scheduled session results in dismissal from the program and re-institution of charges. Of over 2,000 participants in the drug abuse program, 21% have been terminated as unsuccessful, most for failure to attend a counseling session.

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The two other conditions of participation are that the defendants not be re-arrested while in the program, and that they do not use drugs. These conditions are strictly enforced to the extent that violations come to the attention of the program staff. However, reporting procedures for re-arrests are not thorough. The lack of supervision of participants outside of counseling sessions limits the extent to which their further use of drugs can be monitered. Participants are required to submit four urine tests during the counseling phase of the drug abuse program, but the program personnel admit that these tests are inadequate to determine whether drugs are being used.

Arrest records for the current charge are expunged for successful participants. As a result, the successful participant has neither a conviction nor an arrest record.

A study was made of approximately 700 successful participants. Their criminal records were examined for a period of from six months to one year following completion of the program. Less than four percent had been rearrested and convicted on any charge. These results do not demonstrate the success of the program. The analysis relys on rearrest and conviction. Given congested court calendars, the six to twelve month period may have left a number of ex-participants with pending charges. Moreover, no control group

was studied to establish how many of the participants would not have been re-arrested within six to twelve months of the initial charge regardless of the counseling.

Statute Diversion

Diversion of drug offenders is established by statute in a number of jurisdictions.[87] Some statutes also provide for post-conviction treatment programs, and extend diversion to heroin and other hard drug users. Use of the diversion provisions in the statutes has been low because defendants dislike the lengthy treatment periods provided in the statutes for minor charges, while prosecutors and judges prevent diversion in serious cases.

In many statutes diversion is operative only with the consent of the prosecutor. One such statute in Connecticut establishes preliminary eligibility requirements for diversion, focusing primarily on the prior record of the defendant.[88] The defendant must have no prior conviction for a violent crime; must not have had two prior convictions for other charges with a sentence maximum of 10 or more years; and must not have gone through treatment programs more than 3 times previously. In

addition to having a minimal prior record, the defendant must obtain medical confirmation that he is a drug dependent person. Finally, consent of both prosecutor and judge is necessary for diversion.

On entry into the diversion procedure, criminal charges are continued for a period of up to one year for misdemeanors and two years for felonies. The defendant participates in treatment programs operated by the Adult Probation Department on an in-patient basis. Following completion of treatment and a statement by treatment personnel, the original charges are dismissed.

The diversion procedure is seldom used. The Adult Probation Department of Connecticut reported that only three percent of criminal prosecutions for drug offenses were suspended pending the diversion treatment program.[89] Instead, post conviction treatment as a part of a plea bargain is more frequent.

Defendant's reluctance to choose the lengthy treatment programs instead of prosecution is joined with prosecutorial unwillingness to permit diversion. A study of New Haven procedures under this statute notes that post conviction treatment is preferred by the prosecutor.[90] In part the prosecutor prefers post conviction treatment because diversion leaves criminal charges pending for one or two

years. This may result in loss of records or witnesses and in any event, long pending cases reflect poorly on the performance of the prosecutor's office. Post conviction treatment is also preferred because it is more extensive. Finally, some prosecutors believe that drug dependent persons are more likely to persevere in treatment if there is a conviction first.

The Massachusetts diversion statute, which applies to all defendants in drug cases, attempts to limit the discretion of the prosecutor.[91] Diversion is mandatory for first offenders charged with offenses not involving sale, and discretionary for all other drug offenses. Drug-dependent persons charged with non-drug offenses (e.g. theft, robbery) are eligible only for post-conviction treatment.

Defendants are eligible if they are determined to be drug dependent (or addicted) and likely to benefit from treatment. They are informed of the availability of diversion at the first court appearance. If a defendant elects to seek diversion, an adjournment of from 4 to 8 weeks is granted in order to permit a medical (psychiatric) examination. During this period, the defendant obtains the examination on his own and if the examination indicates eligiblity, the defendant requests treatment.

The Massachusetts statute is significant for two reasons. The first is the mandatory diversion procedure for specific offenders. The second is the inclusion of diversion for cases involving sales of narcotics. Neither of these provisions is often used.

A study conducted shortly after the statute was enacted focused on the lower criminal courts in the Boston area, where much of the diversion under the statute occurs. The study found no significant increase in treatment of drug offenders in comparison to prior years.[92] Diversion occurred in less than 2% of the cases. Although this was explained as due in part to a lack of understanding of the statute's provisions, later statistics suggest a continued pattern of infrequent diversion.[93]

The mandatory diversion provision is narrowly defined. In practice it is available only in those cases where a first offender is charged with possession of a small amount of drugs. Cases of possession involving larger amounts are frequently charged with "possession with intent to sell." As currently interpreted, this charge removes the case from the mandatory provisions of the statute.

The mandatory provisions, therefore, apply only to cases in which there is a liklihood of leniency in the absence of diversion and are seldom invoked because defendants have little incentive to do so. For minor cases a common disposition is a continuance for up to one year, after which time the charges are dismissed. Jail sentences are seldom imposed unless the offender has several prior convictions.[94] On the other hand, diversion treatment lasts between 1 and 2 years, thereby exceeding the length of time the defendant is likely to be controlled as a result of a conviction or conditional dismissal. Also the statute requires an admission of drug dependency (or addiction) prior to diversion and many defendants regard this as undesirable. Finally, the statute limits the defendant to entry into a state-licensed treatment program. Many defendants prefer to seek treatment in other agencies.[95]

Defendants have greater incentive to request diversion in serious cases (i.e. sales, defendants with several prior convictions). Since leniency is less frequent, the diversion alternative is more desirable, and there is a higher examination rate in these cases.[96] However, the attitudes of the criminal justice officials limit the use of diversion for serious charges. Diversion is seldom allowed unless

the defendant establishes that the charges involve no harm to others.

For cases of intermediate seriousness attitudes and practices vary. Some judges favor diversion; others do not. The statute has done little to change the attitudes of officials concerning diversion for drug offenses.[97]

Requests for diversion are also made in the felony trial courts. In these courts, the rate of request for diversion appears higher than that disclosed by the study of lower court practice. This reflects the more serious offenses handled by the trial courts. However, diversion seldom occurs in these higher courts and is permitted only in "self-hurt" situations. The District Attorney's Office frequently argues against diversion by suggesting that the defendant's activities involve sale. Diversion decisions become essentially policy determinations made by the court and reflect individual judicial attitudes.

The medical report procedures are disliked by the prosecutors who feel that the reports are unjustifiably favorable to the defendants. The reports often state conclusions, rather than presenting evidence. However, the study discussed earlier found that 50% of the examinations were unfavorable to the defendant.

The medical report is irrelevant to the discretionary decision. One prosecutor suggested a revision under which the parties would proceed directly to the discretionary issues. The defendant would admit addiction or dependency in court. The court could then proceed directly to a consideration of the other issues involved in the decision.

Medical personnel have difficulty evaluating the honesty or accuracy of statements made during examinations. Defendants requesting examination are aware of the need to obtain a favorable report. Hard data, such as puncture marks on the defendants arms, demonstrate use of drugs, but are of marginal value in determining addiction or dependency. As one response to this difficulty, a clinic which receives frequent diversion and post conviction treatment applications, has developed a screening committee, composed in part of ex-addicts. The committee interviews all applicants as a supplement to interviews by individual doctors.

The prosecutor's office is also concerned about the delaying effects of the current statute. Four to eight weeks are required to obtain a medical report. If diversion is allowed the case remains pending for one to

two years. Post-conviction treatment, rather than diversion, is preferred by the prosecutor.

Summary

The practice of diversion in this area is constrained by several factors. First, even if the presence of an illness is recognized and a causal connection between illness and act established, diversion is unlikely if the alleged crime is regarded as serious by the criminal justice officials. Their perception of community attitudes and their individual conception of appropriate public policy are relevant to this decision. If the crime is serious, but treatment is desirable, these officials are likely to prefer post-conviction treatment. For example, major sales of drugs are currently viewed as serious offenses and the fact that the defendant may be an addict does not imply that conviction is inappropriate or that it can be sacrificed in favor of treatment, but simply that treatment should occur at some point.

The second limiting factor is the availability of referral resources. Although appropriate treatment programs may not exist, more often, the programs exist, but are not

conveniently accessible to criminal justice officials.

Accessibility is determined by the policies of the noncriminal treatment programs and by the nature of the mechanisms available to place defendants into them. The programs exist in isolation from the criminal justice system and attempts to establish referral relationships may encounter a reluctance of the treatment agency to accept patients from the criminal justice system. For example, although alcoholism treatment programs are relatively abundant, few are willing to deal with skid row alcoholics. Referral procedures, whether established by statute or informal arrangement, might be too time-consuming for criminal justice officials whose administrative emphasis must be on efficiency. Finally, especially in the case of mental illness referrals, procedures to place the defendant in a hospital involve the risk of public or legal recriminations if the admission is initiated on insufficient bases.

A third factor is the willingness of the defendant to choose diversion instead of other possibilities. In making the choice, the defendant weighs the comparative benefits of alternative courses of action. While, in the abstract, treatment may appear to be invariably preferrable to prosecution, in practice this is not uniformly true.

Factors such as the length of confinement or supervision and the label that diversion treatment attaches to the individual are crucial determinations. Diversion treatment may be resisted or avoided.

In this area, statutes authorizing diversion procedures are frequent. However, they play a limited role in the practice of diversion and, especially with respect to drug offenses, are infrequently employed. Although the statutes establish authority, usage is determined by discretionary decisions. Officials continue to characterize offenses as serious and to desire conviction of certain defendants. The officials continue to function under time and resource constraints and seek to avoid lengthy procedures for diversion. Defendants elect diversion only where it is preferrable, in their eyes, to the probable consequences of prosecution.

CHAPTER FOUR: YOUTHFUL AND NON-HARDENED OFFENDERS

INTRODUCTION

In prior chapters, although diversion occurred for a variety of formal criminal charges, mostly minor, important common characteristics of the incident or of the defendant could be identified: the incident was a "dispute" or the defendant was "ill." If either factor is basic to the criminal complaint and the alleged crime is not serious, diversion, screening or sentence leniency is likely.

This chapter deals with an even more amorphous area. The alleged crimes do not have apparent similarity and the defendants have a variety of personal or social problems. Although less precise, this use of diversion may be the most important. There are currently more programs for this broad category than for either of the first two.

Diversion here results from judgments of criminal justice officials about the defendant and about the nature of the criminal act. The defendant must not be a hardened

criminal. There is a widespread assumption that a harsh penalty or even a criminal conviction channels such a defendant into a criminal career and should be avoided. Information such as prior record, age and apparent lifestyle play a role in this decision, and because the decision is highly subjective, attitudes and prejudices of individual officials are extremely important.

Diversion occurs most frequently for younger defendants.[98] For individuals above juvenile court age, but under 21, many of the factors which led to the creation of the juvenile court system seem still applicable. However, although young adults predominate in all diversion only to young adults, the clear trend is to include older defendants. Thus, the relevant point is simply that the age of a defendant is important in deciding to divert him.

Prior record is equally important. First offenders are preferred; offenders with prior records are accepted; but defendants with lengthy records are rejected.

The second judgment relates to the seriousness of the alleged criminal act. Does it represent serious social deviance? Misdemeanors are more readily diverted than felonies. Does the act justify or require a criminal

conviction? Individual attitudes and office policies are important in this decision, but there is a general tendency to regard acts involving physicial injury as more serious than property offenses. Local policies reflecting community concerns differ on specific crimes. For example, in some areas all burglaries are regarded as serious crimes; in others, store burglaries may be diverted.

The judgment about the defendant might be viewed as correction oriented. It assesses the liklihood of future criminality and seeks to find the best way to handle the individual. The decision concerning the crime is a policy statement. It excludes diversion of defendants whose personal histories might make diversion otherwise appropriate.

Intensive service programs are frequent and influence the judgments of criminal justice officials. Program personnel often function as advocates for diversion of individual defendants. Their advocacy is effective to the extent that the program is accepted as a functional and credible part of the criminal justice system. Although a resultant pattern of expanded diversion is apparent in several jurisdictions, the expansion does not extend beyond the strongly held views of criminal justice officials concerning the seriousness of specific crimes.

Conviction Avoidance

Several urban jurisdictions have special branch courts to handle young defendants within the adult criminal process. These courts are patterned on the juvenile court model, with practices emphasizing diversion and screening.

The Cook County Boys Court is illustrative. It has been described as a "court of equity" for young defendants. A tradition of leniency and the use of extra-legal dispositions was assisted into permanence by one of the first judges assigned to Boys Court.[99] Since that time, subsequent judges have continued to apply informal procedures to dispose of defendants for whom criminal conviction appears unwarranted or counterproductive. Since most noncriminal dispositions resemble screening, the primary benefit is that many young defendants avoid conviction.

The Boys Court handles each year over 20,000 defendants between the ages of 17 and 21. Initially, jurisdiction extended to all misdemeanor charges against youths and to preliminary hearings in felony cases. Currently narcotics and auto theft cases are heard in other courts.

Outright dismissal of charges is frequent. Many dismissals reflect a general attitude of leniency. Others dispose of charges filed on insufficient bases. Given the current limited state of data concerning Boy's Court operations, it is not possible to accurately distinguish between dismissals based on leniency considerations and those based on lack of evidence.

Boys Court employs a variety of diversion practices. Some procedures involve conditional dismissal of charges pending a period of acceptable behavior by the defendant. Boys Court has access to a number of social service agencies, which, in theory, provide guidance and support for diverted defendants. In fact, however, due to inadequate resources and a large caseload, the services provided are not extensive, and none of the procedures consistently provides realistic supervision or counseling.

The bases on which diversion is invoked are unclear. The court has access to social service resources for pre-disposition investigation of defendants. However, such investigations are seldom conducted because they impede the efficient flow of cases through the Boys Court. The investigations require a two-week continuance of the case and a reading of the investigative report at the subsequent court appearance. Even these minimal delays are inconsistent

with the mass production format of dispositions necessitated by the court's heavy caseload. A 1967 survey of Boys Court activities noted that more than 70% of the cases disposed of by the court are handled with no investigative reports and with no supervision following disposition.[100]

As a result the attitudes of individual judges and their first impressions concerning the defendant and the alleged crime are the most important factors in invoking informal disposition practices. The defendant's family background, employment or schooling, and prior record are considered, but only to the extent that they are immediately available to the court. An additional consideration is whether the defendant appears "cooperative." Finally, certain charges, such as robbery, are regarded as too serious for diversion.

