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Compiled and Edited by

D. Alan Henry
Technical Assistance Associate,

Supportive Staff:

Beverly E. Osburn
Administrative Assistant

Audrey Barrett
Typist, Layout

Jennifer M. Abidari
Copyreader

Pretrial Services Resource Center
1010 Vermont Avenue, N.W. Suite 200
Washington, D.C. 20005

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Acknowledgements

The Pretrial Services Resource Center takes great pride in presenting the first Annual Journal on Pretrial Services.

Like all first efforts, this one was born amidst some anxieties and questions on the scope as well as the limits that should be placed on such a Journal. To make things even more difficult, we decided half-way through the project to try and have the Journal available at the National Symposium on Pretrial Services since the theme of the Journal and of the Symposium are similar: the State of Pretrial in 1978.

We also felt that the first volume should be written almost exclusively by pretrial practitioners. The discipline of pretrial is evolving through the hard work and experience of many, and their combined knowledge can be of help to many others.

Our optimistic nature is such that we foresee future editions and actively solicit suggestions on themes from our readers.

Meanwhile, here is the first volume. I wish to deeply thank the contributing authors for furnishing us with the materials specifically written for the Journal, and for agreeing to do so under difficult constraints.

I also wish to thank Alan Henry, Technical Assistance Associate at the Resource Center, for his energy and enthusiasm in making the Journal a reality. Special thanks are also extended to all staff members and others who contributed to this project.

Madeleine Crohn
Director
Pretrial Services Resource Center

March, 1978

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Introduction

Publication of the Journal marks the coming of age of pretrial as a vital criminal justice profession. Launched with impressive swiftness by the newly established Pretrial Services Resource Center, itself a fulfillment of the spirited rise of NAPSA in the 1970's, the Journal will not want for issues to probe, developments to assess, critiques to ponder, or audiences to stir.

Yet to be molded in the decade ahead is the scope, the character, and the ultimate survival of pretrial as a separate entity in an already complex process. In the process of maturing, to what extent will the quality of pretrial's contributions be sustained or deteriorate over time? What further innovations will be launched under its banner? In what mix will its practitioners emerge as advocates for the accused or as neutral servants of the court? Will the experiments that ultimately succeed lead to the permanency of pretrial organizations, or serve as historical transitions towards reshaping responsibilities of the prosecutor, the defender, the court and the jail?

The articles in this issue, coupled with 17 years of Vera-spawned experience, suggest the difficulty of forecasting pretrial's future. On the plus side of the ledger, bail agencies and diversion programs have made important contributions to the revision of traditional procedures leading to release, detention and prosecution. They have stimulated a new receptivity for information, services and dispositional options. They have sensitized officials vested with discretionary power to new ways of thinking about and resolving old problems. They have enhanced the quality of judicial decision making, enlarged the population at pretrial liberty, and moderated the impact of the criminal law on some accused persons who might otherwise have been convicted.

But the accomplishments of pretrial have been accompanied by setbacks as well. Innovation always carries a price, and the field of pretrial reform has not avoided creating special problems of its own. Release pending trial has predictably highlighted the age-old risk of criminal behavior in the interlude. Deferred prosecution of suspects has inevitably led to restrictions on freedom for unconvicted persons who would otherwise have been acquitted or dismissed. Excess funding in some places (in contrast to under-funding in most) has doubtless produced more pretrial supervision than is necessary. And the reformers' focus on procedures to spur release has too often not been balanced by sound law enforcement measures to insure return.

Many programs today congregate under a single pretrial banner, but often produce quite disparate results. We have witnessed splendid programs and token ones, pilot projects which have yet to be evaluated, and wasteful programs which have reached the end of the line. Because the perceptions of persons who draft laws are often quite different from those of lawyers and judges charged with the

duty to carry them out, and because program planners often do not follow-up in the difficult implementation stages, many theories and ventures have not come close to fulfilling their promise. Experience in these adventurous years thus raises sobering questions not only for the institutionalization and quality control of good ideas that can work, but also for the reassessment or dropping of well-intentioned ideas not adaptable to the real world of crime control, due process, and crowded courts.

Viewed in perspective, the pretrial field has only begun to respond to the stimuli of the conventional criminal process: to the stark contrast between outright liberty and total security, to the all-or-nothing choice between early dismissal or full prosecution, to the significance of delay between arrest and release as well as between release and trial. For example, we have yet to test the necessity for maintaining two isolated worlds of pretrial administration—one (called bail agencies) with responsibility for accused persons who have satisfied their bail conditions, the other (called jails or correctional centers) for those with identical conditions yet to be met. With so much short term detention, and so much potential for review and inevitable release, why does pretrial usually exclude the jailers and the jailed? Why should jails and their accused clients continue to be united with prison departments and their convicts rather than with bail agencies and their accused clients?

Many of these questions have their roots in the extraordinary difficulty the law has in dealing with the presumption of innocence during the hazardous period between arrest on probable cause and conviction on a plea or finding of guilt. In serious criminal cases, how can bail agencies be effective with release recommendations which systematically ignore the weight of the evidence, the factor of greatest statutory concern to the prosecutor and judge? Why have diversion programs been unable to resolve the issue of whether a defendant—before being diverted—must acknowledge his guilt or must accept a sentence-like control while maintaining his innocence? Why does the law call it punishment when one is jailed after conviction but not punishment when one is jailed in the same facility without conviction? Why do the proponents of preventive detention legislation regularly oppose compensation for erroneous detention, simultaneously suggesting (i) confidence in the accuracy of predicting which accused persons are guilty and dangerous, and (ii) fear that the predictions may turn out to be wrong?

Pretrial today is built on a curious legacy of laws, institutions and attitudes that go back many centuries. It embraces theories and practices that have survived too long without sufficient questioning. The brief list here touches only a few of the issues and paradoxes found in pretrial's tangled links to criminal law and the criminal process.

The new profession called pretrial has made remarkable strides in a few short years. But progress into the 1980's ought to be accompanied by modesty about what has been achieved and skepticism towards underlying assumptions. Planning an improved system of pretrial justice will remain difficult as long as we inadequately comprehend our current limitations and puzzling past.

Daniel J. Freed
Yale Law School
March 1978

History

LET'S LOOK AT PRETRIAL RELEASE: WHERE ARE WE? HOW DID WE GET HERE? WHERE ARE WE HEADED?

by

Bruce D. Beaudin

* * * * *

Much has been written tracing the important highlights of pretrial release in the United States. Case law, legislative action, program development and court rules have all affected changes in the state systems and the federal system. But where have these changes fallen short? Do we, today, have the "ideal" pretrial release system in any jurisdiction? The author of this article has a very clear opinion on these questions as well as on the more important question of where pretrial may be heading. Possibly the most ominous question is left unsaid, but clearly implied: is it even possible to avoid a system of pretrial, ten years from now, where even more people are detained solely for financial reasons?

Bruce D. Beaudin has been the Director of the District of Columbia Bail Agency for ten years. A 1964 graduate of Georgetown Law School, Mr. Beaudin was a staff attorney and Director of the Public Defender Office of the District of Columbia. He is Co-Chairman of the Advisory Board of the National Association of Pretrial Services Agencies and was its first President and principal incorporator. He is also the Chairman of the Board of Trustees of the Pretrial Services Resource Center.

WHERE ARE WE?

"Let the jury consider their verdict," the King said for the twentieth time that day.

"No, No," said the Queen. "Sentence first, verdict afterwards!"

"Stuff and nonsense," said Alice loudly. "The idea of having the sentence first!" 1/

Probably everyone who has grown up in America has fond memories of following Alice through the looking glass, the rabbit hole, the Mad Hatter's tea party, and the croquet game played with flamingoes and hedgehogs. We have all laughed at the crazy method of dispensing justice that intrigued the King and Queen of Hearts. But we all know it is only fiction. Sentence does not precede the verdict. At least, not in the United States.

"Let the bail be set at $5,000," says the judge. The indigent defendant is stepped back and transported to prison, there to await trial.

"You are hereby sentenced to 6 to 9 months in jail. You are to be held in conditions more restrictive and more punishing than others who have been convicted and will be in the same facility. Now, let us consider the trial date."

These words might just as well have accompanied the decision to set $5,000 bail. The judge might just as well have pronounced sentence. But we don't do that in the United States. We accord citizens their rights under the Constitution and convict before we sentence. And when we convict, we put far fewer people behind bars than we release to various supervised programs. It seems strange indeed that more people serve more time behind bars pretrial than post conviction. It's time to do something about it. Consider for a moment the following:

> "Severe and inhumane overcrowding of inmates presently exists at Harris County detention facilities. This overcrowding occurs in violation of the law and according to the record costs the taxpayers of Harris County over $1,500,000 annually in unnecessary detention.
>
> The Court here takes an initial step to stimulate efforts to remedy overcrowding by promulgating in this Order broad guidelines within which defendants are to maintain an administrative mechanism designed to reduce the inmate population at these facilities. Such maintenance will be coordinated with efforts to streamline the criminal justice system and will be conducted in consonance with the following adjustments to the administration of the Harris County Pre-Trial Release Program: Operational

> control of the Harris County Pre-Trial Release Agency will be transferred to the state District Judges of Harris County; an objective point system of evaluation designed by the District Judges will be utilized in determining eligibility of pretrial release; and coordination efforts will be made with City of Houston officials to install a branch office of the Pre-Trial Release Agency in the Houston Municipal Courts Building and interview space for the agency in the Houston City Jail. Defendants will additionally take appropriate steps immediately to improve living conditions for those who must remain incarcerated in county detention facilities." 2/

The District of Columbia, Alabama, Florida, Texas, and other states have ordered an end to the shocking detention conditions that exist in state and county detention facilities. As a result of such federal action attention has been focused not only on the conditions inside the facilities but, more importantly, on the types of people living there subject to those conditions. There is little doubt that the impact of decisions such as Harris cost us much in both human and economic terms. We cannot look at bail in a vacuum.