Five percent of the Boys Court cases are disposed of by an SOL (Stricken without leave). An SOL dismisses current charges, but permits the prosecution to refile charges within 120 days. This disposition permits the prosecution to conduct further investigation, but the prosecution seldom does so. The SOL leaves a technical legal cloud over the defendant, arguably encouraging good behavior.

SOL's are used in theft or burglary cases, when the defendant offers restitution, or when a burglary has taken place, but no property has been stolen and no one has been injured.

A second diversion procedure is the imposition of "good behavior." Conviction is deferred and the defendant released with the general admonition that he be on good behavior during a specified period. After successful completion of the period charges are dismissed.

Good behavior is used in approximately 4% of the cases. It is given to defendants with no prior record who are charged with minor offenses and whose parents show substantial parental concern. Defendants in school with good scholastic records are preferred.

The final diversion approach is the imposition of court supervision. Unlike the two previously described methods, court supervision attempts to maintain continued contact with the defendant.

Currently supervision is used for approximately 6% of the caseload, a marked reduction from a 30% rate during the 1950's. The decline is attributable to a reorganization of the criminal court structure, under which judges are rotated between Boys Court and other judicial branches.

As a result of rotation, current judges on the Boys Court have less experience in handling youth cases and are more reluctant to rely on court supervision.

Court supervision provides a probation period prior to conviction. Conviction is deferred and the defendant is placed in the care of an agency, often the probation department, to provide counseling and assistance. The typical supervisory period is one year. If the defendant violates the conditions of supervision--most often simply that there be no arrests and that he report periodically to the supervising agency--the supervisor may petition to reinstate the charges.

Supervision is minimal or non-existent for most defendants. The criminal court Social Service Department to which most supervision cases are referred, is understaffed and provides little assistance. However several small service programs accept a limited number of defendants and do provide real supervision.

Defendants and their families are often unaware that the defendant has received a unique, noncriminal disposition. They tend to regard the disposition as an outright dismissal or as a sentence to probation.

Although Boys Court has employed these informal dispositions for more than 20 years, no attempt has been made to evaluate their effect on the defendants, or even to systematically follow the later criminal careers of defendants who have received noncriminal dispositions. As a result, evaluations of the court's performance are impressionistic and impressions vary. Some officials participating believe that the informal dispositions do assist the defendants; others feel that they do not. Attitudes may change over periods of time. The judge who established the pattern of leniency in Boy's Court is currently in the Cook County trial courts. Recently, he imposed a harsh sentence on a young adult felon, noting that leniency has been "proven" ineffectual.

Prior to 1971 statutes in New York state provided for special court approach for young adults.[101] The New York procedures were available to defendants between sixteen and eighteen years of age, if the charges did not involve a capital offense, and if the court consented to application of the statutory procedure.

In felony cases, eligibility was determined shortly after arraignment. The issue was raised on recommendation by the grand jury, the prosecutor, or on the court's own

motion. An investigation into the youth's background and personality and into the facts relating to the crime charged was conducted by the probation department. The court determined eligibility on the basis of the report of this investigation and perhaps a hearing. The determination was a discretionary decision and unreviewable on appeal.[102]

Eligible defendants were processed as youthful offenders throughout the remainder of the criminal proceedings. Court proceedings were informal. A finding of guilty resulted in adjudication as a "youthful offender," which, unlike an adult felony conviction, did not result in loss of the right to vote and other collateral liabilities. Youthful offenders were referred to special correctional programs.

The statute was repealed in 1971 primarily because it placed a heavy burden on criminal justice resources.[103] Decisions pertaining to eligibility were made only after investigation by the probation department. These decisions--unlike the decisions in the Chicago Boys Court--were based on reliable data. However, the combination of early decisions and investigations created resource problems for the probation department. Although conviction rates were high, many defendants were found not guilty, and

investigations in these cases were considered useless because they had not formed the basis for an adjudication. If a defendant was found guilty, a second probation report was often sought for the sentencing decision.

Uniformity was lacking in both recommendation and acceptance practices. No recommendation standards for youthful offender status were developed and decisions to recommend were made on unclear bases by individual District Attorneys and judges.

Judges applied varying standards of acceptance. In a sample of cases drawn from Kings County records, several patterns emerged. Youthful offender proceedings were favored for young persons near the lower limits of the age category (sixteen to seventeen years), and older defendants were more often denied eligibility. Property offenses were frequently included, but assault cases were seldom accepted.

The New York sample disclosed one additional factor. Under the statute a prior felony conviction barred entry into the youthful offender process. The Kings County court extended this principle to prior adjudications as a youthful offender when the original crime charged in the prior case was a felony.

Although procedures such as the Boys Court and the New York selective youth court are seldom applied to defendants above the age of 21, a diversion court in Philadelphia receives both young adult and older defendants, though most of the defendants are under 25. The court diverts persons not charged with serious offenses and who might benefit from a second chance to avoid a criminal career, and functions as the Boys Court must have during its formative years.

The pre-indictment probation court in Philadelphia receives only those defendants for which the District Attorney's office recommends diversion or outright dismissal. Court sessions are held twice per week and the number of cases assigned to the court each day often exceeds 100. Overall, this amounts to approximately twenty percent of the cases filed in the Philadelphia Court of Common Pleas.[104]

The Attorney's Pre-indictment Unit reviews indictable misdemeanors and felonies prior to indictment. Cases are selected for diversion based on the prior record of the defendant and the seriousness of the current charge. The emphasis of the program is on defendants with limited criminal histories. Defendants with minor prior records may be referred, but a prior conviction on a crime of violence, a felony or a charge similar to the current charge results in exclusion. Similarly, if the current charge involves

violence or threat thereof, or is a charge of burglary of a dwelling, it is considered too serious for diversion. Marijuana and other minor cases of drug possession may be referred; drug sales cases are not.

Roughly thirty five percent of the referred cases involve possession of marijuana or other drugs. Forty-five percent involve petty theft charges.

The court proceedings are informal. The defendant, the attorneys, supporting personnel and the judge sit at a conference table. The diversion program is explained to the defendant and a waiver of speedy trial is obtained. Although caseload pressure necessitates a degree of speed, the judge does inquire into the facts surrounding the criminal complaint, the defendant's background and expresses genuine concern for the defendant.

Some defendants are discharged outright. Most, however, are placed on pre-conviction probation. The probation can be for as long as two years, but three and six month periods are more common. Several social service agencies provide assistance to some of the defendants. A limited number of drug dependent persons are placed in treatment programs. For the most part, however, the probationary period is unsupervised.

Approximately 20% of the defendants are denied diversion. Two reasons for rejection are apparent. A number of cases are referred inadvertently by the District Attorney or are referred by judges. Where the District Attorney in the court objects to diversion in court it is denied summarily. Also, some defendants are unwilling to discuss honestly the facts of the charge and in such cases diversion is refused for lack of motivation.

No formal studies have been made of the performance of defendants placed on this form of probation. The impressions of persons associated with the program are that recidivism rates are low. At least this program, as does the Boys Court, avoids undesirable convictions.

Court Employment Programs

Informal diversion programs provide conditional dismissals with minimal supervision to defendants with minor prior records who are charged with non-serious offenses. Newer, more structured diversion programs provide extensive services to similar types of defendants.

The most popular new format is the court employment program. The approach was initiated by the Vera Institute

in Manhattan and Project Crossroads in the District of Columbia,[105] and is now used in over thirty cities. Its utilization was stimulated by grant programs of the U.S. Department of Labor and the Law Enforcement Assistance Administration.

In court employment programs, potential participants are identified by project screeners. Admission results from application of formal criteria and interaction among project staff, prosecutorial and judicial officials, and the defendant. Upon admission, charges are continued during a specified period of job counseling and placement. Dismissal of charges is customary after successful completion of the term. Unsuccessful participants are returned to court for prosecution.

We visited several court employment programs. One program was examined in depth and provides a focal point for discussion. This project is Operation De Novo in Hennepin County, Minnesota. Although there are some differences between Operation De Novo and other employment programs, its operating characteristics are illustrative of the approach.

Operation De Novo was begun under a $74,000 grant from the U.S. Department of Labor. The Minneapolis Urban Coalition provided local sponsorship. De Novo diverts an average of 20-25 defendants per month.

Selection of Clients

a. De Novo

Operation De Novo obtains clients for diversion by screening all complaints coming through the criminal courts, prior to and shortly after arraignment. The initial screening tool is a bail report prepared for each defendant prior to his initial court appearance. A summary review of these reports eliminates most defendants. For those indicated as potentially eligible for release on bail, prior record and current employment status are then considered.

If this closer examiniation reveals that the defendant may be eligible for De Novo, a visual observation is made of his actions during arraignment. This is followed by a review of the prosecutor's file and, for appropriate defendants, an interview with the defendant and his lawyer. Fewer than half of the defendants interviewed are accepted. Cases selected for diversion by the screeners must be approved by the assistant prosecutor involved in the case and by the assistant in charge of criminal matters in the prosecutor's office.

All decisions are colored by pragmatic evaluations of which cases are acceptable to the prosecutor. As a result exclusion criteria based primarily on counseling considerations

are difficult to identify. However, three admission criteria apparently are premised primarily on counseling factors. First, the defendant must be motivated for counseling and demonstrate a willingness to seek better employment and improvement in lifestyle. Second, since counseling is directed at employment placement, the defendant must be unemployed or underemployed. Third, De Novo does not accept defendants with problems of drug addiction, alcoholism or chronic mental disorder because the program believes that its counseling procedures would be ineffective for these defendants.[106]

The employment criteria has been strictly enforced.[107] However, shortly before our visit, De Novo received pressure to provide diversion for defendants who were not underemployed. This pressure came from defense attorneys who suggested equal protection objections and from criminal justice officials who believed that diversion was an appropriate disposition for many defendants rejected by De Novo. As a result, De Novo developed a diversion program premised on restitution and available to defendants with no employment limitations.

One criterion enforced during the screening process reflects a combination of program and prosecutor views. The formal program criterion accepts defendants without

a maximum age limit, but defendants are more readily accepted if they are under 30 years of age. In part this is in response to prosecutor's views that younger individuals are less seriously criminal. Equally important, young adult offenders are more marketable for employment, more likely to be unemployed at arrest, and may be more motivated to improve their employment status.[108] Only 10% of the actual participants are above 30.

In accepting a high ratio of unemployed defendants, De Novo selects a high risk counseling population. From the perspective of the criminal seriousness of both the defendant and his alleged act, however, the screening approach is generally conservative. The conservative approach is dictated by attitudes of local officials. Nevertheless, the history of De Novo reflects a limited expansion of applicability.

Initially Operation De Novo was limited to first offenders. Additionally, formal criteria excluded felonies, crimes involving violence and acts dangerous to other persons.

The prior record restriction was abandoned quite early. It was found to be unnecessarily restrictive both in terms of counseling objectives and, more importantly, in terms of the seriousness of offense and the criminality

of offender. Under current practice, defendants with minor prior records are accepted. Overall, 59% of the participants have no prior record and another 20% have only a juvenile court record. The largest number of reported prior offenses are alcohol violations and misdemeanor crimes against property. Prior felony records appear for only 10% of the participants and those seldom involve crimes against persons. Surprisingly, over 40% of the prior offenses resulted in incarceration. However, although not specifically reported the terms of incarceration were probably brief.

Within one year of the initiation of Operation De Novo, diversion of defendants charged with felonies was permitted. This extension reflects the growing acceptance of De Novo among criminal justice officials. The program's services appear to be effective in helping participants restructure their lives around new employment possibilities. Equally important, De Novo requires strict compliance with program activities before recommending dismissal of charges and rates of rearrest while in the program are low.

Screening of felony cases is more stringent than misdemeanors.[109] Minor misdemeanant offenders are accepted if the current offense qualifies, if the defendant is employable and

if he has the appropriate motivation. Selection of felony defendants involves, in addition, a careful assessment of the defendant's personality and attitudes, as well as the nature of the alleged criminal act.

The current felony intake of Operation De Novo is high. In some months, more than half of the newly diverted defendants have been charged with felonies. Virtually all such offenses are crimes against property, with forgery, theft and possession of stolen property predominating.

The growing confidence of criminal justice officials in the program has also resulted in a relaxation of restrictions against crimes which injure or threaten injury to the victim. A number of defendants charged with minor assault are now diverted. Even some robbery defendants have been diverted. In these cases, diversion occurred only where there was no injury to the defendant.

In Minneapolis the courts seldom exercise discretion in permitting or denying diversion. In selecting defendants, the project deals primarily with the prosecutor's staff. Individual assistant prosecutors apply different standards

for participation. This determination which is essentially subjective, is most important with respect to felony charges. Overall, however, outright refusals of prosecutors to permit diversion are infrequent, because of the care taken by screeners in selecting defendants and their ability to predict prosecutor policies.

Cases selected for diversion must be approved by the assistant prosecutor in charge of the case and by the supervisor of the criminal division. Since the supervisor will seldom permit diversion of cases involving physical injury to the victim or the use of a deadly weapon, diversion is infrequently recommended for such crimes.

One factor tending to stregthen prosecutor reluctance to allow diversion is the presence of a post-conviction tool which permits modification of convictions. The procedure involves a stay of the imposition of sentence pending a period of probationary supervision.[110] Successful completion of the supervision results in reduction of felony charges to misdemeanors. This procedure may be preferred to diversion because it provides tighter control of the defendant and because the period of supervision is determined by the sentencing officials, not the supervisory agency.

Defendants and defense attorneys are highly favorable to the use of De Novo. Except for outright dismissal or acquittal, it is the most lenient disposition from a defense perspective. It is preferable to the procedure which reduces felony charges in that successful completion of the program results in dismissal of charges.

b. Other Programs

The patterns in De Novo are repeated in other court employment programs. The trend towards expansion of general categories of offenses and offenders is clearly present in other programs. The Boston employment program, for example, was initially limited to young adults (17-19 years of age) charged with misdemeanor offenses. The program now is permitted to take defendants in selected felony cases. In the Manhattan program, initial restrictions limited diversion to young adults and minor charges. Both the age and offense limits have been relaxed. The Manhattan program, one of the oldest of the employment programs, now receives some crimes of violence.

This expansion pattern is best described as the result of growing confidence of criminal justice officials in the services provided. An important element is the generally high quality and intensity of services, which is often in direct contrast to the limited services and lower quality

of overloaded correctional procedures. Equally important, in each employment program visited, participation in diversion is not a "free ride." Performance requirements are strictly enforced and many participants are returned to court for failure to comply.

As in De Novo, in other cities visited the expansion is confined to situations in which the alleged act or the background of the defendant suggest the desirability of leniency. The expansion can result from changes in institutional or individual perceptions. Attitudes of individual communities within a city often influence both initial policies and the extent of expansion. Opinions of individual assistant prosecutors and judges vary; one may permit diversion of a case which another will not. Despite expansion, certain crimes such as armed robbery, homicide or serious assault under aggravating circumstances are virtually never diverted. Diversion of property crimes is most frequent.

There are indications in other programs that counseling success is greater for defendants charged with more serious crimes.[111] In New York defendants charged with ordinance violations had low rates of counseling success, presumably because they lack incentive to participate. Also, for

minor charges, the benefits to defendants of obtaining a dismissal are less and they may be reluctant to participate. For example, in New York, marijuana possession, first offenders are often reluctant to enter the programs. New York statutes allow continuance and eventual dismissal after a period of good behavior for these defendants and defendants eligible for this procedure most often refuse to enter an employment program.[112]

Services

a. De Novo

Defendants selected and approved for diversion in De Novo must sign waivers of speedy trial rights and state a willingness to cooperate. They then appear before the criminal court and receive a continuance of the charges for six months. Other employment programs typically provide only a 90-day continuance.

Participants are taken to the De Novo offices by the project screeners. A brief interview with the project intake coordinator further explains the nature of the program. The participant is then referred to one of the counselors who is primarily responsible for placement and training activities.

De Novo currently employs nine counselors. Five of the counselors are ex-offenders with no formal counseling training. Since the main objective of the programs is job placement, formal training is often not essential. Its absence is off-set by enthusiasm and an ability to relate to the clients may be more important. In addition, in Operation De Novo, supervision by trained personnel supplements the ex-offender staff.

Counselor contacts with De Novo participants average one-half hour per week. Specific arrangements are flexible. Much of the activity is concentrated in the early periods of program participation, during which apptitude tests and personal conversations establish a program to be followed in later placement activities.

Since the bulk of the participants are unemployed at entry they frequently require immediate financial assistance during evaluation and placement activities. De Novo maintains a financial assistance fund from which small amounts of emergency financial assistance are given or loaned to clients. Over one-fourth of the participants are referred to outside agencies to meet subsistence needs. Placement in part-time or temporary employment, often through Youth Corps programs, is also used for this purpose.

Extrants in De Novo often lack even basic vocational skills and De Novo utilizes educational and job training referrals to increase the participants' capabilities. Over 20% of the participants are referred to educational services. For most this is at the high school level; for some the educational needs are even more elementary.

Job training referrals occur for 17% of the participants. Most such referrals involve clerical or service occupation training. The extent to which training programs are utilized is limited by the staff view that the benefits received and the likelihood of client retention of such posts are speculative. In addition to referrals, De Novo employs two tutors on a part-time basis whose primary function is to teach basic job obtaining and retention skills. Discussions relate to such simple functions such as completing application forms and using an alarm clock to ensure punctuality.

Job placement referrals are made for almost 70% of the participants. Many referrals do not result in placement, but most of the persons for whom employment is sought are eventually placed.

Rates of job retention are low. Almost half of the participants for whom placement is obtained require second, third or more placements. Failure to retain a position results from a number of factors. Even with the incentive

of avoiding conviction, many clients lose interest in the low-paying jobs they obtain. Inadequate employment skills often lead to termination. Finally, many employers are willing to accept such employees in principle, but do not tolerate them in fact.

In making employment referrals, the counseling staff has developed a list of employers who are willing to hire De Novo clients, and relies on certain employers found by experience to be more likely to accept and retain referred clients. At first De Novo also utilized the Minnesota Job Bank listing of employment openings, but discontinued its use when procedures of this system were altered to include extensive data collection and retention concerning individual users.

The emphasis of employment referrals is necessarily on low-paying positions. Most of the placements are at wages of under $2.50 per hour.

b. Other programs.

As with respect to screening functions, the operational characteristics of De Novo in the service area are similar to those noted in other programs. The primary point of difference is that other programs utilize a standard 90-day continuance of charges. However, services delivered and methods of delivery are relatively consistent among the programs.

The use of ex-offenders, ex-addicts and other "street people" is counseling positions was initiated by the Manhattan program and is commonly regarded as successful innovation.[113] The ability of such counselors to relate to the clients and the enthusiasm which they bring to their tasks off-sets the lack of formal training. However, several programs report a need for intensive screening of applicants for counseling positions in order to make the innovation work.

Similarly, thepattern of low educational development and low employment skills is encountered in other programs. As in De Novo, it results in a pattern of frequent attempts anf failures to place clients before a final referral is completed.[114]

Measures of success

a. De Novo

At the close of the period specified in the initial continuance, successful participants are returned to court.

In some cases, additional continuances are requested in order to complete counseling and placement work. Unsuccessful participants may be termined and returned to court for prosecution at any point during their contact with De Novo.

As with the initial decision to divert, judges regard the dismissal decision as essentially a prosecutorial function. The prosecutor, in turn, accepts Operation De Novo recommendations in virtually all cases--there has been only one refusal to dismiss. This acceptance of recommendations is a derivative of two factors--initial decisions to divert reflect prosecutorial policies and dismissal recommendations follow conservative practices.

Decisions to terminate participants without a recommendation for dismissal are largely at the discretion of the project staff. Slightly more than 30% of the participants are terminated as unsuccessful. The most often stated reasons are re-arrest, lack of cooperation and absconding from the program. The latter accounts for roughly 40% of the terminations. Re-arrest accounts for another 20%. However, one-third of the defendants who were arrested while in the program were not terminated. If the rearrest does not come to the attention of the prosecutor or, when it does, if the prosecutor does not demand termination, the staff may retain the defendant in the program if it is satisfied with

the quality of the client's participation. Similarly, terminations for lack of cooperation depend on subjective judgments. Despite some flexibility, De Novo's director describes termination practices as "conservative."[115]

The rate of arrest for De Novo clients during program participation is over 15%. However, most of the arrests are for minor charges and convictions occur for approximately half of these participants. No data is available concerning arrest rates for a comparable defendant population during the six month period following filing of charges.

De Novo's impact on recidivism is unclear. The program has not been in operation for a sufficiently long period of time to develop follow-up comparisons of recidivism between participants and a selected control group. However, in a three-month follow-up of successful completions, a recidivism rate of roughly 10% has been noted.

Operation De Novo produced an over 30% increase in employment among successful participants. However, while 71% of participants reported some employment during the first three months after the program, only 53% were employed at the end of the three-month period.[116] Almost one-half of them were holding jobs other than those with which they left the program.

Operation De Novo costs roughly $700 per client. This is similar to the costs for other employment programs,[117] and is less than the average cost of probation counseling.

b. Other programs

As in other respects, De Novo is similar to other employment programs visited in both the standards used to measure success and the program's performance along these standards. Other employment programs visited terminate between 30 and 40% of all participants without a recommendation for dismissal. The standards for unfavorable termination are applied on a flexible, discretionary basis by program staff and, despite the flexibility, application is generally described as conservative or strict. Lack of cooperation, rather than any firm standard such as re-arrest, is the most frequent explanation for termination.[118]

The pattern of compliance with dismissal recommendations in De Novo is common to most employment programs. In several programs, the staff view the dismissals as essential to maintaining the integrity of the program and the client incentive to participate. If prosecutors or judges are reluctant to comply with the recommendations, strong efforts are made to persuade them. The problem is minimized by prosecutorial and judicial participation in the initial decision. Nevertheless, refusals to dismiss do occur. For example, in one city, one judge routinely refuses to grant dismissals, believing that, despite successful participation, a criminal

act requires a criminal conviction. In another program, less than 50% of successful participants receive dismissals. Again, judicial attitudes are the important factor.[119]

Most other employment programs report lower arrest rates during program participation than the over 15% rate in De Novo. For example, the arrest rate in the Manhattan program is under 5%.[120] The explanation of this disparity is not clear. Most likely, it relates to the fact that De Novo participation lasts six months, while other programs retain participants for only three months. Also, De Novo's counseling services are less intense than other programs; roughly the same amount of service is delivered in three months in other programs as is delivered during the six month interval in De Novo.[121]

In other employment programs evaluative studies have been conducted. While these suggest, on their surface, reduced recidivism among successful participants in comparison to a selected comparison group of non-participating defendants; methodological problems make the comparisons unreliable. The evaluative study conducted for the Manhattan program is illustrative.[122] The re-arrest records of all dismissed participants from the initial 23 months of the program were examined. Of the total of 247 successful clients, re-arrest data could be traced for 152. Also a sample of 100 unsuccessful participants, matched according to initial entry dates with the 152 successful clients was taken. Of the 100 terminated

defendants, rearrest data could be traced for 62, and these constituted the study's terminated client population. Finally, to construct a comparison group of defendants who had no contact with the program, court records were examined for a three-month period prior to the program. This examination yielded 150 persons who might have been eligible for the program. Of these, arrest data was traceable for 91 persons, and these formed the control group.

Rearrest information was compared for 12 and 18 month periods following disposition of charges. The 12 month comparison is noted below.

Date of project entry	Group	# subjects	Re-arrest percent
-	control	91	31.9%
initial 23 months	dismissed	152	15.8%
	terminated	62	30.8%
initial 13 months	dismissed	76	25.0%
	terminated	30	36.7%
14-23 months	dismissed	76	6.6%
	terminated	32	25.0%

Although it suggests lower recidivism for successful participants, the study results are of marginal value. The study included only those persons for whom there was a possibility of tracing arrest records through police data

facilities. In practice, this excluded defendants charged with offenses where finger prints are not routinely taken. The excluded offenses were minor violations such as disorderly conduct and misdemeanor assault. The significance of this exclusion is that, as noted in the project reports, counseling is less effective in cases of minor violations because the defendant has less incentive to cooperate.

Equally important is the manner of recording later arrests for those defendants studied. The study relied on police department searches of their own records. Offenses committed later that did not involve a fingerprintable crime may have been excluded. Also, it is not certain that all defendants for whom a search was requested could be fully traced through police records.[123]

An additional, obvious limitation on the reliability of the study results involves the rationale for selecting a control group. The purpose of a control group was to provide a similar defendant population against whose recidivism the rearrest performance of successful clients could be compared. The control group had similar prior record, current charge, age, sex and race characteristics as did the successfully diverted defendants. However, successful diversion clients were first screened for

motivation and later, in fact, adequately cooperated with the program for the full counseling term. Neither of these steps could be simulated for members of the control group. As a result, there is the strong possibility that the motivational differences between the two groups explains all or most of the lower recidivism.

A related problem is that program screening in Manhattan eliminated defendants with drug problems because they were regarded as poorer counseling risks. The screening process included both interviews with potentially eligible defendants and a review of their prior record. Even with this screening, one-fourth of the defendants accepted during the first year had drug problems.[124] For the control group, only the prior record could be reviewed, and it is likely that this group included more drug users than did the successful client population.

Operation Midway

In the counseling and treatment diversion programs discussed previously, virtually all successful participants received dismissals. These programs involved prosecutorial or judicial domination of decisions concerning program entry. Diversion caseloads were comprised of low priority, nonserious offenses.

This section discusses a non-statute diversion program in which these officials play a secondary role in determining the eligibility of individual defendants. The program is entitled Operation Midway and was developed by the Nassau County Probation Department under an LEAA grant.[125]

Eligibility decisions are made by the counseling staff under guidelines formulated by the program, the District Attorney and criminal court judge. Prosecutor approval for specific defendants is granted pro forma. Although the entry decision is thus essentially a correctional function, the counseling staff attempts to predict prosecutorial and judicial reactions to individual defendants in making these decisions.

The policy decisions of the judge and prosecutor are exercised on individual defendants at the dispositional level. Only one-half of the successful participants receive dismissals. For the remainder, the program's extensive pre-conviction correctional services play an important role in plea bargaining and sentencing decisions.

Defendants faced with possible felony convictions are often willing to apply for Midway despite the uncertainty of obtaining eventual dismissal and the fact that counseling may last for more than one year. On the other hand, the prosecutor does not resist the program, largely because it

places the defendant under close supervision of an accepted criminal justice agency and does not preclude eventual conviction in serious cases.

Structure

Operation Midway offers intensive, varied counseling to selected felony defendants on a non-institutional format. Prosecution is deferred for up to one year for selected defendants. Eligible defendants must be between sixteen and twenty-five years of age and reside in Nassau County. At the outset, all felony charges other than homicides were considered eligible for participation. Recently, at the urging of the Nassau County District Attorney, some felonious sales of narcotic drugs have been excluded.

Application for admission to Operation Midway is made by formal motion of the defendant within thirty days of indictment. A Midway representative is assigned to the court to assist in identifying eligible defendants.

The proportion of potentially eligible defendants who actually apply for the program is uncertain. Estimates range from thirty percent to fifty percent. Reasons for failing to apply vary, but an important factor is the defendant's expectation of lenient disposition through traditional processes. Counselors in Operation Midway suggested that applications are more frequent when the defendant has little chance of successfully defending against the charges or anticipates a harsh disposition. One defense attorney suggested that a lenient plea bargain offer, or even the expectation of such an offer, reduces the defendant's motivation to participate.

Even after a motion for admission is filed, a lenient disposition offer might result in withdrawal of the motion. Six percent of the applications for Midway were withdrawn by the defendant. Some of these withdrawals were intended to avoid the potential negative implications of a rejection by the Midway staff. This practice occurred especially during the early period of the project. It was discontinued when defense attorneys were convinced that a rejection would not be held against the defendant. In other cases the motion was withdrawn because of a plea bargain. For example, in a case involving possession of a narcotic drug, the motion was withdrawn and the defendant pleaded

guilty to loitering. The defendant's motion had been favorably received by the Midway staff.