HOW DID WE GET HERE?

In the Judiciary Act of 1789 and later in the Eighth Amendment to the Constitution the United States declared that its citizens should not be jailed merely on a charge that a crime had been committed. In fact, the Congress granted an absolute right to bail in all non-capital cases. But what exactly is this right?

In its most basic essentials the one and only purpose of bail is to assure the presence at trial of any person charged with a crime. In feudal England, where the system of bail originated, its sole purpose was to assure the presence of the accused before the King or his Magistrates. What is important is that never in the history and development of the use of bail was the element of danger a valid criterion of setting bail. The only concern that could be legally considered was, "What amount will ensure the presence of the accused?".

The "excessive bail" clause of the Eighth Amendment has been the subject of many court interpretations. What they all have in common is that they identify bail as a right, and excessive as that amount which is unnecessarily high insofar as insuring the presence of the accused.

Turning again to England, the use of bail to assure appearance before the King was a very individual and personal thing. If the accused had property, that property was offered to and held by the King to guarantee appearance. It was also not uncommon to have a very close friend proffer his property to supplement any deficiency. It is significant, though, that in England the failure of the defendant to appear resulted in imprisonment for whoever put up the property.

As bail practices developed in the United States the personal involvement of each accused became attenuated as private enterprise groups viz., professional sureties and bondsmen, began to sell bail for a fee. The obvious advantage to the accused was that only a portion of the amount was necessary. The not so obvious disadvantage to the accused was that he had to pay for what was his by right — namely release. Unlike a system where his property was returned when the case was

complete — he had to pay the bondsman whatever fee the bondsman wanted to charge. In addition, while bail seemed to be a function of the courts, in reality the decision of who got bail became a decision of a bondsman. The situation is perhaps best described in the following:

> "The effect of such a system is that the professional bondsmen hold the keys to the jail in their pockets. They determine for whom they will act as surety — who in their judgment is a good risk. The bad risks, in the bondsmen's judgment and the ones who are unable to pay the bondsmen's fees, remain in jail." 3/

In addition, the combined effects of rising crime rates and great poverty resulted in more and more people being jailed because of inability to post bond. Despite the Supreme Court's admonitions in Stack v. Boyle (1951), bail setting procedures continued as rote, short hearings that gave little attention to the individualized criteria mandated by the Supreme Court in Stack.

As a result of these conditions and the inherent inequities that grew up, recurrent criticisms spanning more than half a century led to sweeping reforms of bail practices and laws in the 1960's. The Manhattan Bail Project, under the sponsorship of the Vera Foundation, proved that alternatives to the traditional surety bail system worked. People could be released without bail and would reappear with the same consistency as those released under traditional practices. In many instances the rate of return for those released on their own recognizance was better than the rate of return of those released on traditional surety bail. Why? Because of the release provisions once again focused upon the individual commitment of the accused.

In 1966 Congress enacted the Federal Bail Reform Act, 4/ a law which embodied the concepts proved by the Vera experiment. Personal recognizance or release on non financial conditions became the preferred treatment for every federally accused person. Courts were instructed by the law to consider only risk of flight criteria in fixing appropriate release conditions. The use of traditional money bail was retained, but only as the lowest ranking option.

Most states have since revised their bail laws to provide for the same hierarchy of release options as exist in the Federal Bail Reform Act. The use of the financial option is presumed to be the least acceptable option. The change in the law has done little to affect traditional practices.

Money bonds continue to be "the norm" in most places and jails continue to be full of persons detained pending trial, because of inability to post surety bonds. Although many "projects" served as catalysts to spur criminal justice systems to wider use of personal recognizance releases, such programs were ineffective as far as insuring overall compliance with the law. The simple reason that the laws are not complied with is that the laws do not provide a mechanism for dealing openly with danger and the dangerous defendant. Thus, under the subterfuge of high risk of flight, in slavish dedication to traditional arguments, courts set high money bonds in an attempt to insure the pretrial confinement of those they perceive to be danterous. As a result, trying to protect the community under the fiction of deciding prospective risk of flight, the courts and legislatures have given birth to the hypocrisy of bail.

WHERE ARE WE GOING?

The single complaint common to all critics of bail reform is that no legal measures exist to insure the safety of the community or to minimize the potential threat posed by the release of certain defendants. Traditionally, historically, and legally, the only purpose of bail is to assure the appearance of an accused for trial. Yet, every judge who sets bail does so in the context of his or her own human standards and experiences.

Of primary importance among these experiences is the threat of danger posed by the release of some people. In the mind of the judge that threat must be minimized in some way. Using intricate and sophistic reasoning the justification goes something like this: The crime is so bad, the likelihood of conviction so high, and the prospect of lengthy imprisonment so great that the motivation to flee is intense enough to justify this $100,000 bond.

The fallacy in this reasoning is that the Vera experiment and its progeny have proved that the three elements cited above have little effect on failure to appear rates. In reality, quite the converse is true. Accused murderers are among those with the best records of appearance. Yet, there is a human need to "get off the streets" those persons charged with heinous crimes. Presumptions of innocence, likelihood of reappearance, etc., mean little. Thus, the fiction of money bond as a method for determining risk of flight is hypocritically twisted to justify setting money bonds high enough to keep people in jail pending trial.

It is this very hypocrisy which fills jails and causes the federal intervention previously referred to. Even today, judges are setting bonds that are designed to keep people in jail pending trial. And while it may be appropriate to detain some people clearly identified as dangerous, the fact is that it ought to be done openly, legally, and honestly. It ought to be done without hypocrisy if it is to be done at all.

In the District of Columbia a statute has been enacted which attempts to deal with this hypocritical situation.

In the Court Reform and Criminal Procedures Act of 1970, effective February 1, 1971, a new release law applicable to the District of Columbia clearly provided for the legal, honest and open detention of dangerous suspects — without any bail at all. It also provided for consideration of danger as a criterion for fixing conditions of release other than financial. And it specified that financial conditions could be imposed only to assure the appearance of the accused. 5/

The new statute seemed to provide an answer to the dilemma. The deficiencies in the "old" law were corrected. Danger, as well as risk of flight, could be considered in setting release conditions. People identified as extremely dangerous could be legally detained without bail. Experience thus far has proved the theory unworkable. Despite a rearrest rate of over 30%, less than a handful of the accused have been detained without bail under the law since 1971. Even now Congress is considering amendments to the law to permit the detention of more defendants under even "looser" conditions.

Citing such factors as the mechanics of the statute being too intricate, the resources to use it inadequate, the procedures of invocation too burdensome and other such concerns, criminal justice officials simply have not used the law and defendants continue to be detained under the fiction of high money bond. Perhaps

the "answer" was not the right "answer". Perhaps it is impossible to predict who will commit crime. As a matter of record, the Department of Justice in 1969 spent $360,000 for a study that was designed to analyze which factors could be used to predict danger. The conclusion -- danger prediction may be statistically probable but no one can predict individual danger. Is it feasible to detain 10 persons to insure holding the one who will be rearrested? Is it constitutional?

We should keep the detention issue in its proper perspective. The harshest critics of bail reform concede the need to change the system so that indigent defendants under the equal protection provisions of the Constitution enjoy the same rights to and practices of release as monied defendants. Our system demands equal treatment of the rich and poor. There is clear consensus that money bond and traditional bail is no longer necessary to insure appearance.

In a 1968 report the American Bar Association through its Project on Minimum Standards for Criminal Justice, Standards Relating to Pretrial Release, said:

> "The bail system as it now generally exists is unsatisfactory from either the public's or the defendant's point of view. Its very nature requires the practically impossible task of translating risk of flight into dollars and cents and even its basic premise — that risk of financial loss is necessary to prevent defendants from fleeing prosecution — is itself of doubtful validity. The requirement that virtually every defendant must post bail causes discrimination against defendants who are poor and on the public which must bear the cost of their detention and frequently support their families on welfare.
>
> Recent experimental studies have demonstrated that if a quick but careful inquiry is made into the facts concerning the defendant's roots in the community a vastly more rational bail decision can be made. In short, risk of financial loss is an insubstantial deterrent to flight for a large number of defendants whose ties to the community are sufficient to bring them to court." 6/

In 1973 the National Advisory Commission on Criminal Justice Standards and Goals had this to say:

> "The Commission feels that attempts to insure appearances at trial by creating a financial incentive for such appearances are of little value, other than to provide a source of income for private bondsmen. Extensive experimentation has shown that most defendants can safely be released on nothing more than their own promise to reappear at a designated time, and the Commission recommends that maximum use be made of such programs." 7/

Thus, both the American Bar Association and the National Advisory Commission recognize the validity of nonfinancial release conditions as alternatives to traditional surety release. In addition, each recognizes the virtual uselessness of the professional bondsman or surety. In fact, the American Bar Association report states categorically that "the practice of employing compensated sureties should be abolished". 8/ Without citing them further both the American Bar Association

in its Standards Relating to Pretrial Release and the National Advisory Commission's Courts, and Corrections volumes urge the adoption of release programs whose primary emphasis follows the standards delineated in the Bail Reform Act of 1966.

Recognizing that laws and theory clearly advocate wider use of personal recognizance release let us consider the results of failing to use these programs.