A motion for admission to Operation Midway initiates a screening process which, in theory, involves Midway staff, the District Attorney, and the judge. In practice, however, applications are approved if the Midway staff so recommends. The District Attorney's office plays a passive role, resulting from the trust that has developed in the performance of the Midway staff. The prosecutor's willingness to accept a Midway recommendation is also facilitated by the fact that admission to the program does not bind the prosecutor to agree to a dismissal following successful completion and the fact that Midway is operated by the Nassau County Probation Department, an agency with demonstrated competence in supervising criminals.

Roughly fifty percent of all applications are rejected by the Midway staff. The formal criteria for eligibility are the age and charge limitations noted above and a timely filing of a motion. Since few applications are filed which do not comply with these formal criteria, the more important reasons for rejection are the subjective criteria enforced by the staff.

Thirty-five percent of all rejections occur because of caseload considerations. The majority of these are designed to maintain the low client-counselor ratio which Midway

regards as essential to delivery of intensive probation services. Initially, counselor caseloads were limited to 25 clients per counselor, but this ratio was later reduced to 20 clients per counselor to ensure frequent contact. An additional caseload consideration is the desire of the program to retain a balance between drug-related and other offenses. Because of the age limitations of the eligible population, a majority of the applications involve drug offenses. Rejections occur to limit the proportion of drug offenders in the program to approximately 40%.

The screening process involves interviews of defendants by members of the counseling staff. The interviews, which are extensive and may involve discussions with the arresting officer, seek to determine the applicant's motivation for treatment and the overall nature of his problem. Psychiatric or other testing procedures are occasionally used during screening. Applicants may be rejected for failure to cooperate with the interview process or because they fail to display adequate motivation for treatment. Rejections may also occur when the preliminary assessment suggests either that care other than that available in Midway will be of most benefit to the defendant, or that the defendant is already under the care or supervision of another agency.

Operation Midway is not limited to first offenders, and over fifty percent of the accepted clients have prior records. However, if the applicant's prior record is lengthy or indicates progressively worsening criminal behavior he may be rejected.

None of these criteria are inflexible.[126] The manner in which they are applied in making specific screening decisions varies. An illustrative rejected application suggests the interplay.

> Defendant A was charged with possession and sale of marijuana. He had two recent convictions on drug charges, serving a two year sentence in one case. Another drug case was pending against him. Interviews established that the defendant experimented with "virtually every known narcotic drug." No strong motivation for treatment was noted. Midway recommended that the court reject the defendant's motion. The counselor noted that "the interests of society and of this individual would best be served by confinement in a residential setting where his deep-seated drug addiction would receive the intensive care and therapy indicated."

On occasion, the judge refers a defendant to Midway although the defendant's prior record would otherwise suggest exclusion. This occurs because the judge believes that the defendant might benefit from Midway's services. In such circumstances, the referred defendant may be accepted by the program with some reluctance.

Application of these criteria produce a selected, intermediate risk caseload. Most clients are from lower middle class backgrounds. The median age is nineteen years. The program is not limited to persons with minor prior records and participants have frequently been charged with serious felonies.[127] On the other hand, persons with lengthy criminal records suggesting hardened criminality, severe addiction problems, or serious emotional disorders are exluded by the counseling staff.

Counseling

The Midway staff consists of thirteen counselors. Their caseloads are limited to roughly one-third of the normal probation caseload in Nassau County. Unlike in employment programs, Midway counselors are trained probation workers. Cost per client is roughly twice the cost of probation supervision.

The services provided to clients are varied and individualized. The counselors make extensive use of intelligence, vocational and other testing and frequent contact is maintained with the client and his family. Funds are available to support clients in vocational training services. Also the defense attorney is encouraged to remain

in close contact with his client and the program.

Participants are required to comply with five rules of behavior. They must refrain from violations of law, maintain residence in the county, report changes of address, keep appointments and submit to psychiatric and medical tests as instructed. These rules are loosely enforced and noncompliance does not automatically lead to termination.[128]

The services produce changes in the client's lifestyle, or equip him with the capacity to function in his current situation. Two illustrative client histories demonstrate the diversity of the approach.

> Defendant B: Defendant was seventeen years old. He was charged with burglary and petty larceny. He had two prior adjudications as a juvenile delinquent (both involving burglary), one conviction for possession of stolen property and two arrests (both dismissed) for burglary.
>
> His family environment was poor. The mother was dominant and possessive. The father had alcohol problems. His attitude was to blame others for his problems.
>
> Defendant entered the program while in jail. Testing indicated average intelligence and attitude problems. Early performance in program was marginal. There were failures to keep appointments and general disinterest. Problems with family continued.
>
> Gradully, counseling built a new attitude. Defendant obtained employment at a gas station. Independence developed from parents. Continued assistance obtained employment at a hospital. Defendant married. Participates in Fortune Society.

Defendant C: Defendant was twenty-four years old. He was single and a college graduate. Lived in county for eight months. Charge was possession of a dangerous drug. Prior record of drug offenses.

Testing established C to be in the upper one-third in intelligence. He had some involvement in hippie culture. He suffered from a speech impediment (stutter). Future plans were ambiguous.

Midway arranged speech and hearing evaluations for the defendant. These revealed no emotional cause. Defendant was placed in an oral communications course. His speech difficulty improved.

During preliminary portions of the program defendant held several jobs. Testing and interviews revealed an aptitude and interest in a legal career. Defendant applies to law school. Career plans chrystallize. Refrains from use of drugs.

The initial intent of the Midway planners was to establish this program as a crisis intervention service utilizing the trauma of arrest as an opportunity to reach the defendant's underlying problems. However, procedural problems prevented the program from reaching defendants shortly after arrest. Arraignment on an indictment was chosen as the earliest feasible contact point.

The counselors adopt what they refer to as a client advocate role. In many cases this role is manifest in arranging dispositions for successful participants. This is discussed in the next section. The advocate role is also manifest in the treatment and counseling services of the program.

The basic counseling attitude is that the crime charged is a product of broader maladjustments in the individual's life. The counselors seek to remedy these maladjustments by affirmative action. Several illustrative examples of the resultant practice are instructive.

> a. Client was frightened of his first contact with college. Counselor drove him to school and assisted him in settling in a dormitory and during orientation.
>
> b. Client discouraged by administration of Welfare Department. Counselor accompanied him to intake and secured services.
>
> c. Client involved in fight with two men and charged with assault. Received summons although police and District Attorney regarded charge as inappropriate. Counselor appeard with client in court and explained to new assistant District Attorney that prior District Attorney had promised dismissal. Client received a dismissal.
>
> d. Client's employment teriminated because of arrest (on which Midway entry was based). Midway officer met with employer to have client re-instated. (129)

The rate of successful completions for clients admitted to Operation Midway is high. Only thirteen percent were returned to court as unsuccessful. The majority of the terminations were due to lack of cooperation on the part of the defendant.

Although rearrest is not, in itself, a sufficient basis for termination, it does lead to an informal reassessment of the clients' progress. This assessment may result in termination. However, at the time of our study, only 4% of the participants had been rearrested while in the counseling program.

Midway has been in operation for slightly more than two years. Since the treatment program averages twelve months, few participants have been out of the program for an extended period and an evaluative study of post program performance has not been completed. The data that does exist is, therefore, of uncertain value, but does suggest a good performance. Only three of the seventy completed participants have been re-arrested, and each was arrested on a minor charge. Also, attitude tests administered to some completed participants indicate positive changes in comparison to similar tests administered at the outset of program participation.[130]

Dispositions

Following completion of the counseling period, the participant functions without supervision for one to two months. After this period is completed, a disposition

conference and appearance is held in court. Project staff files a recommended disposition for the defendant. The eventual disposition is a result of interaction among the Midway counselor, the judge, an assistant District Attorney and the defense attorney.

The judge and the District Attorney's office are inactive in the initial screening decisions; they rely on responsible action of the Midway staff to admit motivated applicants who fit the general criteria for admission. At the dispositional point, however, they assert their personal judgments concerning state interests.

The Midway staff believes that successful participation in the program justifies dismissal of charges. The judge and the District Attorney, on the other hand, take the position that, if the crime charged is serious, conviction of some offense is required. Refusals to permit dismissal occur in drug sale cases, robbery and crimes against persons. They also occur in other crimes where there are aggravating circumstances. Overall, slightly more than fifty percent of the successful participants receive dismissals.

Dismissals are never granted in drug sale cases. At the point of our visit, sale cases were newly excluded from

Operation Midway. There is some question as to whether this exclusion applies only to persons involved in large sales, or to all defendants charged with sale. Regardless, in practice, the District Attorney requires a conviction on at least a minor charge in all sale cases.

> Defendant D had been charged with possession and sale of LSD. He was in the program for twelve months. The Midway recommendation was dismissal. It described the defendant as a nineteen year old, alien youth. He had become involved in the drug culture. During the program he developed independence from this influence and obtained employment. He was more acclimated to our society.

In the case of Defendant D, the District Attorney did not follow the Midway recommendation. A plea to disorderly conduct was entered. The defendant received an unconditional discharge (disposition amounting to conviction, but with no sentence).

Charges of crimes against property are dismissed if there are no aggravating circumstances. Crimes against persons are never dismissed.

Most often refusal to offer a dismissal originates with the District Attorney. However, the judge's view of these crimes is often similar to that of the District Attorney and occasionally is more severe.

> Defendant E was charged with armed robbery. Midway recommended a reduced charge. The District Attorney agreed to a plea to a

misdemeanor. The court refused the plea, requiring, instead, a plea to a Class E felony.

In disposition proceedings, the Midway staff perform as advocates for the defendants. The counselor becomes involved in plea negotiation.[131] The defendant's successful performance in Midway is taken as a mitigating factor in both plea discussions and sentencing decisions.

For the successful clients who do not receive dismissals, completion of Midway procedures results in lenient dispositions. None of the defendants were sentenced to incarceration and most received unconditional discharges. Most were permited to plead to misdemeanor or other minor charges. It is generally agreed that, in all cases, the disposition received was more lenient than would have been anticipated without Midway.

Dispositions of drug sales cases are illustrative:

Crime on which Convicted:

Disorderly Conduct	-	6 cases
Public Intoxication	-	1 case
Misdemeanor Possession	-	4 cases
Felony Possession	-	2 cases
		13 cases

Sentence:

Unconditional Discharge	-	9 cases
Conditional Discharge	-	1 case
Probation	-	1 case
Not Indicated	-	2 cases
		13 cases

The project's role in plea bargaining varies. In some cases it amounts to little more than affirming that the defendant has progressed under Midway's guidance. In other cases, the staff strongly urges leniency.

The staff has modified its recommendations in response to the perceived policies of the court and the District Attorney. In cases in which dismissal is unlikely, the staff recommend reduced charges. This occurs despite the fact that the staff most often believe that dismissal are justified for successful participants. It occurs because the staff believe this modification is necessary to maintain their credibility in the eyes of the District Attorney.

Summary

With the exception of the victims' interests, all of the discretionary judgments which play a role in diversion practice are clearly operative in this area. Judges and

prosecutors define some offenders and offenses as not seriously criminal and appropriate subjects for non-criminal disposition. In the absence of structured diversion programs, noncriminal dispositions include screening and unsupervised diversion. When a structured program is present, similar policy decisions by these officials result in referral of non-serious cases to the program. On the other hand, diversion of serious cases is not common in either the informal or the structured programs. An apparent exception is Operation Midway and, significantly, in Midway the policy decisions are expressed at disposition.

In the intensive service programs the project staff structures diversion recommendations in line with the perceived policies of the officials. The staff also enforces motivational and other criteria to select and retain a client population which is amenable to counseling.

Defendants do not invariably elect diversion. Rather, when the likely result of prosecution is less severe, the defendants avoid diversion.

The services provided to diverted defendants in the programs discussed in this chapter range from minimal supervision, through vocational counseling and placement, to intensive and multi-faceted counseling. In part the variety of approaches reflects of the amorphus nature of

the client population. In the absence of any single identifiable cause of deviance, counseling responses among the various programs do not conform to a unified counseling approach.

CHAPTER FIVE: CONCLUDING OBSERVATIONS

INTRODUCTION

The purpose of this report is to describe the current practice of diversion in the criminal justice system. In order to accomplish this, it is necessary to look closely at the discretionary system which defines when diversion is appropriate.

DISCRETION

Discretionary decisions are paramount in the practice of diversion. These decisions control entry into diversion. They determine the length of the participant's contact with the program. They also shape the eventual disposition of charges against him.

In criminal justice literature, discretion commonly refers to the decisions of officials--police, prosecutor

and judge. In diversion, the decisions of three other groups are equally important. These are the victims, the defendants and the staffs of the service programs. Diversion becomes an actuality through the interplay of all these parties.[132]

This interplay is a dynamic relationship. The positions of the parties vary from program to program and are constantly in flux. When measured against traditional conceptions, the roles of the actors are often unconventional. Treatment personnel, basically committed to helping their clientele, play strict supervisory roles and frequently return the counseled person to prosecution. Defense attorneys advise clients to submit to prosecution or acknowledge guilt, rather than accept treatment or counseling with the potential of dismissal of charges. Defendants accept conviction instead of treatment. Prosecutors offer the incentive of eventual dismissal as a lever to encourage defendant acceptance of counseling. They may become leading proponents of establishing alternatives to prosecution. Judges decide the issue of conviction or non-conviction on judgements about the possible rehabilitation of the defendant and on an assessment of public policy rather than on the factual question of guilt or innoncence. They defer to prosecutor decisions regarding dispositions.

When a judge makes an independent decision, the rationale for his actions may be identical to that of the prosecutor, and occasionally reflects harsher policy.

Officials' Discretion

Diversion mirrors the attitudes of officials of the criminal justice system. It does not force them to adopt new disposition patterns. Rather, it may provide an outlet for existing tendencies.

The myth that criminal justice officials, especially the police and the prosecutor, invariably seek conviction on all criminal charges finds no support from an examination of actual practice. Noncriminal disposition of criminal charges is a common occurrence even when there is sufficient evidence to prove guilt. In certain circumstances there is a willingness, occasionally an eagerness, to adopt diversion.

Outright dismissals, refusals to file charges and diversion take place for a variety of reasons. These practices may reflect a view that a defendant should be handled leniently or that they will enhance his ability to function in society. On the other hand, the need to conserve limited resources may be the dominant consideration. Faced with an over-abundance of cases, officials must operate

under some standard of priorities. Low priority (low seriousness) offenses must be handled with minimal expenditure of time; often this requires disposition without conviction. Many of the defendants currently diverted would receive dismissals in the absence of a diversion program.

The decisions are made on an individual basis. They reflect personal judgments about the alleged crime, the offender and the role of the criminal justice system. Perceived community attitudes are important. Office policies channel, but do not determine the decisions. Formal eligibility criteria provide only a rough outline.

Common patterns do appear. Certain crimes and classes of offenders routinely receive non-criminal dispositions. Others seldom do, unless evidence is insufficient. Alleged crimes involving serious physical injury, the threat of such injury (e.g., by the use of a deadly weapon) and sale of narcotics are customarily treated as serious offenses, not eligible for diversion. On the other hand, the lesser crimes such as possession of small amounts of marijuana may be screened or diverted. Similarly, defendants with lengthy prior records are prosecuted, while those with limited or no prior records are handled leniently.

Between these extremes, there are a large number of intermediate crimes and offenders, decisions concerning which are highly individualized. Nonetheless, concepts such as "seriousness," "criminality" and "motivation" reappear as explanations for the decisions. Despite the semantic similarity, application of these concepts produces dissimilar results in terms of the frequency of diversion. For example, the prosecutor's staff in Philadelphia diverts up to 20% of its caseload while other prosecutors, operating under apparently similar rationales, divert less than 5%.

Statute Diversion

The use of statutes to establish diversion programs has been limited. In most of the statutory programs, judicial or prosecutorial discretion is central to the initiation of diversion procedures. This discretion may be mandated by specific provisions requiring prosecutor or judge consent to diversion. Occasionally it derives from the need to interpret imprecise statute provisions. In either event, the decisions made by criminal justice officials are similar to those that occur within non-statute diversion. The "seriousness" of the charge and the "criminality" of the defendant are central considerations. Also involved is the time required to invoke diversion as compared to the time necessary for prosecution or other dispositions, with efficient dispositions preferred for low priority matters.

Many diversion statutes specify the length of time that charges are continued while the defendant participates in treatment. The counseling term is determined by legislative policy. Prosecutors may resist statutory diversion because the procedures keep criminal charges pending too long (e.g., one or two years). Prosecutors' offices are evaluated, in part, on the speed with which they dispose of their case-loads. Lengthy continuances pending treatment are inconsistent with this evaluative perspective. Also, a long continuance raises the possibility that witnesses and other evidence will disappear, thus compromising the prosecutor's ability to obtain a conviction on failure of treatment.

Diversion statutes often provide both treatment under diversion procedures and treatment in a post-conviction, correctional setting. Post-conviction treatment is preferred by system officials, especially in serious cases. This preference is explicable by two factors. First, post-conviction treatment follows an adjudication of guilt and avoids the problems of diversion delay. Second, under post-conviction treatment, the defendant's acts receive a criminal label, while diversion leads to dismissal of criminal charges. The system's function is seen, in part, as application of appropriate labels to deviant conduct. Dismissal is acceptable when the defendant and his alleged crime are perceived as non-serious or only marginally

criminal. For serious cases, post-conviction treatment provides a more appropriate correctional response. It also attaches an acceptable label.

In the absence of statute, many criminal justice officials establish diversion programs under their discretionary powers. Others do not. The distinction depends in part on the attitudes of the various officials, in part on the pressures of caseload in relation to resources.

The statutes create formal authority and procedures as well as authorize the facilities for diversion programs. They do little to alter the underlying, personal viewpoints involved.

> The drafters assumed that providing judges, lawyers, and defendants with the option of treatment would reorder the priority they gave to treatment, and lead them to choose it in most cases. The idea, however, that defendants will elect examination and treatment, lawyers will so advise them, and judges will divert eligible defendants ignores the dynamic interplay of motivation, attitudes, tactics, knowledge and role conception that characterizes decision-making in the criminal justice system.
>
> Offering a drug addict treatment in an inpatient facility is no incentive if he will receive probation anyway. Nor does a legislative imprimatur alone overcome judicial perceptions of community needs and the evils of drug use.[133]

However, some officials, mostly in offices or courts without severe caseload problems, assume that their sole function is limited to determination between conviction and non-conviction. The statutes create explicit authority for a third option. Also, non-statutory diversion into treatment is limited by the extent to which treatment resources are available. Diversion statutes commonly provide such resources.

Mandatory diversion provisions are infrequent. They represent a qualified repeal of the criminal code. Without exception, they are limited to minor crimes and often to defendants with no prior criminal record.

In form, the mandatory statutes eliminate prosecutorial and judicial discretion in the diversion decision. It is clear that they are generally disliked by these officials. Frequently, they are subverted by the prosecutor or the judge. For example, mandatory diversion of worthless check cases is sometimes avoided by prosecutor failure to notify the parties of necessary procedures and forms.[134] The effect of the mandatory statutes can also be manipulated by charging offenses which take the complaint out of the mandatory portion of the statute. For the most part, the manipulation is selective. Diversion for some offenders is not

viewed as inappropriate. The objection to the statutes is not that they create the possibility of diversion, but that they limit the discretion to make selective decisions.

Defendant Interests

These statutes are mandatory in the sense that, if the defendant invokes the statute and meets its requirements, the prosecutor and the court cannot prevent diversion. The defendant's decision is voluntary. He must elect between traditional prosecution or diversion. The issue is whether the obligations imposed by diversion are preferable to the anticipated results of prosecution.

Voluntary submission to diversion is relevant to the success of treatment or correction. A defendant compelled against his clear wishes to accept counseling or treatment is likely to be an unsuccessful participant in such a program. In non-statutory diversion programs, voluntariness is supplemented by careful examination of the defendant's motivation for treatment. Does he truly desire to solve his problems, or does he seem simply to desire to avoid conviction?

Some observers believe that the defendant's choice is voluntary in a formal sense only. They fear that defendants are compelled to elect diversion to avoid the harsh results

of prosecution. Thereby, compulsary state control of the individual, albeit through counseling, treatment or enforced settlement of grievances, occurs without proof of a criminal act. Objectionable compulsion would exist if the anticipated results of prosecution were harsh. This would create a major imbalance between the two alternatives. However, in current practice, diversion is seldom invoked for offenses in which the anticipated criminal disposition is severe and, as a result, few defendants face this form of compulsion.

The defendant's interest frequently lies in avoidance of diversion, rather than in acceptance of it. For example, few defendants invoke the Massachusetts diversion statute for first offense possession charges.[135] The anticipated result of prosecution on such charges is a conditional dismissal, largely unsupervised, or a lenient sentence. Diversion, on the other hand, imposes a lengthy treatment period. It requires the admission of drug dependency or addiction and forces the defendant to accept a selected treatment program.

The defendant's choice may depend basically on a comparison of the length and intensity of supervision expected under the two alternatives. The preferred disposition for him is the one that places the fewest restraints on his future conduct. As a result, diversion accomplished by commitment procedures is seldom an attractive alternative and is frequently resisted or avoided by the defendant.

Resistance is especially common to commitment for narcotic addiction or mental illness treatment.

> Normally, for the accused, win means not being made to go to trial or to enter a guilty plea or to be sent to jail or to hospital at all, but it can also mean being sent to a hospital for less time than to jail, or to jail for less time than to a hospital; in some cases it means being known to be guilty but avoiding trial (and hospital and jail) altogether . . .[136]

Defendants seldom resist informal diversion. Typically, the obligations imposed under this form of diversion are minimal. Dismisaal is conditioned on a brief period of good behavior and actual supervision is non-existent or infrequent.

Defendant resistance does occur in the extensive service diversion programs. These programs require that the defendant actively participate in counseling. His conduct is supervised and failure to perform will remove him from the program and subject him once again to prosecution. As a result, marijuana defendants in New York City, for example, opt for an unsupervised, conditional dismissal, rather than participate in a court employment program. Defendants in Nassau County may plead guilty to a minor offense, rather than participate in Operation Midway for one year.

Victim Interests

Of all the participants in the interplay which defines appropriate cases for diversion, the role of the victim is the slightest and the most elusive. The victim's interests become directly important only when he is sufficiently concerned to express them. Often this concern is lacking, or the victim is unaware of his potential access to and influence on the decisions.

When the victim, or his relatives, express an interest, that becomes one part of the prosecutor's assessment of the seriousness of the charges. An illustration from a non-diversion setting is instructive. Felony rape charges frequently are filed because the parents of the girl are irate. Recurrently, the alleged facts of the crime portray consensual, rather than coerced, sexual relations. In one city, prosecutors refuse to press rape charges, but do respond to the parents' anger by filing assault, battery or other minor charges.

For crimes not involving disputes, the victim's position varies widely. It is not uniformly vindictive. Depending on his personality, a victim may urge lenient or noncriminal disposition of the defendant.

The victim's influence is greatest in crimes involving disputes. In such situations, vindictiveness is occasionally present, but more frequently, the victim desires an informal settlement. Two common rationales recur. The first is that the victim seeks compensation or restitution for his losses. The criminal complaint is filed as a vehicle for obtaining redress rather than punishment of the defendant. The second is that the victim, and often the defendant, may desire to preserve the relationship between the parties. This is a recurrent factor in the settlement of husband-wife disputes. Criminal complaints are filed to provide immediate safety and to give the defendant a mild "lesson." Prosecution and conviction, however, are inconsistent with the continuing ties between the parties, and are not desired by the victim.

In complaints arising from disputes in which there is no continuing relationship between the parties, the victim's interests are often defined by considerations which relate solely to the immediate dispute. On the other hand, although criminal justice officials often promote or, at least, willingly accept settlements, they may desire to prosecute if the facts suggest that the defendant has engaged in fraudulent acts which might be repeated against other victims. Since informal settlement between the parties may make prosecution impossible, officials occasionally impose fines

or court costs to deter the complainant from reaching a settlement which meets only his individual interests.

Program Staff

Many diversion programs include counseling staffs whose activities both influence the decisions of criminal justice officials and are influenced by the attitudes of these officials. The counseling staff participate in diversion decisions and their participation may result in expanded use of diversion. However, the staff also apply exclusionary criteria which limit diversion practices.

The program staff approach the administration of criminal justice from a counseling perspective. The counseling perspective defines the critical considerations as whether the defendant is likely to benefit from the program's counseling, whether he is properly motivated for treatment, whether caseload and other restraints necessary to maintain high levels of counseling intensity permit diversion, and, finally, whether the defendant cooperates with the counselor. This perspective clashes with the general "crime" orientation of criminal justice officials (police, prosecutor and judge). The crime perspective defines the critical considerations as whether the defendant is a "true criminal," whether the crime is serious and whether it is provable. In most diversion programs not mandated by statute, the crime perspective dominates the eligibility decision.

Direct conflicts of viewpoint are infrequent. Diversion programs tend to avoid serious crime situations and, therefore, deal primarily with situations in which officials are predisposed toward a non-criminal disposition. The program staff function under guidelines pre-determined by negotiation with criminal justice officials; they also apply informal criteria for diversion which seek to predict prosecutorial or judicial reactions.

Prediction of the reactions of criminal justice officials to individual defendants is essential to create and maintain credibility. Credibility and the cooperation which can flow from it are important to the performance of a program. The program must deal with the criminal court and the prosecutor on a daily bais and frequent recommendation of unacceptable defendants would weaken its position.

The diversion programs promote their perspective within limits. Although the policies of criminal justice officials dominate the decisions, diversion of marginal defendants is occasionally proposed by the program staff. If the recommendation is resisted, informal debates occur in which the program staff advocates diversion. As a result of repeated and restrained bartering over an extended period, perceptions of criminal justice officials can be altered and restrictions relaxed.

In their dealings with criminal justice officials, the program staff function in a manner not unlike that of defense counsel, according to recent research.[137] That role involves both advocacy and cooperation. As one lawyer commented during our study: "I push hard for what I believe in, as long as I don't have to step on the toes of too many people that I will have to work with again."

Cooperative advocacy is one manner in which the pattern of diversion decisions is altered. A second factor is the mere presence of an extensive service program and its apparently successful performance with clients. Unlike informal diversion or screening, the extensive service programs provide substantial supervision and assistance to the defendants. As a result, judges and prosecutors are less likely to regard diversion as essentially a "do-nothing" response.

The availability of supervision can lead to the diversion of marginally serious cases. For example, in Operation Midway, diversion often occurs for serious offenses. The court and the prosecutor are largely passive in individual entry decisions, in part because of their confidence in the program's counseling and supervisory performance. Significantly, Midway is operated by the probation department, an agency to whom supervision of criminals is commonly entrusted.

In other extensive service diversion programs, performance and supervisory standards are enforced in order to maximize counseling success and to avoid the characterization in the minds of officials that diversion is a "free-ride" for the defendant. The enforcement is both more and less than routine reporting. The defendant must cooperate and exhibit motivation for improvement, as well as attend counseling sessions. However, enforcement is flexible and lies within the discretion of the counselor. This discretion is exercised subject to the overall policies of the program which may be rather strict, and failure to adequately perform frequently results in termination from the project and return to court. Termination rates are generally high--20 to 50% of all participants.

The administration of diversion programs is not a constant struggle between aggressive staff and recalcitrant officials. In many cases in which diversion occurs, officials would prefer noncriminal disposition even if diversion were not available. Occasionally, judges or prosecutors seek diversion of defendants regarded by the program staff as beyond the appropriate seriousness standards, or otherwise inappropriate for the available counseling. In some cities, officials have advocated that the diversion program expand and diversify its services.

Defendants acceptable to criminal justice officials are sometimes rejected by a formal program in an effort to control its caseload. One-third of the applicants of Operation Midway were rejected because their entrance would increase counselor caseloads beyond established limits. Others were rejected because they would create an imbalance between clients charged with drug offenses and those charged with other crimes. In other programs, explicit caseload-control rejections occur less frequently because intake is initially controlled by project screening staff. But intake is managed to prevent overloads on counseling services.