In all likelihood, the first place the boil will fester and break will be in the detention facilities. Generally speaking, old, outmoded buildings house pretrial detainees as well as convicts. As the crime rate has risen rapidly these institutions built originally to hold a limited number of people are strained to the bursting point like the shoe in the children's nursery rhyme. Unfortunately for society, prisoners today cannot be moved to other places, as the children in the show might have been, simply because no other places exist. Cries of "build bigger jails" can be heard. This remedy is expensive in both human and economic terms and is not, as we have seen, the most efficient way to deal with the problem. Nor is it comfortable for local authorities to be "haled" into Federal Court to explain the atrocious conditions that are giving rise to suits all over the country.

In addition, ask any institutional director who runs a facility that houses both pretrial and post conviction people his or her most serious problem and you're likely to hear: "the morale problem posed by housing the two categories under one roof". Post conviction defendants have more privileges than pretrial detainees. Imagine the effect of that apparently simple difference on people who view themselves as presumptively innocent and illegally detained. Resources that might otherwise be committed to rehabilitational programs are diverted to preserving a minimum of peace among prisoners who shouldn't be there in the first place.

Secondly, consider the effect of non-use of release provisions on prosecutors. As the jails fill with more and more pretrial detainees pressure builds on the prosecutor to "dispose" of cases so that prisoners can be transferred. Pleas may be accepted to lesser charges to dispose of backlogs. Prosecutors may make deals to accept pleas in exchange for a "time already served" credit recommendation. Cases may be dismissed altogether because time served prior to trial already exceeds the maximum sentence that could be imposed for conviction. These pressures are unacceptable to a system that purports to dispense justice.

What about the courts? In the first instance, failure to follow the law is certainly grounds for examination of the fitness of any judge to continue in his duties. How can quality justice be dispensed by judges who so cavalierly disregard the law and the Constitution? What about the expense to the community to redress the wrongs caused by bad judgment viz., federal suits, costlier jail programs, loss of revenue from those who could be working, higher taxes to support detained prisoners and families of prisoners, etc? These are but a few of the costs to taxpayers of failure of the courts to comply with the release law.

Finally, but certainly not least among the factors we should consider, what about the person who goes to jail because he can't make a bond that was probably set illegally? If he's declared not guilty, and better than 20% of those arrested in most jurisdictions are never even brought to trial, who pays him for the time he lost? Who gives him back the job he lost, or the family that he was severed from, or the hours and days, perhaps weeks and months that were taken from his life — illegally? No one critic or proponent of liberal release laws, advocates the detention of people before conviction unless they can be declared dangerous.

Yet over and over again we read stories about those who were detained for days or even months and were released when some "mistake" came to the fore.

The Senate has recently passed the much heralded "S.1" bill in its present form as S.1437. The House of Representatives will soon begin to hold hearings on the bill. Not only does the bill provide for preventive detention but it does so under conditions that should shock anyone who believes in the principles set out in the Constitution. Unlike the District of Columbia law referred to above it does not provide for due process hearings. It does not even attempt to define and interpret danger. It does not carry sanctions to see that pretrial detention — when ordered — is administered under the most careful of conditions. It preserves the traditional money bond condition in a way that will permit continued hypocrisy. If the law is passed it is likely that several states will follow the lead of Congress. We will have taken four steps forward since 1789 and are on the brink of taking five backward.

We, those of us who administer, analyze, and propound laws — judges, legislators, law enforcement officials, pretrial professionals, researchers, and plain ordinary citizens — must take a good look at what we're about to slide so easily into. We must grapple head-on with the issue of what to do about dangerous people and not leave it to the bail system to handle. Bail, after all, is to insure appearance not community protection.

FOOTNOTES

1/ From The Adventures of Alice in Wonderland by Lewis Carroll.

2/ Alberti v. Sheriff of Harris County, 406 F. Supp. 649 (1975).

3/ Pannell v. United States, 320 F. 2d 698, 699 (D.C. Cir. 1963) (concurring opinion of J. Skelly Wright.)

4/ Bail Reform Act of 1966, P.L. 99-465, 18 U.S.C. §3146.

5/ Court Reform and Criminal Procedure Act of 1970, P.L. 91-358, D.C. Code §23-1321.

6/ American Bar Association Project on Standards for Criminal Justice; Standards Relating to Pretrial Release, Introduction, 1968.

7/ National Advisory Commission on Criminal Justice Standards and Goals; Courts, Standard 4.6 Pretrial Release, 1973.

8/ ABA Project on Standards for Criminal Justice; Standards Relating to Pretrial Release, Standard 5.4, 1968.

PRETRIAL DIVERSION: THE FIRST DECADE IN RETROSPECT

(Together With Some Reflections On Where We Go From Here)

by

John P. Bellassai

* * * * *

Pretrial diversion reached its zenith in 1975, but most would agree that this was only a prelude to what we can expect in the future. Having survived the early seventies (and some predicted as a discipline it would go the way of phrenology) diversion has entered a serious, cautious maturation period. One can arrive at this conclusion by a careful examination of the key events of the past decade in diversion, which is exactly what the author has done.

Starting with 1967 the author traces chronologically the development of diversion in the United States in a pragmatic fashion, providing the scholar or practitioner with an excellent historical reference piece.

Mr. John Bellassai's interest in diversion started in 1971 while still in law school at Georgetown University, leading to the co-authoring of a law review article prepared for and included in the Georgetown Law Journal (Vol. 60) in 1972 titled "Addict Diversion: An Alternative Approach for the Criminal Justice System". Following his graduation the same year, and admittance to the Bar of the District of Columbia, Mr. Bellassai was chosen as the first Director of the D.C. Superior Court's Narcotics Diversion Program, a position he holds to this day. Mr. Bellassai has been an active member of the National Association of Pretrial Services Agencies since 1973, serving as Chairperson of the Law Committee since 1974.

> I will guarantee to take from this jail, or any jail in the world, five hundred men who have been the worst criminals and lawbreakers who ever got into jail, and I will go down to our lowest streets and take five hundred of the most abandoned prostitutes, and go out somewhere where there is plenty of land, and will give them a chance to make a living, and they will be as good people as the average in the community. 1/

Over the past decade, formalized programs of pretrial diversion have become popular reform adjuncts to—or as some would prefer to believe, alternatives to—the traditional criminal justice system in nearly every jurisdiction in the country. In the most recent count by the American Bar Association (ABA) there were 148 ongoing programs in 37 states, the District of Columbia, and the territories. 2/ Now even newer programs are being implemented, and it is growing harder to keep up with their proliferation. Starting in 1967 with the widely-publicized recommendation of the President's Commission on Law Enforcement and Administration of Justice 3/, much has been written in praise of pretrial diversion, mainly by front-line criminal justice decision-makers and by diversion practitioners themselves. 4/ Yet recently, a good deal has also been written about diversion by way of criticism, especially from the defense bar, civil libertarians, and professional researchers. 5/

It is not this writer's intention to defend or criticise diversion, as theory or in practice. Rather, what follows is intended simply to review, in as objective a fashion as possible, the record of the past ten years in terms of proliferation of diversion programs and the widespread acceptance and support the concept has come to enjoy. By way of conclusion, some predictions as to likely future directions will be advanced, together with a review of significant obstacles and challenges to the way many programs have operated in recent years which are appearing on the horizon.

However, before embarking on our review of the events of the last ten years, a few preliminaries deserve clarification. First, the word "diversion" (like its even less precise relative, "diversionary") has become a very fashionable label applied these days by various authors, criminal justice planners and grant applicants to just about any community-based alternative to incarceration. The term "diversion" has thus become so overused and exploited that it serves more to confuse than to clarify. In contrast, the term as used here must be understood to refer only to pretrial diversion, or as it is perhaps more aptly called, "pretrial intervention" or "deferred prosecution". 6/

Second, as for which of the literally hundreds of so-called "diversionary" mechanisms and programs operational today are considered true pretrial diversion for the purposes of this review, the working definition first developed by the

American Bar Association Pretrial Intervention Service Center some six years ago will be adhered to. 7/ Significantly, the definition of true pretrial diversion embodied in the draft "Standards and Goals for Diversion" developed recently by the National Association of Pretrial Services Agencies (NAPSA) for practitioners in the field also generally comports with the ABA Center's widely-accepted definition, though NAPSA's appears a bit less catholic. 8/ Consistent with both definitions, for our purposes here we are concerned only with those diversionary programs and procedures which feature (1) uniform elibibility criteria; (2) structured delivery of services; and (3) dismissal (or its equivalent) of pending charges upon successful completion of the required conditions of the diversion regimen. 9/

Third, before beginning our review of major developments in pretrial diversion since the seminal year 1967, it is important to note that at least one successful community-based pretrial diversion program—the Citizen's Probation Authority (CPA) in Flint, Michigan—predated the Report of the President's Commission by two years. 10/ In addition, a few states by 1967 had already enacted legislation authorizing treatment in lieu of prosecution for various categories of defendants. 11/ CPA is still functioning and has served as a model for other, more recent prosecutor-sponsored diversion programs. Likewise, all the state statutes of the pre-1968 period are still on the books and are invoked to varying degrees. 12/ Nevertheless, the widespread interest in pretrial diversion which led to the explosive proliferation of new programs in the 1970's must be traced back directly to the 1967 Commission Report. It is to the post-1967 period, therefore, that the history of pretrial diversion on a truly national scale belongs. And as this first decade of nationwide experience with pretrial diversion comes to a close, it seems particularly appropriate to look back now and identify historic highlights leading to the state of the art today.

As is well known to all who have a continuing interest in pretrial services, it was the Manpower Administration of the U. S. Department of Labor (DOL) which was the first government entity to take steps to translate the recommendations of the President's Commission into reality. In 1968, DOL funded two pilot pretrial diversion programs—one in New York City and the other in Washington, D. C. Each accepted first offenders (other than drug or alcohol abusers) charged with non-violent misdemeanor offenses who were unemployed or underemployed; each provided counseling and job development and placement services; and each offered dismissal plus expungement to successful divertees. 13/ These two programs, the Manhattan Court Employment Program (MCEP) and Project Crossroads, were each adjudged to be clear successes after their first 18 months and were refunded by DOL. Major evaluations of each were commenced starting at that point and continuing over sucessive years. 14/ The practical results were, on the one hand, widespread favorable publicity for the two programs and the concept they represented and, on the other, a fuller commitment from DOL not only to refund the projects in question but to replicate them elsewhere. 15/

While DOL prepared the groundwork for expanding the MCEP-Crossroads model to other jurisdictions, additional independent impetus was given to the concept of pretrial diversion on the national scene during 1970. First, in that year, the President's Commission on Prisoner Rehabilitation published a report recommending among other things, that:

> "[t]he Congress should enact legislation and appropriate funds for the creation...of special units to provide

> pre-adjudication... services of all kinds to defendants ... with the object of diverting as many defendants as possible from full criminal process." 16/

Second, Congress passed the comprehensive Drug Abuse Prevention and Control Act of 1970 (commonly known as the Controlled Substances Act, or CSA) 17/. Though the primary stated purpose of the law was to schedule illegal dangerous drugs in such a way as to make federal penalties for possession or sale commensurate with the risk of harm to the user, Congress added a diversion section to the Act. Section 404(b) permitted first offender drug law violators to be placed on probation, with "appropriate conditions" (e. g., drug treatment), for up to one year after entry of a deferred plea of guilty. Provided the defendant did not violate any of the conditions of his probation during this time, the statute mandated that "the court shall discharge such person and dismiss the proceedings against him". 18/ Further, if the defendant was under 21 years of age at the time of the offense, the statute provided for expungement of all public records relating to the arrest and conviction 19/.

The significance of the enactment of Section 404(b) of the CSA in 1970 was two-fold in terms of lending impetus to the general national trend towards community-based pretrial diversion for drug abusers. First, unlike Title I of the Narcotic Addict Rehabilitation Act (NARA), enacted in 1966, which had also provided for treatment in lieu of prosecution for selected drug addicts 20/, the CSA diversion section did not require treatment in a custodial (i. e., hospital) setting. In fact, a form of probation-without-verdict, it required rehabilitation in a community setting, as did the DOL manpower program model for non-addicts. Second, and even more important, the legislative history of Section 404(b) of the CSA made it clear that Congress was aware that few street addicts are charged or prosecuted under federal law for possession of drugs. The diversion provision was incorporated in the statute not in anticipation of significant federal addict diversion but, rather, as an example to the states to reform their own laws in parallel fashion.21/ Thus, 1970 saw a federal-level policy mandate the implementation of community-based drug diversion on the state level; the large number of drug diversion programs which sprung up thereafter owe their conceptual legitimacy in large part to this law.

Returning to the area of non-addict diversion, other occurrences in 1970 signalled that the concept of pretrial diversion was gaining increased momentum and legitimacy. For one thing, the New Jersey Supreme Court promulgated Rule 3:28 of its Rules of Criminal Procedure.22/ This marked the first state-wide, formalized authorization for community-based programs of pretrial diversion other than by legislation. It also marked the first entry onto the scene of the judiciary as a major actor—albeit without banners waving or trumpets blaring—in the diversion process. The conventional wisdom had declared until then (absent specific statutory provisions to the contrary) that the pretrial stage of the criminal process was the preserve of the prosecutor par excellence.23/ While this earliest form of New Jersey Supreme Court Rule 3:28 in no way sought to invade the domain of the prosecutor in the screening and charging process out of which diversion decisions came, the groundwork was nonetheless laid for judicial monitoring of the fair administration of formalized diversion by the prosecutor—a groundwork upon which, in later years (at least in New Jersey) a non-statutory role for the judiciary in the diversion process would be erected.24/

Also in New Jersey, 1970 saw the advent of the third manpower model pretrial

diversion program, the Newark Defendants' Employment Project (NDEP).25/ Apart from being the first such program in that state and serving as an impetus to the implementation of additional programs in other counties, NDEP was of significance for the diversion field nationally in that the project's funding came in part from DOL but also in part from the Law Enforcement Assistance Administration (LEAA), via block grant monies.26/ Thus, 1970 saw the entry of LEAA into the area of diversion program funding, previously a DOL preserve. (The significance and impact of the LEAA financial contribution to diversion's development in the years since that time have been so massive and multi-faceted as to need no further comment.)

Finally, 1970 saw Senator Charles (Mac) Matthias of Maryland praise on the floor of the Congress the accomplishments of Project Crossroads during its pilot phase and use this as an opportunity to call for nationwide experimentation with the manpower model of pretrial diversion.27/

The following year, 1971, witnessed tremendous activity on the federal and local levels. DOL activated seven more diversion programs on the Crossroad-MCEP manpower model: Operation DeNovo in Minneapolis, the Baltimore Pretrial Intervention Project, the Boston Court Resource Program, Project Intercept in the San Francisco Bay area, plus programs in Cleveland, San Antonio, and Atlanta.28/ At the same time, LEAA funded two new program starts of its own which were to prove equally successful and replicable: Operation Mid-Way in Nassau County, New York, and the New Haven Pretrial Diversion Program in Connecticut.29/ While these new efforts were getting under way, the first two programs funded by DOL, Crossroads and MCEP, were institutionalized in their respective jurisdicitons . 30/ Meanwhile, in Philadelphia, the local trial court and the office of the District Attorney were jointly operating a major pretrial diversion program, the Pre-Indictment Probation Program, under a special Rule from the Pennsylvania Supreme Court. 31/ The program diverted thousands of defendants in its first year without federal assistance and was considered so useful and successful by the end of the year that it provided the impetus for additional programs under a statewide Supreme Court Rule. 32/

On the national scene that year, U. S. Attorney General Richard Kleindienst told the National Conference on Corrections that the Nixon Administration approved of the use of first offender pretrial diversion and that fostering such programs was a priority for the Department of Justice. 33/ The American Bar Association gave its support to the use of pretrial diversion with the publication by its Special Committee on Crime Prevention & Control (chaired by prominent trial attorney Edward Bennett Williams) of New Perspectives on Urban Crime. The well-received ABA book strongly recommended diversion for both drug-dependent and non-drug abusing defendants on a selective basis. 34/ Finally, the Approved Draft of the ABA Standards for the Prosecution Function and the Defense Function were released in 1971. In its Standards, the ABA for the first time articulated a duty on the part of both the prosecutor and the defense attorney to explore the feasibility of diversion in all appropriate cases. 35/

The year 1972 saw no major achievements for the expansion of pretrial diversion sufficient to generate great publicity on a national scale. Nevertheless, significant events occurred which would lead to major developments in future years. For example, in 1972 LEAA funds led to the start-up of the Metropolitan Dade County Pretrial Intervention Project. The consistent record of accomplishment of Dade County Pretrial Intervention since that time has led not only to the

proliferation of programs in the State of Florida—far in excess of the number anywhere else in the south—but to the adoption of a state diversion statute 36/, and to state-level standards and goals for diversion promulgated by a Governor's Commission. 37/

Likewise, 1972 saw the implementation of the New York City Addiction Services Agency's Court Referral Project (CRP) with LEAA funds. (Until its unfortunate demise in 1976 as a fatality of New York's fiscal crisis, CRP was the largest drug diversion program in the country outside of the TASC system 38/, which evolved in large part based on the CRP model and in response to CRP's track record of success.) Another major development in the drug diversion area occured in 1972 with the passage by the California Legislature of Penal Code Section 1000, which authorizes the pretrial diversion of drug-dependent defendants on any non-violent offense, as long as there exists no record of previous drug law convictions or probation or parole violations.39/ The emerging significance of §1000 for diversion is not only that it is a state-wide mechanism through which thousands of cases are diverted yearly to community-based treatment programs, but that this statute has given rise to more court decisions addressing various aspects of pretrial diversion directly than have all other diversion programs and statutes combined. 40/

As indicated above, the Philadelphia Pre-Indictment Probation Program, inaugurated in January of the previous year, had proved so successful in meeting its stated objectives that it was institutionalized and expanded; Mid-1972 saw the enactment of Pennsylvania Supreme Court Rules governing diversion 41/, together with the establishment of the ARD (Accelerated Rehabilitative Disposition) as a pretrial diversion procedure of statewide applicability. 42/

On the national scene, two more respected organizations took official positions in favor of diversion during 1972. The American Correctional Association adopted a resolution advocating the increased use of diversion at its August convention. 43/ In addition, the American Law Institute promulgated its Model Code of Pre-Arraignment Procedure, §320.5 which not only recommends use of pretrial diversion but details preferred procedural steps for the diversion of appropriate cases. 44/

Finally, in a little-noted decision, the U. S. Eighth Circuit Court of Appeals in the case of U. S. v. Gillispie 45/ ruled that the local U. S. Attorney did not have the absolute discretion to decide to indict an otherwise eligible narcotic addict who meets the eligibility criteria for treatment in lieu of prosecution under Title I of NARA. 46/ Though the case revolved around interpretation of a federal statute (NARA) and the Federal Rules of Criminal Procedures, it served as a precursor to later, important state court decisions involving diversion by advancing two important propositions—that (1) a prosecutor's discretion as to who is to be accorded the benefits of treatment in lieu of prosecution is not necessarily absolute; and that (2) the courts have a role to play in monitoring the even-handed administration by prosecutors of diversionary benefits to defendants who meet predetermined eligibility criteria. 47/

The focus of attention and activity the following year, 1973, was back to the national level. In the U. S. Senate, the Community Supervision and Services Act, S. 798 (first introduced the previous year and by now popularly known as the "Burdick Bill", after its sponsor) passed unanimously. It called for federal pretrial diversion of selected offenders from all U. S. District Courts. 48/

(Though the same measure has been introduced in the Senate in every succeeding Congress, a concomitant House measure has yet to pass, for a variety of reasons.)