Clients are not accepted by the formal programs unless they are properly motivated. This is a discretionary decision or, at least, one without objective standards, but criminal justice officials seldom question such rejections. The decision to terminate a participant because of failure to perform adequately within the program is also highly subjective, and it also is generally accepted without question by officials.

It is interesting that in this major aspect of the administration of diversion programs, the decisions of program staff based on subjective considerations prevail over the decisions of the officials. In none of the programs visited did rejection of a defendant or his

Summary

The practice of diversion is a complex, dynamic process. Any attempt to define a limited set of discrete rationales to fully explain the practice would obscure this complexity. The explanations differ depending on the participant perspective from which the practice is viewed, and assume still different colorations when all perspectives are considered. Diversion is not simply an alternative to corrections, nor solely an alternative to prosecution, but it may be both, or more, or less.

Diversion occurs because it provides a response which meets various interests of the participants. This does not imply that all of the purposes for which it is used are in fact achieved. Although those objectives defined in terms of immediate results are often clearly attained, no reliable existing data confirms that the longer term intended effects of diversion occur. Diversion does permit a number of defendants to avoid conviction; it does provide disposition of low priority offenses with minimal prosecutorial and judicial time involvement, and it does satisfy victim interests by ensuring restitution in property dispute cases. However, whether peace bonds, arbitration awards or referrals to family counseling resolve grievances between neighbors

or remedy the defects of a disrupted marital relationship, and whether court supervision or unsupervised pre-conviction probation has any substantial effect on the future behavior of informally diverted defendants is uncertain. Obviously since such informal diversion occurs, some officials assume that these procedures do have long term impact. Nevertheless, no data other than impressionistic exists to confirm or to deny the assumptions.

On its surface, the assumption that intensive counseling does have a long term effect appears to be more reliable. The impressions of officials, program staff, defendants and observers are supplemented by the intensity of services available to diverted defendants. The impressions are apparently confirmed by evaluative studies which suggest low recidivism rates for successful participants. However, the studies are methodologically deficient. Some of the studies make no attempt to contrast participant recidivism to any comparable defendant population. Others select comparison groups of defendants, but the control groups are not screened for motivation while successful diversion participants are not only screened for motivation, but must also retain their motivation and cooperate in counseling during the entire diversion interval. The study results are, therefore, inconclusive and the effect of counseling procedures remains unclear.

Despite this uncertainty diversion is a significant and exciting topic for criminal justice research and experimentation. Contemporary trends suggest that its use, especially in the structured, extensive service form, will continue to increase. Also, diversion represents a significant addition to traditional options in criminal justice practice--options which have repeatedly failed to achieve desired results. Through continued experimentation, guided by knowledge of the experience of other programs and understanding of the informal interactions which define the practice of diversion, diversion might eventually be shaped into an integral, on-going and significant portion of all criminal justice systems.

FOOTNOTES

1. Despite growing use of the term, definition of diversion presents some problems. See Vorenberg and Vorenberg, Early Diversion from the Criminal Justice System: Practice in Search of a Theory, in Prisoners in America (1973). There is a tendency to regard any program which deals with persons who might otherwise enter the criminal justice system as a diversion program. This is especially true with respect to juvenile delinquency programs. Youth Service Bureaus are seen as an alternative to current juvenile courts. See generally S. Norman, The Youth Service Bureau: A Key to Delinquency Prevention (1972). However, the relationship of these bureaus and other general counseling programs to criminal justice caseloads is questionable, except as they receive referrals of defendants. See Lemert, Instead of Court: Diversion in Criminal Justice (1971). They are likely to create co-existing rather than alternative processes. See R. Nimmer, Two Million Unnecessary Arrests (1971).

In any event, this broad definition is unworkable in research terms. This definition would require review of all programs dealing with deviant behavior within or without the criminal justice process.

It was necessary for our purposes, therefore, to elect a definition forcing closer relationship to criminal justice cases. During the earliest phases of the project, a variety of definitions were suggested. Diversion could be defined as any disposition which avoided or mitigated the effects of criminal conviction. This could include processes such as plea bargaining. See Note, Addict Diversion: An Alternative Approach for the Criminal Justice System, 60 Geo. L.J. 667 (1972). Out-right dismissal of charges in the interests of justice might also be included.

As the research progressed, it became clear that relevant distinctions could be drawn among dismissals (including decisions not to arrest or not to prosecute) without conditions, dismissals (again including arrest and prosecution nonaction) conditional on performance of an obligation and convictions with lenient charge or sentence conditions. The second of these categories encompasses most of the newer programs around which current interest in the process of diversion is focused and has received only limited attention in current criminal justice literature. See note 3 infra. It was, therefore, selected as the operational definition for the study. See Brakel,

Diversion from the Criminal Process: Informal Discretion, Motivation and Formalization, 48 Den. L. J. 211 (1971). In focusing our research on this definition, we excluded illicit obligations which might be made the condition of dropping criminal charges, such as payment of a bribe.

2. For most programs, the issue of the defendant's guilt seldom arises unless he is terminated as unsuccessful and returned to court. Criminal justice officials, however, tend to view the process as giving a "break" to a guilty person. Their implicit assumption of guilt here corresponds to a similar presumption which prevails in most administrative practices within criminal justice. See generally A. Blumberg, Criminal Justice (1969). When diversion involves the input of new counseling services, the staff of the program seldom considers the issue of guilt. Participants are viewed as persons in need of assistance.

In one diversion program discussed in Chapter Three, no assumption of guilt is made. In this program, cases are referred to arbitration processes. During the arbitration, responsibility for the act is litigated.

The presumption of guilt has troubled some observers. The fear has been that the attractiveness of the diversion alternative would induce some innocent defendants not to

contest the issue. Thus state control over the individual occurs without adjudication or admission of guilt.

However, as will be apparent in later chapters, this problem has not developed in current diversion programs. Diversion occurs primarily in non-serious crimes and defendants who choose not to enter do not commonly face serious penalties. In several programs the problem has been a lack of defendant incentive to enter, not an overwhelming desire to enter.

3. The term diversion was apparently first used in the reports of the President's Commission on Law Enforcement. See, e.g., President's Commission on Law Enforcement and the Administration of Criminal Justice, Task Force Report: Corrections (1967). Prior to that Commission and for several years thereafter, comments concerning processes we now define as diversion were limited to off-hand commentary in more general discussions of aspects of the administration of criminal justice. See F. Miller, Prosecution (1969); Kaplan, The Prosecutorial Discretion--A Comment, 60 NW U.L. Rev. 174 (1965); Goldstein, Police Discretion Not to Invoke the Criminal Process, 69 Yale L.J. 543 (1969).

In recent years, the literature concerning diversion has mounted. See Brakel & South, Diversion from the Criminal Process in the Rural Community, 7 Am. Crim. L. Q. 122 (1969); Robertson, Pre-trial Diversion of Drug Offenders: A Statutory Approach, 52 B.U.L. Rev. (1972); Note, Addict Diversion: An Alternative Approach for the Criminal Justice System, 60 Geo. L.J. 667 (1972); Lemert, Instead of Court: Diversion In Juvenile Justice (1971); Brakel, Diversion from the Criminal Process: Informal Discretion, Motivation and Formalization, 48 Den. L.J. 211 (1972); Harlow, Diversion from the Criminal Justice System, 2 Crime & Delinq. Let. 136 (1970); Vorenberg, supra, note 1.

4. See Vorenberg, supra, note 1, at 152.

5. See, e.g., H. Packer, The Limits of the Criminal Sanction (1968) and sources cited therein.

6. See Vorenberg, supra, note 1.

7. The Report of the Courts Task Force of the President's Commission on Law Enforcement was, perhaps, the first to discuss in any depth the disposition pattern we now refer to as diversion. Its comments portray the interrelation of the correctional and prosecution oriented

bases of diversion.

> A major difficulty in the present system of nontrial dispositions is that when an offender is dropped out of the criminal process by dismissal of charges, he usually does not receive the help or treatment needed to prevent recurrence . . . . Whether mental illness, youth, or alcoholism is the mitigating factor, there rarely is any follow-up . . . . In some places attempts are made to refer offenders in need of treatment to appropriate community agencies . . . .

President's Commission on Law Enforcement and the Administration of Criminal Justice, Task Force Report: The Courts 6 (1967).

8. See generally Packer, supra, note 5. The concept of deterrence has been much discussed in contemporary literature. For one of the most recent discussions, see F. Zimring & G. Hawkins, Deterrence (1973).

9. See, e.g., Morris & Hawkins, An Honest Politician's Guide to Criminal Law (1971); Schur, Crimes Without Victims (1969); Allen, The Borderland of Criminal Justice (1964).

10. See Task Force Report: The Courts, supra, note 4; S. Dinitz (ed.), Deviance: Studies in the Process of Stigmatization and Societal Reaction (1969); K. Menninger. The Crime of Punishment (1968); N. Morris & G. Hawkins, An Honest Politicians Guide to Criminal Law (1969); A. Goldstein & J. Goldstein (eds.), Crime, Law and Society (1971).

11. The "community treatment" concept has been much discussed and experimented with in a variety of settings. See generally, NIMH, Center for Studies of Crime & Delinq., Community Based Correctional Programs: Models and Practices (1971); N. Johnston, L. Savity & M. Wolfgang, The Sociology of Punishment and Correction (2nd ed.) (1970).

12. See Vorenberg, supra, note 1, at 177-183.

13. See Nimmer, A Slightly Moveable Object: A Case Study in Judicial Reform of the Criminal Justice Process, 48 Den. L. J. 179 (1972).

14. See, e.g., 21 USC §840 et. seq. (1972); State v. Hudson, 276 NE 2d 345 (Ill. 1971), cert. den. 40 USLW 3416 (1972).

15. Concerning the relation between statutes and the necessity of discretionary enforcement practices, see Remington and Rosenblum, The Criminal Law and the Legislative Process, 1960 U. Ill. L. For. 481.

16. See American Bar Association Minimum Standards for Criminal Justice, Standard Relating to Pleas of Guilty, (approved draft, 1968).

> [T]he plea provides a means by which the defendant may acknowledge his guilt and manifest a willingness to assume responsibility for his conduct . . . . Pleas to lesser offenses make possible alternative correctional measures better adapted to achieving the purposes of correctional treatment, and often prevent undue harm to the defendant from the form of conviction.

Id. at 2. Of course, the plea bargaining process is subject to substantial abuse, and often is unrelated to the concept of what is in the best interests of the defendant.

17. The role of individual "moral entrepreneurs" in social reform has been discussed in other contexts. See Becker, Outsiders (1963).

18. See Vorenberg, supra, note 1, at 182.

19. See, e.g., Vera Institute of Justice, Pre-Trial Intervention: The Manhattan Court Employment Project (1972); de Grazia, Pre-trial Diversion of Accused Offenders to Community Mental Health Treatment Programs (1972).

20. This aspect of the project occurred during the early portions of the second year of research. A sample of 1200 cases was selected for each of two cities from the police arrest records. The cities were Albuquerque, New Mexico and Charlotte, North Carolina. Co-operation was obtained from police, court, prosecutor and correctional personnel in each city. Research was conducted with the assistance of the Pilot Cities staff in the two cities.

Samples of cases were selected to be weighted to include crime types for which diversion is a common disposition. We planned to follow the case from the police records through the court and, when appropriate, to the correctional level. The purpose was to examine disposition patterns

and rationales.

The selection of a sample from police records was not a major problem. However, when court and correctional records for the selected cases were sought, major difficulties in locating and recording reliable information ensued.

Our original plan was to record substantial amounts of information concerning offender and crime characteristics and dispositional information. However, much of the requisite data was lacking, and after extensive effort, the information collected was adjudged to be marginally reliable. The entire problem of coordinating records between the various criminal justice agencies is a serious impediment to research and basic understanding of the function of the system. It has been discussed extensively in connection with a Justice Department funded effort to develop coordinated statistics systems. See, e.g., Project Search, Designing Statewide Criminal Justice Statistics Systems--The Demonstration of a Prototype (1970).

21. Brakel, Diversion from the Criminal Process: Informal Discretion, Motivation, and Formalization, 48 Den. L. J. 211 (1972).

22. See President's Commission on Law Enforcement and the Administration of Justice, Task Force Report: Juvenile

Delinquency and Youth Crime (1967); S. Norman, The Youth Service Bureau: A Key to Delinquency Prevention (1972); California Youth Authority, Youth Service Bureaus in California, Progress Rep. 3, (1972).

23. Pre-judicial determination of criminal charges in particularily common in the juvenile courts . . . . In many juvenile courts more than half of all cases are disposed of at the intake stage.

Task Force Report: The Courts, supra, note 4, at 6. See also Task Force Report: Juvenile Delinquency, supra, note 16.

24. Two publications of the U.S. Department of Juvenile Delinquency present a comprehensive picture of the use of volunteers. U.S. Office of Juvenile Delinquency and Youth Development Using Volunteers in Court Settings (1969);--Volunteer Programs in Courts: Collected Papers on Productive Programs (1969).

25. See, e.g., N. Car. Ann. Stat. §14-107 (1969).

26. See, Subin, Criminal Justice in a Metropolitan Court 31-32 (1966). Diversion on payment of restitution also is the most frequent disposition of criminal complaints alleging a failure of a father to make support payments to his children. These complaints may not involve a prior or continuing legal marriage. The ease of obtaining restitution once the father has been taken into custody in non-support

cases places the criminal justice agencies in the position of collection agencies. Such complaints are typically not solicited by the criminal justice system. Those that do come to its attention must demonstrate that serious efforts to obtain the payments without the use of the criminal process have failed. The diversion process in San Joaquin County is illustrative.

> When a woman applies to the Public Assistance Department for AFDC, the Social Worker attempts to determine the location of the absent father and his ability to contribute to the support of his family. If the father is located and agrees to make the payments, the matter is dropped. If he is not located, if he refuses support, if he fails to abide by a support agreement, or if paternity is in question, the case is referred to the Family Support Division, District Attorney's Office.
>
> That Division, using information provided by the social workers and after discussing the conditions of non-support with the mother, attempts to locate and secure a support agreement from the absent father. If the Division is successful, payments are made to the Division and forwarded to the Public Assistance Department as reimbursement for the AFDC grants.
>
> When a financially able father refuses support, he can be prosecuted . . . After conviction . . . . the father is in effect placed on probation to the Family Support Division and makes payments through that Division.