In that same year, the National Commission on Marihuana and Drug Abuse not only went on record recommending that all states set up programs of pretrial diversion for defendants charged with simple possession offenses, but took the view that this avenue of case processing was "constitutionally mandated".49/ Coming on the heels of this recommendation, LEAA, in conjunction with the Special Action Office for Drug Abuse Prevention (SAODAP) in the Executive Office of the President, implemented a nationwide program of pretrial and postconviction referral to treatment of addicted defendants called TASC (Treatment Alternatives to Street Crime). By the end of that year, the first 12 TASC projects were operational. 50/ Some of these featured the use of pretrial diversion (as distinct from simply treatment as an adjunct to pretrial release) more prominently than others. One early TASC project—operating out of the Office of the U. S. Attorney for the Southern District of New York—was unique in that true pretrial diversion was the only case dispositional route for successful clients, most of these having been charged with serious felonies, as well. 51/

One of the first diversion-related events of national note in 1973 was the release in January of that year of the seven-volume National Advisory Commission (NAC) Criminal Justice Standards and Goals. Several key standards, most importantly 2.1 in the Courts volume and 3.1 in the Corrections volume, called for pretrial diversion and spelled out procedural and service delivery considerations deemed important to the diversion process. 52/ Two months later, DOL awarded initial funding jointly to the American Bar Association's Commission on Correctional Facilities and Services and the National District Attorney's Association for a Pretrial Intervention Service Center. 53/ The PTI Center was given the mandate to serve as a clearinghouse of diversion information for all interested parties, to commission monographs and other publications on key issues in the field, and to provide technical assistance to states and localities desirous of establishing programs of pretrial diversion. 54/

When viewed from the perspective of long-term influence on the development of diversion program operations, few occurrences during the decade in question had such deep and profound influence as the establishment by the ABA of its PTI Service Center. Center publications on legal issues, program design, and research and evaluation not only determined the configuration of many of the new programs implemented in succeeding years but also led to operational modifications in some of those whose existence predated Center activation. 55/

Also in the spring of 1973, the National Association of Pretrial Services Agencies (NAPSA)—formed the previous year as a professional association for pretrial release program administrators only—met in Washington, D. C. and decided to expand its area of concern to pretrial diversion, as well. This marriage of release and diversion in 1973 under a "common umbrella" professional association, with the consequent enrollment of many diversion practitioners in NAPSA and the election of several diversion program administrators to its Board of Directors, was an event of profound significance for the emerging discipline. Despite increasing recognition of diversion as a legitimate innovation over the previous six years by criminal justice officials and its popularity at all levels of government, diversion practitioners themselves had never come together before to establish a common identity or to work toward common goals beyond the scope of their respective jurisdictions. The appropriateness of this inter-disciplinary bond

fostered in 1973 by NAPSA has had other than purely national significance: With the subsequent evolution of state pretrial services associations, the professional identification of release and diversion has generally persisted. 56/ It is beyond doubt that the release-diversion alliance forged in 1973 has been a major factor working to solidify the position of diversion as a permanent feature of state and local criminal justice systems. 57/

In contrast to the primarily national-level developments of 1973, the following year was dominated by initiatives at the state level. Following on the widespread dissemination of the NAC Standards, LEAA in January of 1974 began a major funding initiative through its state planning agencies for Standards and Goals Commissions appointed by the various state governors, each of which would develop standards for all facets of the justice system in its state. 58/ Coming as it did in the middle of the "diversion boom", the LEAA State Standards initiative led naturally to the development of particularized diversion standards and goals at the state level. (By January, 1977, nine states 59/ reportedly had developed diversion standards through the mechanism of their governor's Standards and Goals Commissions, while fifteen others 60/ indicated that work on diversion standards was ongoing. 61/)

In addition, during 1974 four states—Massachusetts, Florida, Washington and New York—enacted statutes authorizing statewide pretrial diversion and laying down, with varying degrees of particularity, procedures and criteria for diverting defendants. 64/ This was a quite significant development in that these were the first non-drug diversion statutes to be passed at the state level since the diversion movement began in 1967.

The enactment two years earlier of California Penal Code §1000 concerning drug diversion led during 1974 to several state court decisions of broad import to the diversion field, rather than simply of interest to practitioners in California. The decisions handed down in that year in California, though they only directly affected aspects of that state's statutory scheme, were to be of nationwide significance because they were the first state court decisions to address issues of fundamental importance to pretrial diversion everywhere—the role of the prosecutor versus the judge in the diversion process; what constitutional rights a defendant could be required by a prosecutor to waive as conditions precedent to diversion; and whether the existence of statewide enabling legislation required that each locality make the diversion option available to defendants under its jurisdiction.

In companion decisions issued by the California Supreme Court in March, 1974, the roles of the prosecutor and the judiciary in diversion eligibility determination were clarified. In Sledge v. Superior Court 63/, the California Supreme Court refused to strike down the statutory provision which vested in the prosecutor the sole discretion to initiate the process of considering whether a given defendant meets the published criteria for selection and thus is eligible for diversion. However, the court stated that any defendant denied access to diversion by a prosecutor on the grounds of failing to meet predetermined eligibility criteria could, if later convicted of the offense charged, appeal in court the earlier eligibility exclusion as erroneous. 64/ In People v. Superior Court (generally known as the case of On Tai Ho), 65/ the California Supreme Court struck down as unconstitutional the provision of Penal Code §1000 which gave the prosecutor a veto over a judicial decision to divert a defendant whom the prosecutor, in his preliminary review of the case, already had found met the statutory eligibility criteria. 66/

Taken together, these two important cases indicated that the process of initial diversion decision-making necessitates roles for both prosecutor and court consistent with established principles of constitutional law, separation of powers, and administrative due process. Prosecutorial discretion, as the Eighth U.S. Circuit Court had ruled two years earlier in Gillespie, 67/ not only is not absolute and unreviewable in such situations but the fact that diversion eligibility determination and enrollment occurs at the pretrial stage does not therefore automatically preclude a role for the courts.

In appellate court decisions also coming out of California in 1974, other grounds on which defendants who had met predetermined eligibility criteria yet nevertheless had been denied entry into diversion were struck down. In People v. Reed 68/, the California Court of Appeals for the Second District ruled that a defendant could not be denied diversion under Penal Code §1000 simply because a program was not in place in the county having jurisdiction over the case, especially since the jurisdiction wherein the defendant resided did have an appropriate program available. 69/ In Harvey v. Superior Court 70/, the Court of Appeals for the Third District ruled that where a defendant otherwise eligible for Penal Code §1000 diversion had concurrent open cases pending, that could not be construed as an automatic indication that the defendant was either unsuitable for or ineligible for diversion. 71/

Finally, in December, 1974, the California Supreme Court in Morse v. Municipal Court 72/ ruled that a defendant initially approved by the prosecutor as meeting predetermined eligibility criteria for Penal Code §1000 diversion can properly consent to diversion "at any time prior to commencement of trial". Therefore, any non-statutory requirement that the defendant agreed to waive litigating pretrial motions as a condition precedent to diversion was impermissible. 73/

In addition to the California state court decisions of direct applicability to pretrial diversion, a major U. S. Supreme Court case decided in 1974 was to have an indirect impact. In Marshall v. United States 74/, the Supreme Court refused to strike down as a denial of the constitutional rights to due process and equal protection the two-prior-felony-convictions exclusion to drug treatment in lieu of penal incarceration contained in Title II of NARA. 75/ The Court concluded that Congress could reasonably assume that drug-dependent defendants with two or more previous felony convictions would be less amenable to treatment than "less hardened" offenders and that therefore such a uniform exclusionary criterion was valid. 76/ Though Title II of NARA is not a pretrial diversion provision, Title I, as noted above 77/, provides for treatment in lieu of prosecution and therefore is. The rationale underlying the Supreme Court's decision with regard to NARA Title II seems undeniably applicable to the identical exclusion contained under Title I, as well. Thus, to the extent that Marshall by analogy legitimizes prior offense exclusions to federal pretrial diversion for addicts, it has been viewed by many as a "green light" for including (or retaining) similar eligibility exclusions in non-federal diversion programs, both drug and non-drug. 78/

Federally-funded program initiatives in the drug diversion area continued into 1974, with nine new TASC programs 79/ being added to the list of 11 others from the previous year. 80/ One additional federal pilot diversion program inaugurated in 1974 deserves special mention because of its then uniqueness: In August, the Justice Department, through the Office of the U. S. Attorney for the Northern District of Illinois, started a pilot federal diversion program in contemplation of passage the following year of the Burdick Bill. 81/ The stated in-

tent of the Justice Department was to expand this effort to all 94 federal district courts after the passage of the federal bill. (As of 1978, the long-awaited federal diversion legislation has yet to be enacted; however, additional prosecutor administered federal diversion programs for non-drug dependent defendants are ongoing in Washington, D. C. 82/, Portland, Oregon 83/ and Memphis, Tennessee. 84/ Louisville, Kentucky also has a program operated out of the U. S. District Court there.) 85/

The year 1974 saw the issuance by the ABA's PTI Center of the first Directory of Pretrial Intervention Programs. 86/ A total of 57 diversion projects in 22 states and the District of Columbia were listed. Considering the fact that only four of these had existed in 1970, the nationwide proliferation of programs was very visibly brought home to the criminal justice community with the publication of this first issue of the Directory. Appropriately, the year also saw the inception of the Maryland Association of Diversion Programs, reportedly the first such state association to be established. 87/ (The Maryland example would soon thereafter lead to the estblishment of other state associations, though usually these took the form of umbrella alliances of both pretrial release and pretrial diversion programs, on the model of NAPSA.) 88/

It is perhaps not an exaggeration to say that the next year, 1975, saw the apogee of pretrial diversion for the entire decade. Three more states—Arkansas, Colorado, and Tennessee—enacted statewide diversion legislation 89/ and a federal diversion bill, H. R. 9332, 90/ was introduced in the House of Representatives for the first time during the 94th Congress, paralleling reintroduction of the Burdick Bill in the Senate.

DOL in 1975 funded ten more manpower-mode diversion programs (the "Third Round" PTI projects) under Title III of the Comprehensive Employment and Training Act (CETA) 91/, while awarding continuation funding to eight others in the "Second Round" PTI group. LEAA meanwhile started up thirteen additional new TASC programs 92/ while granting continuation funding to thirty others. 93/ As of April of that year, the second edition of the ABA's Directory of Pretrial Intervention Programs listed 118 projects in 31 states, the District of Columbia, Puerto Rico, and the Virgin Islands—more than double the number recorded in the previous year. The New Jersey Supreme Court adopted detailed Guidelines interpreting its Rule 3:28 on diversion—in the process not only encouraging the practice to be administered with more uniformity from county to county but also laying down detailed procedural requirements dealing with many aspects of diversion operations. 94/

Three unrelated events occurred during June, 1975 which were to have very different effects on diversion programs and practitioners, yet each of which was profound. Perhaps most importantly, on June 19, President Gerald Ford, in his Crime Message to Congress, stated that "experimentation with pretrial diversion programs should continue and be expanded". 95/ This was the first time that a President of the United States had directly endorsed the idea of pretrial diversion, though President Nixon earlier, in 1973, had done so indirectly through his remarks at the Annual TASC Conference 96/ and through Attorney General Kleindienst's remarks to the National Conference on Corrections in 1971. 97/

On June 25th, thirty release and diversion programs throughout the State of Michigan banded together to form the Michigan Association of Pretrial Services Agencies (MAPSA). 98/ Though not the first state association of diversion programs 99/ MAPSA was the first release-plus-diversion association to be formed on

the national (i. e., NAPSA) model. In this regard it has been a precursor for seven or more other unified state associations implemented since that time. 100/

The next day, June 26th, the California Court of Appeals for the Third District, in the case of Kramer v. Municipal Court, ruled that a pre-termination administrative hearing which complied with basic due process requirements was implicitly mandated for divertees under Penal Code §1000, despite the fact that the statute was silent on this point. 101/ This was the first time a court had directly applied to a pretrial diversion procedure the administrative due process requirement for a hearing already enunciated by the U. S. Supreme Court for parole and probation revocation processes. 102/ By not tying its decision to narrow state statutory grounds, but rather by basing it on general principles of administrative law enunciated by a line of California precedents, the California appellate court in Kramer provided a persuasive impetus for requiring pre-termination hearings for any and all diversion programs, regardless of whether their existence is based on enabling legislation or other authority. 103/

Like its predecessor, 1976 was a good year for pretrial diversion on the federal and state levels. The third edition of the ABA's PTI Directory which appeared that year listed 148 diversion programs in 42 states and territories, up again significantly from the number listed the previous year. The initiative toward the formation of state associations continued, with the creation of strong associations in New York, Ohio, and elsewhere.104/ Connecticut followed the lead of other states in passing statewide diversion legislation and the New Jersey Supreme Court modified and expanded its Guidelines governing Rule 3:28 diversion so as to be even more encompassing in scope and detail. The American Bar Association at its Annual Conference passed a resolution in favor of the use of pretrial diversion which had been sponsored jointly by its Section of Criminal Justice and the Commission on Corrections—the first time that the ABA as a whole, rather than one of its committees, had gone on record advocating diversion. 106/

The year also witnessed the award of two major LEAA grants to the national professional association, NAPSA. One called for NAPSA to develop standards and goals to govern the operation of pretrial diversion programs, plus similar standards to govern programs of pretrial release. 107/ The second grant called for the establishment of a Pretrial Services Resource Center which would provide, among other services to pretrial practitioners and those interested in setting up programs, an information clearinghouse, technical assistance and in-house publications addressing key issues in release and diversion. 108/ With the imminent phase-out of the ABA's DOL-funded PTI Service Center, the Resource Center, to be created via this LEAA grant to NAPSA, would be the primary support entity for pretrial services nationally. The fact that the grantee was the National Association and that the Center would be staffed by professionals who had had direct experience in the pretrial services field was widely interpreted to mean that, in the eyes of criminal justice policy-makers and government officials, pretrial services as an identifiable, credible discipline in its own right had come of age.

Important court decisions appeared in 1976 that were to add in new ways to the growing body of judicial opinion about diversion practices and procedures. In U. S. v. James H. Smith 109/—a decision, the real import of which has been understated in other commentaries—the District of Columbia Court of Appeals ruled in effect that the existence and therefore the eligibility criteria for the U. S. Attorney's non-statutory diversion program for minor first offenders is completely a matter of prosecutorial discretion. The prosecutor may thus require defendants,

otherwise eligible for entry into the First Offender Treatment Program (FOT), to elect between litigating pretrial motions and opting for diversion. The Court reasoned that since successful completion of the FOT Program results in a nolle prosequi of pending charges while non-completion simply results in a return to regular court processing (i. e., to trial) with no prejudice to the defendant's case, the Government cannot be said either to chill the exercise of constitutional rights nor coerce defendants into contracting away those rights when it insists on an early election between filing pretrial motions and opting for diversion. 110/ It is difficult not to conclude that this ruling directly contradicts, in rationale and result, the California Supreme Court's 1974 decision in the Morse case. 111/

Later in the year, the New Jersey Supreme Court handed down a series of decisions that would have long-range impact on diversion eligibility selection, both in that state and elsewhere. In State v. Strychnewicz 112/, the Court ruled that prosecutors must provide defendants who are considered for diversion under Rule 3:28 but rejected written reasons stating the grounds for such rejections. 113/ The Court made clear in the process its intention to monitor prosecutorial diversion screening for abuses of discretion and to provide an avenue for judicial review of appropriate instances of diversion rejection for suspect reasons. 114/

In the companion cases of State v. Leonardis, Rose and Battaglia 115/ (known collectively as Leonardis I), the New Jersey Supreme Court ruled that though the nature of the offense charged is a major consideration properly taken into account by prosecutors when assessing diversion suitability under Rule 3:28, nevertheless, rehabilitation is the primary purpose of diversion. Therefore, the prosecutor may not reject a candidate for diversion based solely on the nature of the charge. Rather, the prosecutor must apply a balancing test of all pertinent factors, on a case-by-case basis, before deciding whether to offer diversion. 116/ Again, the Court made it plain that judicial review of prosecutorial abuses in this area would be in order, according to standards of reviewability and burdens of proof determined by the Court. 117/

Finally in that year, a New Jersey appellate court in State v. Nolfi 118/ that a defendant otherwise eligible for diversion under Rule 3:28 may not be denied access to diversion solely because the county in which his case lies does not have a program in place. In this respect, Nolfi paralleled the California appellate court decision in Reed 119/ by saying that statewide authorization for diversion necessitates making programs of diversion available to all state residents and, by extension of that rationale, to out-of-state residents charged in that state's courts. 120/

The year 1977, the last at which we will look, was a year of consummation for many of the initiatives and developments already identified which had come before. The Pretrial Services Resource Center opened operation in Washington, D. C. at the start of the year and the ABA's PTI Service Center finally closed out after five years of service to diversion practitioners. Not only was the torch passed smoothly to the Resource Center, but a heightened level of information exchange and technical assistance to pretrial programs across the country was the result. 121/ In May of 1977, the preliminary draft of the Standards and Goals for Diversion, developed under the LEAA award to NAPSA noted earlier, were presented for review and comment at the Sixth Annual NAPSA Conference held in the Washington, DC area. 122/ As a follow-up to its previous decision in Leonardis I, the New Jersey Supreme Court issued its opinion in Leonardis II 123/, which had been re-

heard solely on the issue of whether the court can compel the enrollment of an otherwise eligible defendant in a program of diversion over the objection of the prosecutor and absent statutory authority to do so. The Court concluded that while it could do exactly that, based on its inherent authority to interpret and achieve compliance with its own Rule (Rule 3:28), nevertheless it would take such steps only after a supposedly aggrieved defendant had met a very exacting burden of proof that the prosecutor had abused his discretion. 124/ In the process the Court termed the exercise of power to divert a defendant to be "quasi-judicial". It added, however, that even if this were not the nature of the power to divert, courts have a traditional role to play in "safeguarding individuals from abusive government action". 125/ Applying for the first time to a non-statutory diversion scheme the rationale of a long line of civil and administrative law cases, the Court pointed out that "once the government undertakes to act, it is obligated ... not to do so in an arbitrary or capricious manner". 126/