Institute for the Study of Crime and Delinquency, Model Community Correctional Program, Report II 92 (1970).

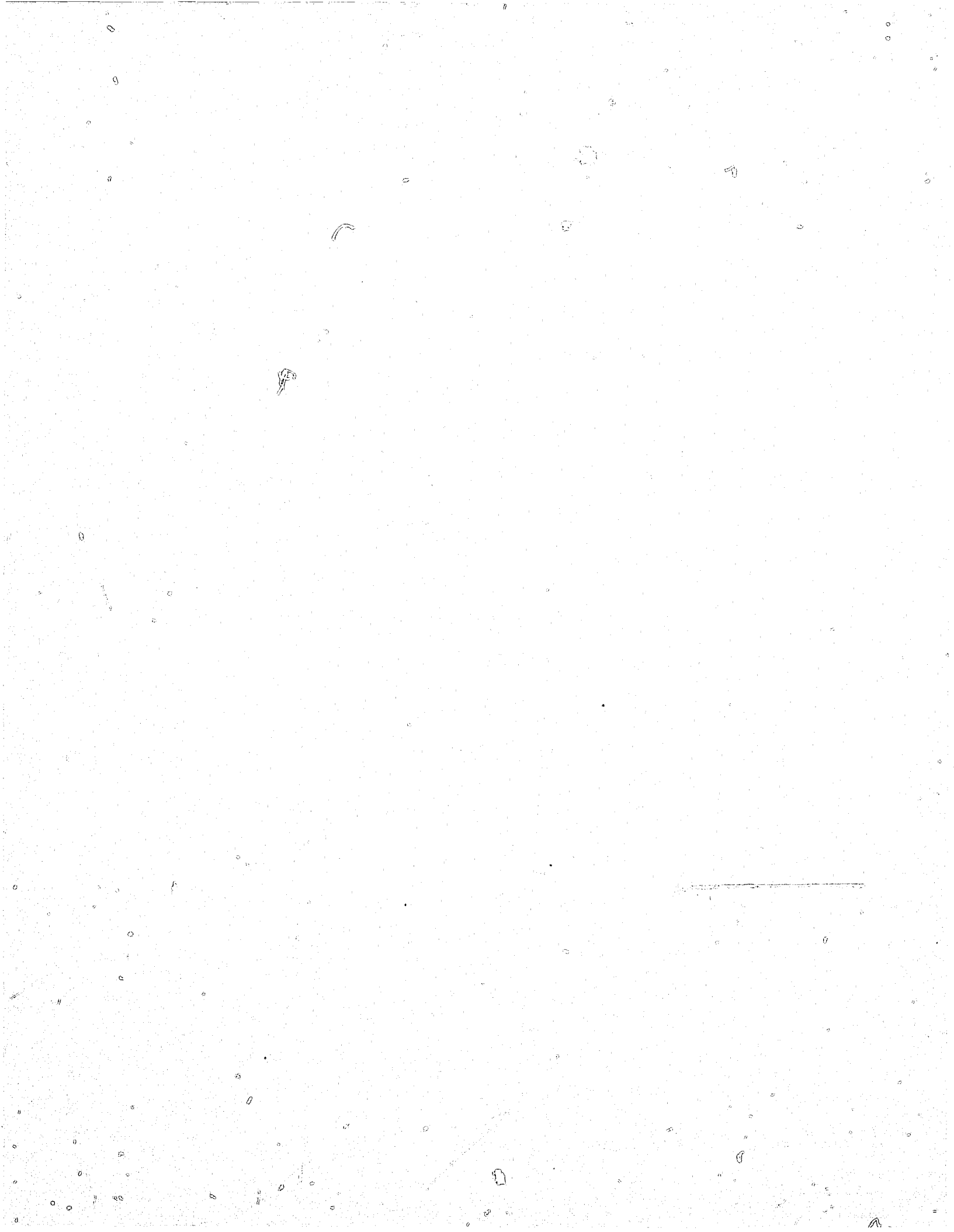
27. See, e.g., Minn. State. Ann. § 609.535 (1963). See generally, F. Miller, Prosecution, The Decision to Charge a Suspect with a Crime 272-73 (1969).

28. See Brakel, supra, note 21, at 230.

29. In Charlotte, N.c. the investigation of consumer fraud complaints is the responsibility of the Criminal Investigation Bureau (C.I.B.) fraud unit, located within the police department. Most complaints received by the C.I.B. are the result of referrals from the Piedmont Better Business Bureau which functions as both the local B.B.B. and an informal screening point for consumer complaints.

On referral to the C.I.B., consumer complaints are initially reviewed with the intention of ascertaining the liklihood of a fraud having been committed. Since investigatory resources are scarce, the fraud unit seldom investigates complaints to the extent required for prosecution. Complaints are seldom filed with the prosecutors office. Instead the fraud unit pressures the suspected business or individual to close down operation and move out of town. In the words of the chief of the fraud unit, "Most of the time [fraud suspects] are merely run out of Charlotte to become somebody else's problem."

30. See R. Nimmer and D. McIntyre, Report on the Comprehensive Grant to the Illinois States Attorneys Association (1973) (unpublished).



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31. Moreover, the crime itself may be difficult to identify. It is often committed in the course of ordinary business activity and may not be significantly distinguishable from non-criminal business conduct. Especially where financial offenses are involved, the crime may be so technical that discovery is possible only after detailed and lengthy audit or economic analysis by specially trained enforcement personnel with expertise in such fields as accounting and economics. Careful scouting of a huge mass of data for weeks or months may be necessary to produce the required evidence of criminality. A complicated security fraud investigation, for example, may involve several years of investigation by a team of law enforcement personnel.

President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Crime and Its Impact--An Assessment 106 (1967).

The elaborate cases alluded to above are not representative of the bulk of the fraud cases a criminal justice system encounters. The routine cases require much less expertise than do those in the commission's example. However, the elements of expertise and in-depth investigation are necessary for all investigations into complaints about possible consumer fraud.

32. It is impossible to frame definitions which embarce all unfair practices. There is no limit to human inventiveness in this field. Even if all known unfair practices are specifically defined, and prohibited, it would be at once necessary to begin over again. If Congress were to adopt the method of definition, it would undertake an endless task. It is also practically impossible to define unfair practices so that the definition

> will fit every business of every sort in every part of the country. Whether competition is unfair or unfair generally depends on the surrounding circumstances of the particular case. What may be harmful under certain circumstances may be beneficial under different circumstances.

H.R. Rep. No. 1142, 63rd. Congress, 2nd Sess. 19 (1914).

33. These are results of a 1969 unpublished study undertaken by the Philadelphia Ombudsmen Program. The study selected approximately 400 consecutive complaints filed with the unit. The purpose of the study was to achieve a better understanding of the types of complaints the unit was dealing with, not to describe the unit's overall caseload.

34. The Philadelphia Consumer Fraud Unit considers education of the consumer to be a primary function. Members of the unit engage in developing and educating consumer groups. While consumer groups are considered important by the unit they are not intended to function in a way which causes cases to be diverted from the attention of the prosecutors office. Ideally they function as focal points for the dissemination of consumer information. However it was indicated by at least one member of the unit that there were some consumer groups who were actually settling complaints which should have been called to the attention of the fraud unit personnel. Since the goal of

the District Attorney is prosecution, such dispositions by outside consumer and mediation groups are disliked by the fraud unit.

35. In surveying practices concerning intra-family disputes we were fortunate to have the services of Professor Raymond Parnas of the Law School of the University of California at Davis. His background work and preliminary reports were vital to the formulation of the material discussed in this section. His prior work in the area and the data he developed during the Bar Foundation survey have been reported in several publications. See, e.g., Parnas, The Judicial Response to Intra-family Violence, 54 Minn. L. Rev. 585 (1970); Parnas, The Police Response to Deomestic Disturbances, 1967 Wis. L. Rev. 914.

36. We selected a general sample of cases from police arrest records in Albuquerque, New Mexico. These cases were followed through disposition. See note 20 supra. The sample included 90 intra-family assault cases. Of these cases, 30% were disposed of when the wife (complainant) withdrew charges. Most of the remainder were disposed of without conviction. A diversion device, entitled "advisement," was used in roughly 20% of the cases. Under this disposition, the husband is released without conviction, but charges can be re-instated if a further complaint is

filed against him. No data was available concerning the frequency of violation of the advisement condition (typically lasting six months to one year).

37. Brakel, supra, note 21, at 223.

38. Subin, Criminal Justice in a Metropolitan Court 40 (1966). The informal hearing process is used extensively in many jurisdictions. However, its use is probably most extensive in California. There the Bar Association continuing education materials provide information concerning the nature and purpose of such hearings and the defense attorney's role. Cal. Continuing Education, California Criminal Law Practice § 3.15 (1964).

39. See Parnas, The Judicial Response to Intra-family Violence, 54 Minn. L. Rev. 585 (1970).

40. The order of protection sets forth "reasonable conditions of behavior to be observed for a period not in excess of one year." Specifically it may require a party

(a) to stay away from the home, the other spouse, or the offspring;

(b) to permit a parent to visit the offspring at stated periods;

(c) to abstain from offensive conduct against the offspring or against the other parent or against any person to whom custody of the offspring is awarded;

(d) to give proper attention to the care of the home;

(e) to refrain from acts of commission or omission that tend to make the home not a proper place for the offspring;

(f) to notify the court or probation service immediately of any change of residence or employment;

(g) to cooperate in seeking and accepting medical and/or psychiatric diagnosis and treatment, including family casework or child guidance for himself, his family, or offspring.

Some judges refuse to include item (g) in an order of protection, feeling it fruitless to "order" unwilling parties to "cooperate in seeking and accepting" treatment.

41. See M. Bard, Training Police as Specialists in Family Crisis Intervention (1970).

42. Id. at 19.

43. Id. at 32.

44. Id. at 32.

45. Id. at 33.

46. The list would be lengthy. It extends from relatively small departments such as Louisville, Kentucky and Charlotte, North Carolina, to large cities such as Chicago. The Seattle police department has recently proposed a modified format similar to the Crisis Unit approach which entails placement of a professionally trained psychiatric worker on police patrols. No information was available at this writing concerning the status of this experiment.

47. Generally, disposition patterns at the judicial or prosecutor level for these complaints are similar to

those for family assault charges. Informal prosecutor hearings are common. In Detroit these hearings are conducted in a quasi-judicial manner by a police officer, and most result in out-right or conditional dismissal.

> [The prosecutor] may warn the person complained against to stay away from the complainant or face prosecution. He may suggest the return of property . . . .

Subin, supra, note 38, at 54. See generally D. Newman, Conviction--The Determination of Guilt or Innocence Without Trial ch. 11 (1966).

48. See B. Herbert, Report on the Programs of the Philadelphia Center for Dispute Settlement (1971) (unpublished).

49. In addition to the absence of the responding party, the low referral rate is also attributable to a misconception concerning which cases could be referred. The initial emphasis of the referral effort was on consumer fraud complaints. Most of these are routinely settled by the fraud unit. See Phila. D.A. Annual Report 239-40 (1969).

50. Of 276 cases disposed of during 1970-71, 213 were arbitrated, 34 were withdrawn by the complainant prior to hearing and 29 were returned to court because the defendant did not appear for the hearing. Herbert, supra, note 48, at 5.

51. In one hearing observed during the field study, the arbitrator made several efforts to produce a reconciliation,

but none occurred.

> Respondent admitted assaulting the complainant. The parties were cousins and next door neighbors. They had been good friends for many years. The hearing developed the fact that the assult derived from problems with the in-laws of the complainant. The complainant wished to achieve a reconciliation, but it was apparent that both parties continued to harbor animosity. The hearing officer requested that the parties speak to each other during the hearing and express their feelings. This failed to produce a settlement. Later, speaking privately with the complainant, he indicated that an award of damages was justified, but that it would merely stiffen the animosity of respondent. Complainant agreed to accept an award without damages, but this failed to produce better feelings between the parties.

52. See generally Plaut, Alcohol Problems: A Report to the Nation (1967).

53. See Alcoholism and Law Enforcement 35-45 (D. Gillespie ed. P. 169); V. Strecher, Law Enforcement Police Development Source Book (1968).

54. See Levin, San Francisco Court School Alcoholism Prevention, 53 ABAJ 1043 (1967). See also Soden, How a Municipal Court Helps Alcoholics, 24 Fed. Prob. 45 (1960).

55. Pinnardi, Chronic Drunkenness Offender, 12 Crime & Delinq. 339 (1966).

56. See R. Nimmer, Two Million Unnecessary Arrests (1971).

57. See Nimmer, St. Louis Diagnostic and Detoxification Center: An Experiment in Non-Criminal Processing of Public

Intoxicants, 1970 Wash. U.L. Q. 1; Nimmer, The Public Drunk: Formalizing the Police Role as a Social Help Agency 58 Geo. L. J. 1089 (1970).

58. See, e.g., J. Weber, Final Evaluation Report, St. Louis Detoxification and Diagnostic Center (1969).

59. See R. Rock, Hospitalization and Discharge of the Mentally Ill 87 (1968).

60. See Foote, Tort Violations Remedies for Police Violations of Individual Rights, 39 Minn. L. Rev. 493 (1955).

Other factors work to make the police reluctant to sing the required petition.

> One of these is the fear of public criticism if the commitment turns out to be unwarranted and the matter reaches the news media. The problem of "railroading" appears deeply imbedded in the public mind and its specter can easily be raised . . . . This fear causes the police to use extreme caution in dealing with the mentally ill and few care to accept more than the minimum responsibility for such persons.

Rock, supra, note 59, at 91.