Finally, adding to the weight of judicial opinions on diversion, the D. C. Court of Appeals in the case of Walter L. Green, Jr. v. U. S., 127/ ruled that the Office of the U. S. Attorney did not abuse its discretion or act improperly when it terminated from the local Narcotics Diversion Project a divertee who was rearrested on probable cause in another jurisdiction, even though the divertee had already been acquitted on the rearrest by reason of insanity at the time he was terminated from the diversion program. The Court held that where the terms of the diversion agreement stated clearly that rearrest upon probable cause was ground for unfavorable termination, the prosecutor need not rely on a conviction under law for the new offense before exercising his authority to terminate from diversion. 128/

No one can doubt that the record of the first ten years as outlined above is positive—even extraordinary—for such a new and often controversial concept as pretrial diversion. Movement and evolution will surely continue into the next decade, possibly at an even faster pace. While it is always risky to predict developments in a new area of law or social policy, a few tentative predictions will be offered by way of conclusion. Some clear trends can be discerned, and this is perhaps the best place to start with predictions. In contrast to the situation throughout most of the decade we reviewed, the stage for major developments in diversion over the next few years will be the states: state legislatures and state courts. The trend toward uniform statewide diversion, either by statute or court rule, made such consistent gains over the originally typical "informal agreement" approach 129/ during the past decade that this can now be said to be an irreversible development. State court decisions in many jurisdictions worked to buttress the evolution toward statewide, uniform systems of diversion, as we have seen. The existence of governors' standards and goals commissions and their drafting of state diversion standards plus the proliferation of state pretrial services associations will also doubtless insure that most of the activity over the next decade occurs at this level.

The numerous programs implemented as pilots during the past decade are now being institutionalized in sufficient numbers that patterns of permancence also can be safely predicted. In this regard it is significant that 40 percent of the diversion programs listed in the ABA's 1974 edition of the PTI Directory were sponsored by independent, private sector entities while reference to the 1976 edition of the Directory shows that only 17 percent of the programs are independent or sponsored by private sector groups. In contrast, only seven percent of the programs listed in 1974 were under the administrative control of executive agencies

of state or local government, whereas 36 percent of the programs listed in the 1976 Directory are so lodged. (This does not include prosecutor-administered programs, which actually declined from 23 percent of the total in 1974 to 16 percent in 1976.) The other large gain for program sponsorship has been courts, which again according to the ABA Directory, sponsored or administered 11 percent of the programs listed as of 1976 in contrast to five percent in 1974. These patterns of institutionalization of diversion into large, conventional units of government doubtless will affect the traditional flexibility associated with the concept and with individual programs. Advantageous in terms of fiscal security and administrative stability, the large-scale institutionalization of diversion programs into traditional agencies of government raises the spectre of co-optation; the next decade will tell whether diversion will remain an alternative to, or finally become an extension of the traditional system of processing criminal cases and defendants.

Lastly, by way of predictions that can be made with some degree of certainty, the next decade will see increasing involvement of the courts in the entire continuum of diversion processing, from eligibility determination to termination for cause. Ostensibly to insure the existence of basic administrative due process in diversion, the untoward effect may well be the infusion of inflexibility in the process to the extent that prosecutors and other actors in the system will pull back from liberal use of the diversion option in favor of other, more conventional post-adjudication routes as well as, perhaps, totally non-criminal avenues such as pre-charge mediation and conciliation.

FOOTNOTES

1/ "Crime and Criminals: An Address to the Inmates of the Cook County Jail, Chicago, 1902" by Clarence Darrow, in Weinberg, A., Attorney for the Damned, Simon & Schuster, New York (quoted with permission of the publishers).

2/ See, Directory of Criminal Justice Diversion Programs 1976, American Bar Association Pretrial Intervention Service Center, Washington, D.C.

3/ Report of The President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 134 (1967).

4/ See, e.g., Brakel, S., "Diversion from the Criminal Justice Process: Informal Discretion, Motivation, and Formalization," 48 Denver Law Journal 211 (1972); Henschel, W., and Rix, T., "Reflections on a Functioning Pretrial Diversion Program, " in Prosecutor's Manual on Screening and Diversionary Programs, National District Attorneys' Association, 1972; Vorenberg, E., and Vorenberg, J., "Early Diversion from the Justice System: Practice in Search of a Theory," in Prisoners in America, Ohlin, L., ed., Prentiss-Hall, 1973; and a variety of publications issued by the Pretrial Intervention Service Center of the American Bar Association, 1973-76, as cited throughout this work.

5/ See, e.g., Goldberg, N., "Pretrial Diversion: Bilk or Bargain?", 31 NLADA Briefcase 6 (1973); Gorelick, J., "Pretrial Diversion: The Threat of Expanding Social Control, 10 Harvard Civil Rights-Civil Liberties Law Review 180 (1975); Nejelski, P., "Diversion: The Promise and The Danger," reprinted in Crime and Delinquency, vol. 22., no. 4, at 393 National Council on Crime and Delinquency, October 1976.

6/ The term "pretrial intervention" was coined by the Department of Labor in 1968-68, when developing the initial DOL pilot programs of diversion. All subsequent DOL-funded programs and activities, including the American Bar Association's Pretrial Intervention Service Center, have adhered to this terminology. The term "deferred prosecution" has been preferred by many prosecutors, doubtless due to its early use by Michigan prosecutor, Robert F. Leonard, in writing about the Citizen's Probation Authority in Flint, Michigan, the earliest formalized pretrial diversion program, and the subsequent preference for this term demonstrated by the National District Attorneys' Association in its publications, See, Leonard, R., "Deferred Prosecution Program," in The Prosecutor, Journal of the National District Attorney's Association, July-August, 1973, re-printed in Source Book In Pretrial Criminal Justice Intervention Techniques and Action Programs, ABA PTI Service Center, 1974. (supra, note 4) The term "pretrial diversion" has generally been the most popular of the three, seemingly due to its use throughout the 1967 President's Commission Report.

7/ See, "Legal Issues and Characteristics of Pretrial Intervention Programs," Directory of Pretrial Intervention Planning and Action Programs, ABA PTI Service Center 1974 at 2.

8/ "Programs referred to in the ... Goals and Standards are pretrial diversion programs which offer adult defendants an alternative to traditional criminal justice proceedings and which

- are voluntary
- occur prior to adjudication
- are capable of offering services to the 'divertee'
- result in a dismissal of charges if the divertee completes the program"

"Goals and Performance Standards for Diversion," reprinted in Resource Materials, National Conference on Pretrial Release and Diversion, Arlington, Va., May 10-13, co-sponsored by the National Association of Pretrial Services Agencies and the Pretrial Services Resource Center.

9/ On the one extreme, this eliminates the sort of informal, unstructed not to charge, historically exercised by prosecutors in the Anglo-American tradition. On the other hand, it eliminates formalized programs which provide pretrial services to defendants while released on bond but which do not result in a dropping of pending charges. Third party custody programs and the supportive service arms of pretrial release agencies thus are not diversion programs for the purposes of this discussion.

10/ For a discussion of the history and features of the CPA, see Leonard, R., Deferred Prosecution Program, supra note 6, and Mullen, J., The Dilemma of Diversion: Resource Materials on Adult Pretrial Intervention Programs, National Institute on Law Enforcement and Criminal Justice, LEAA, 1975, at 16-19.

11/ Connecticut General Statutes Annotated § 19-484,-497; Illinois Revised Statutes Ch. 91½, § 120; New York Mental Hygiene Law § 210. Each of these statutes authorized treatment in lieu of prosecution for drug addicts only, and diversion was to be to a hospital or other custodial setting rather than to community-based ambulatory services.

12/ The degree to which state and local prosecutors over the past ten years have diverted defendants under these older statutes is generally difficult to determine. However, some idea of their extreme under-utilization can be gleaned from references in older publications. For example, only 217 voluntary commitments occurred under New York § 210 drug diversion during 1968. Report of the New York State NACC for its First Twenty-One Month Period at 9, 1971, as cited in Note, "Addict Diversion: An Alternative approach for the Criminal Justice System," 60 Georgetown Law Journal 677, at note 48. In contrast, the new York ACD diversion statute enacted in the mid-1970's diverted in the five boroughs of New York City alone 19,145 defendants in its first ten months on the books. During that same period, pending charges were dismissed against 1,722 other defendants who had successfully completed the required six months or more of ACD diversion. Diversion From the Judicial Process: An Alternative to Trial and Incarceration, A Report by the Sub-Committee on Elimination of Inappropriate and Unnecessary Jurisdiction, New York State Supreme Court, Departmental Committees on Court Administration, 1975 at 56-60.

13/ These were to be fundamental characteristics of all the DOL-funded pretrial diversion programs established between 1968 and 1975. It is not too bold to say that the dozens of other pretrial diversion programs implemented at the local level with other than DOL funds in the years since 1970 were faithful to these three crucial features largely due to the publicity and success of the DOL manpower model programs.

14/ For the pilot phase of Project Crossroads, see, Final Report, Project Crossroads—Phase I (January 15, 1968 - May 15, 1979), National Committee for Children and Youth (Washington, D.C. 1972). For the MCEP pilot phase evaluation, see, The Manhattan Court Employment Project of the Vera Institute of Justice, Summary Report on Phase One: November 1, 1967 - October 3, 1969 (New York, 197?). References to both evaluation reports appear in Source Book in Pretrial Criminal Justice Intervention Techniques and Action Programs, supra note 6, and both programs are dealt with, along with others, in a second ABA PTI Service Center publication, Rovner-Pieczenik, R., Pretrial Intervention Strategies: An Evaluation of Policy-Related Research and Policymaker Perceptions (1974). See also, Dilemma of Diversion, supra note 10, at 7-11, 40-42.