61. As reported by Rock, the two lists of criteria employed by the Los Angeles unit were:

Symptoms indicating hospitalization:

1. Pronounced depression or agitation
2. Pronounced paranoia trends
3. Pyromaniac proclivities
4. Destructive behavior
5. Hallucinations or delusions with reactive behavior
6. Complete loss of contact not caused by stroke or brain injury

Symptoms not indicating hospitalization:

1. Stroke
2. Physical infirmities
3. Moderate loss of memory
4. Childishness
5. Irritability or restlessness
6. Careless toilet habits
7. Feeding problems
8. Occasional periods of mild depression
9. Moderate confusion

Rock, note 59 , at 99-100. Obviously the list would be difficult for even a professional mental health worker to apply. Its application by members of the unit results in largely subjective, individual decisions. The decisions are also influenced by "feedback" from the hospital staff which must also pass judgment on each case referred for hospitalization. Id. at 102.

62. Rock, supra, note 59, at 104.

63. Rock, supra, note 59, at 89-90.

64. See Rock, supra, note 59 and Gilboy & Schmidt, "Voluntary" Hospitalization of the Mentally Ill, 66 Nw U. L. Rev. 429 (1971).

65. See, e.g., A. Goldstein, The Insanity Defense (1967); T. Szasz, Law, Liberty, and Psychiatry (1963).

66. See generally A. Mathews, Mental Disability and the Criminal Law (1970).

67. Report by the D.C. Crime Commission 543 (1966).

68. See, e.g., R. Arens, Make Mad the Guilty, ch. 3 (1969).

69. See E. DeGrazia, Report on Pre-trial Diversion of Accused Offenders to Community Mental Health Treatment Programs p. 1 (1972).

70. Id. Feasibility as defined by the project included the extent of acceptance of such referrals by the prosecutor, the defenants, as well as the treatment agencies and an analysis of the effect of treatment on the referred defendants. Id. at 13.

71. Id. at App. 4-9.

72. The expansion to marijuana offenses may not be a function of the program's performance. The U.S. Attorney who initially regarded these offenses as "serious" was new to the criminal justice system. Id. at 27. His later willingness to allow diversion may resulted from his growing practical experience with these offenses.

73. Difficulties with referral agencies are not uncommon when diversion practices attempt to utilize existing non-criminal agencies. These agencies function under standards and objectives that are not always consistent with receiving and servicing criminal justice clients. See Bard, supra, note 41, at 30 and Rock, supra, note 59, at 102-103.

74. As is true in most of the comparative studies of diversion effectiveness, selected comparison defendants were taken from available court records. The primary

similarity between these defendants and program participants was the crime charged. Factors such as motivation and underlying personal or health problems could not be controlled, comparisons in performance are, at best, only suggestive, at worst, misleading. See deGrazia, supra, note 69, at 51.

75. See generally, Robinson v. California, 370 US 660 (1962); J. Kaplan, Marijuana--The New Prohibition (1970); T. Duster, The Legislation of Morality: Law Drugs and Moral Judgments (1970); E. Schur, Crimes Without Victims (1965).

76. See chapter Four, infra.

77. The severity of narcotics statutes has been much discussed. See references in note 75, supra. See also W. Eldridge, Narcotics and the Law (1968).

In many jurisdictions these provisions are ameliorated in practice by plea bargaining on the lesser charges. In such circumstances the statutes provide the state with an additional lever to induce an early guilty plea from the defense. See, e.g., Nimmer, A Slightly Moveable Object: A Case Study in Judicial Reform--The Omnibus Hearing, 48 Den. L.J. 179 (1971).

78. See, e.g., 21 USC 840 et. seq. (1972); Ill. Rev. Stat. ch. 56-1/2, § 704 et. seq. (1972 Supplement).

79. See, e.g., Narcotic Addict Rehabilitation Act of 1966, 18 USC 4251 (1970); Cal. Wel. & Inst. Code §3050 (1971).

80. See, Note, Addict Diversion: An Alternative Approach for the Criminal Justice System, 60 Geo. L. J. 667, 670 (1972).

81. Possession cases were assigned to the court for preliminary hearing. The court simply failed to act on the case for more than six months.. Under New Mexico procedures, this delay caused the charges to lapse. The prosecutor was technically free to refile, but possession charges were seldom refiled. Both officials were in agreement that prosecution was inappropriate.

82. Sess. Laws of N.Y. Ch. 1042 (McKinney, 1971).

83. Mass. Gen. Law Ann. ch. 94C, § 34 (1972).

84. See Narvalz, Tough Drug Stand Urged by Both Sides at Albany, N.Y. Times, Jan. 5, 1973, p.1, col. 6.

85. When applied to sale cases, diversion is discretionary (Mass. Gen. Law. Ann. ch. 123 (1972)) or limited to situations in which the sale was solely for the purpose of supporting a habit. See generally NARA, supra, note 79.

86. Unlike other programs mentioned in Chapter Four, the drug abuse program does not limit its caseload to maintain low counseling ratios. Instead, defendants are

admitted to the program, but required to wait for counseling procedures. The delay has some negative effect on the participants' attitudes, which is mitigated somewhat by providing, through Gateway House, access to a stroefront "assistance" office.

87. See e.g., Mass. Gen. Laws Ann. ch. 123, §38 et. seq. (1971); N.Y. Mental Hygiene Law § 210 (McKinney 1971); Ill. Rev. Stat. ch. 91-1/2, §120.1 et. seq. (Smith Hurd Supp. 1971); Conn. Gen. Stat. Ann. § 19-484 et. seq. (1939); 28 USC § 29101 et. seq.

88. Conn. Gen. Stat. Ann. § 19-484 (1969).

89. See T. Capshaw, 4th Annual Stat. Rep., Conn. Adult Prob. Dept. (1971).

90. J. Cooper, The Heroin Addict in the New Haven Criminal Justice System 57 (1971).

91. Mass. Gen. Laws Ann. c 123, § 47 (1972).

92. J. Robertson & P. Teitelbaum, Optimizing Legal Impact: A Case Study (1972) (unpublished). See also Reobertson, Pre-trial Diversion of Drug Offenders: A Statutory Approach, 52 BU L. Rev. 335 (1972).

93. Id. at 44.

94. Id. at 64-66.

> For the majority of defendants in the sample studied, the possibility of treatment in lieu of prosecution or sentencing offered little attraction . . . . The expected

disposition for many of these charges was as good if not better than could be obtained by invoking the law. Id. at 63.

95. Id.

96. Id. at 66.

97. Id. at 73.

98. Brakel, supra, note 21, at 225.

99. This judge followed a published schedule of lenient sentences and fines for convicted youths. He also used extralegal diversion procedures for many cases. There was, for example, a device for forcing charity. Youths convicted of vandalism, criminal trespass, or similar offenses were lectured on the need to recognize the sanctity of property and the rights of others. They were then fined. In lieu of payment of the fine and conviction, however, the judge allowed the offender to make a contribution to a religious or other charity.

100. Municipal Court Social Serv. Dept., Boys Court 6 (1967 unpublished).

101. N.Y. Code of Crim. Procedure § 913e-193m (repealed 1971). For a discussion of the act, see S. Rubin, the Law of Criminal Correction 446-450 (1st ed. 1963).

102. See Zivin v. County of Nassau, 186 N.Y.S. 2d 110 (Sup. Ct. 1959).

103. See Levine, The Youthful Offender under the New York Criminal Procedure, 36 Albany L. Rev. 241 (1972);

N.Y. Crim. Proc. Law § 720, commentary (McKinney, 1971).

The current statute (N.Y. Crim. Proc. Law 720 (McKinney, 1971) resembles the Model Youth Correction Act in that both are applicable only at the sentencing stage. After conviction, a youth will be sentenced and his conviction entered as a youth offender, not an adult criminal. See American Law Institute Model Youth Corrections Act (1940). The model act is widely used. See Luger, The Youthful Offender, in President's Commission on Law Enforcement and Administration of Criminal Justice, Task Force Report: Juvenile Delinquency and Youth Crime 119 (1967).

104. Initial estimates were that the program could divert 2500 cases per year. Memorandum from J. Crawford, Deputy District Attorney, to A. Spector, District Attorney, April 1, 1971. In fact, the diversion process is employed for more than twice that number of defendants. During its first six months, slightly more than 20% of all cases pending indictment were diverted.

105. See National Commission for Children and Youth, Project Crossroads (1971); Vera Institute of of Justice, Pretrial Intervention: The Manhattan Court Employment Project (1972) [hereinafter cited as Manhattan Report].

106. The experience of the Manhattan program with addicts has been that they record lesser success rates than other participants.

> At first the staff tried to help [addicts] kick their habits without entering treatment centers. . . . This practice was discontinued when it became obvious that they were unable to hold a job and that their condition had not been helped by the experience. But when the Project decided to refer them to treatment centers, it had difficulty getting them admitted . . . . Drug addiction programs in the City screen heavily for motivation. The addicts coming into the Project are randomly selected and predictably few want to shake their habits.
>
> [T]he staff has devoted disproportionate amounts of time to working with addicted participants. Many have been forced to admit they have a problem. Some have decreased drug use; some have given up drug use altogether. Fifteen to twenty percent of those who have been identified have entered treatment centers--though few have completed their residency.

Manhattan Report 72-73.

107. Roughly 71% of the participants are unemployed. Evaluation Report--Operation De Novo 4 (1972 unpublished). In comparison, the Manhattan project records the following figures for its first three years:

1st year	2nd year	3rd year
79.3%	54.9%	49.1%

Manhattan Report 41.

108. The counseling benefits to younger defendant clients is limited. The Manhattan program reports that counseling is more difficult for persons under 17 years of age.

> Sixteen year old defendants present present many special problems. Usually they are failing in or have dropped out of school, and are incapable of assuming the kind of responsibility necessary for achieving stability and economic independence.

Manhattan Court Employment Project, Quarterly Report: Third Quarter Fiscal Year 1971-72, 5 (1972).

Nevertheless, De Novo has recently expanded to include services for juvenile defendants and Project Crossroads has dealt primarily with a young adult caseload.

109. See Henschel & Skrien, Operation De Novo, Hennepin Lawyer, May-June, 26 (1972).

110. Minn. Stat. Ann. § 609.135 (1971).

111. See generally, Statements of Mr. Ennis Olgiati and Mr. William Henschel, Hearings on S 3309, Senate Sub-Committee on Penitentiaries, July 19, 1972.

Persons charged with minor offenses may lack motivation to cooperate with counseling efforts. The probable consequences of conviction on ordinance violation charges is minor and may be seen as less onerous than diversion counseling. Manhattan Report 24. But see, Semi-annual Report, Manhattan Court Employment Program 11 (1973) (dismissal rate for misdemeanor offenders found to be identical to that of felony offenders).

112. See note 82, supra.

113. Although these counselors are generally successful, selection of applicants for counseling positions often

requires innovative screening interviews. See Manhattan Report 43; Boston Court Resources Project, The Selection of Advocates and Screeners for a Pre-trial Diversion Program (1972).

114. See Manhattan Report 7. See also ABT Associates, Second Interim Progress Summary of the Pre-trial Intervention Program of the U.S. Department of Labor 14 (1973).

115. See Evaluation Report, supra, note 107, at 7.

116. APT Associates, supra, note 114, at Minneapolis Table 11B.

117. See Manhattan Report 8.

118. See, e.g., Manhattan Court Employment Project, Quarterly Reports (1970-1972); ABT Associates, supra, note 114.

119. ABT Associates, supra, note 114, at 15.

> Of the entire group of 1433 participants favorably terminated [from seven monitered programs] only 233 (16%) were not granted a dismissal of charges . . . . the majority of these were participants at the California site where judges in the two project locations refuse to entertain . . . . dismissal recommendations. All other sites experienced very low rates of [refusals].

Id.

120. During its initial period, the Manhattan program had a 12% rate of re-arrest for active participants. However, as the program gained experience, the arrest rate while in the program fell to under 3% and has remained at this low

level. See Manhattan Court Employment Program, Quarterly Reports (1970-72).

121. APT Associates, supra, note 114, at Minneapolis 4.

122. See Manhattan Report 55 et. seq.

123. Id. at 60.

124. Id. at 72-73.

125. See Nassau County Probation Department, Operation Midway (1973 pamphlet).

126. See generally, B. Cohen, Project Operation Midway (1972).

127. Of 140 participants accepted to Midway, the following is a breakdown of most serious crime charged.

Sale of narcotics	64
Burglary	44
Possession of narcotics	23
Robbery	17
Grand Larceny	9
Forgery	8
Assault	7
Criminal mischief	6
Other	2

128. See generally Cohen, supra, note 126. mmittee

129. Cohen, supra, note 126, at 11-12.

130. See generally, Cohen supra, note 126.

131. "In addition to dismissal as a feasible disposition, it was also possible for the Operation Midway staff to become involved in plea negotiations. This may be considered in those cases where the alleged criminal act was of such severity that the District Attorney's office would not consider dismissal."

Id. at 9.

132. The President's Commission, in discussing diversion noted several factors which might be considered in the eventual decision. They reflect the mixed prosecutorial and correctional nature of the decision.

> Among the factors that might be weighed in determining whether to adopt a noncriminal disposition are: (1) the seriousness of the crime and the effect upon the public sense of security and justice if the offender were to be treated without criminal conviction; (2) the place of the case in effective law enforcement policy, particularly for such offenses as tax evasion, white collar crimes, and other instances where deterrent factors may loom large; (3) whether the offender has medical, psychiatric, family, or vocational difficulties; (4) whether there are agencies in the community capable of dealing with his problems; (5) whether there is reason to believe that the offender will benefit from and ccoperate with a treatment program; and (6) what the impact of criminal charges would be upon the witnesses, the offender, and his family.

President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts 8 (1967). See also Model Pre Arraignment Code, Draft 5.

133. J. Robertson & P. Teitelbaum, Optimizing Legal Impact: A Case Study 73 (1972).

134. Brakel, Diversion from the Criminal Process: Informal Discretion, Motivation and Formalization, 48 Den. L. J. 211, 229 (1972).

135. See pp. 99-103, supra.

136. E. DeGrazia, Pre-trial Diversion of Accused Offenders to Community Mental Health Treatment Programs 5 (1972).

137. See Skolnick, Social Control in the Adversary System, 11 J. Con. Res. 52 (1967); Note, In Search of the Adversary System--The Cooperative Practices of Private Criminal Defense Attorneys, 50 Tex. L. Rev. 60 (1971).

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