15/ See note 28, infra, and accompanying text. See also Abt Associates, Inc., Pretrial Intervention: A Program Evaluation of Nine Manpower-based Pretrial Intervention Projects Developed under the Manpower Administration, U.S. Department of Labor, Final Report (Cambridge, 1974).

16/ Report of The President's Task Force on Prisoner Rehabilitation, The Criminal Offender—What Should be Done? at 22 (1970)

17/ Public Law 91-513, 84 Stat. 1236 (1970)

18/ 21 U.S.C. § 844 (b) (1).

19/ Id. § 844 (b) (2)

20/ 28 U.S.C. §§ 2901-06 (1970)

21/ See 116 Congressional Record H9163-64 (daily ed., Sept. 24, 1970) (remarks of Congressman Robinson and Springer). For an example of a state drug diversion statute enacted along the lines of this federal model, see the conditional discharge section for the first drug law offenses under the New Jersey Controlled Dangerous Substances Act, N.J.S.A. s 20:21-20 (a) (1), (2) and (3) (b).

22/ For the text of the Rule, see Zaloom, J., Pretrial Intervention under New Jersey Court Rule 3:28 Proposed Guidelines for Operation, ABA PTI Service Center Article Reprints Series, No. 2 (January, 1975), reprinted from The Criminal Justice Quarterly (Fall, 1974). See also Authorization Techniques for Pretrial Intervention Programs: A Survival Kit, Appendix C (ABA PTI Center, February, 1977).

23/ See expecially, Prosecutor's Manual on Screening and Diversionary Programs, supra note 6.

24/ See notes 115-120, 123-126, infra, and accompanying text.

25/ For a description of NDEP, its origins and significance, see Zaloom, Pretrial Intervention under New Jersey Court Rule 3:28 Proposed Guidelines for Operation, supra note 22, at 5-6

26/ Ibid.

27/ 116 Congressional Record S 21161-62 (daily ed., December 22, 1970)

28/ For a narrative description of each project together with an assessment of the impact of each see Abt Associates Report, supra note 15. For further discussion of the nine projects and, in particular detail, the Minneapolis and Boston programs, see Dilemma of Diversion, supra note 10, at 11-15, 83-101.

29/ For a discussion of these program starts, see Dilemma of Diversion, supra note 10, at 19-22, 32 and 34. See also, Cohen, B., Operation Mid-Way, Final Evaluation—Phase I (Feb. 1, 1971 - Nov. 30, 1971) (Nassau County Probation Mineola, NY, 1972); Freed, D., De Grazia, E., and Loh, W., New Haven Pretrial Diversion Program—Preliminary Evaluation (May 16, 1972 - May 1, 1973) (New Haven, 1973).

30/ Project Crossroads became a regular adjunct of the Social Services Division, D.C. Superior Court in that year. MCEP was expanded to cover all five boroughs of the city of New York and remained under the Vera Institute of Justice, a private sector entity, though government funding of the program continued in various respects. See, Court Employment Project of the Vera Institute of Justice, Annual Report, Fiscal Year 1973-74 (Vera Institute, 1974), at 3, 18.

31/ For a discussion of the original Pre-Indictment Probation Program, see note Addict Diversion: An Alternative Approach for the Criminal Justice System, supra note 12, at notes 52,54 and 62-64, and accompanying text; Specter, A., "Diversion of Persons from the Criminal Process to Treatment Alternatives", in Pennsylvania Bar Association Quarterly, vol. XLIV, no. 5 (October, 1973), reprinted in Source Book in Pretrial Criminal Justice Intervention Techniques and Action Programs, supra note 6, at 16-21.

32/ Rules 175-185, Pennsylvania Rules of Criminal Procedure, Accelerated Rehabilitative Disposition (Approved May 24, 1972), reprinted in Authorization Techniques for Pretrial Intervention Programs, supra note 6, at Appendix C.

33/ See the Attorney General's remarks as quoted in The ABA News.

34/ New Perspectives on Urban Crime, A Report by the American Bar Association Special Committee on Crime Prevention and Control (Washington, D.C.)

35/ American Bar Association Standards Relating to the Prosecution Function and the Defense Function (Approved Draft, 1971).

36/ See note 62, infra, and accompanying text.

37/ See note 58, infra, and accompanying text.

38/ CRP was selected in 1974 as a model program by the Drug Enforcement Administration (DEA) of the U.S. Department of Justice. For a discussion of the programs's design and impact, see Drug Abuse and The Criminal Justice System: A Survey of New Approaches in Treatment and Rehabilitation (DEA, Washington, D.C., 1974), at 72-82. For a general discussion of the TASC system and particulars about individual TASC program models, see Treatment Alternatives to Street Crime (TASC): An Evaluative Framework and State of the Art Review (Lazar Institute, Washington, D.C., 1975) (a several-volume narrative evaluation prepared for the National Institute of Law Enforcement & Criminal Justice, LEAA).

39/ California Penal Code §§ 1000-1000.4 (approved December 15, 1972). The specific section which authorizes the court to make diversion decisions is § 1000.2. The statute is reprinted in its entirety in Legal Opinions On Pretrial Diversion Alternatives, Information Bulletin No. 1 August, 1975) (ABA PTI Service Center), at 2.

40/ See, Legal Opinions on Pretrial Diversion Alternatives, supra note 39; see also notes 63-73, 101-103, infra, and accompanying text.

41/ See note 32, supra.

42/ See article by District Attorney Arlen Specter on the ARD, Diversion of Persons from the Criminal Process to Treatment Alternatives, supra note 31

43/ For the text of the ACA Resolution, "Diversion of Non-dangerous Offenders," adopted at the 102d Congress of Corrections in Pittsburgh in 1972 see ABA Corrections Commission Information Bulletin No. 13 (revised Jan., 1973). at 14.

44/ For the text of the ALI Model Code provision on diversion see Source Book in Pretrial Criminal Justice Intervention Techniques and Action Programs, supra note 6

45/ 345 F. Supp. 1236 (1972).

46/ 28 U.S.C. §§ 2901-06 (1970).

47/ For a comparison of state court decisions on prosecutorial discretion in diversion decision-making, see notes 65-73, 112-116, 123-126, infra, and accompanying text.

48/ See generally "Hearings on S. 798, The Community Services and Supervision Act, before the Subcommittee on National Penitentiaries of the Senate Committee on the Judiciary," 93rd Congress., 1st session. (March 27, 1973)

49/ Drug Abuse in America: Problem in Perspective, The Second Report of the National Commission on Marihuana and Drug Abuse (March, 1973), Recommendation Section, Legal Controls—Federal and State, No. 3

50/ These programs were implemented in Austin, Texas; Baltimore, Maryland; Birmingham, Alabama; Cincinnati, Cleveland, and Dayton, Ohio; Indianapolis, Indiana; Kansas City, Missouri; Marin County, California (San Francisco Bay area); Miamia, Florida; New York City (Office of the U.S. Attorney for the Southern

District of New York, i.e., Manhattan); and Wilmington, Delaware.

51/ See generally, Preliminary Comparative Evaluation of Five TASC Projects (System Sciences, Inc., Bethesda, Md., June, 1974).

52/ Both of these NAC diversion recommendations, together with the extensive commentary accompanying the original text, appear in Source Book in Pretrial Criminal Justice Intervention Techniques and Action Programs, supra note 6, at 106-141.

53/ See generally, Report to the U.S. Department of Labor on the Status of the ABA Pretrial Intervention Service Center, Interim Progress Report—Phase I (Aug. 9, 1974).

54/ Id. at 2-4

55/ Perhaps the best example of this was the addition of pre-termination hearings to the diversion procedures of several of the DOL Manpower model programs, pursuant to cautionary recommendations contained in ABA PTI Center legal issues monographs.

56/ See, notes 88 and 100, infra

57/ See generally, Beaudin B., "What is NAPSA?' in Resource Materials, 1976 National Conference on Pretrial Release and Diversion (NAPSA, April 14-18, 1975).

58/ See, State of the States on Criminal Justice: A Report of the National Conference of State Criminal Justice Planning Administrators (May, 1976) at 32. See also State Planning Agency Grants—Guidelines Manual M-4100, I.D. March 31, 1975, at 110-112, para. 63 (LEAA, 1975).

59/ These states are Florida, Georgia, Idaho, Louisiana, Michigan, Missouri, Nebraska, North Dakota, and Texas, according to Authorization Techniques for Pretrial Intervention Programs: A Survival Kit, supra note 22, at 3-10 and Appendices A and B (hereinafter referred to as Survival Kit)

60/ Alabama, Alaska, Arizona, Arkansas, California, Colorado, Delaware, Maryland, Montana, New Jersey, Ohio, Oregon, Pennsylvania, South Dakota, and Wisconsin.

61/ Survival Kit, supra note 22, at Appendix B.

62/ House Bill 2199, "An Act Establishing a District Court Procedure for Pre-Trial Diversion of Selected Offenders to Programs of Community Supervision and Services", (enacted by Massachusetts Legislature in August, 1974); "Correctional Reform Act of 1974" (enacted by Florida Legislature, § 944.025 of which authorizes pretrial diversion for selected first offenders); New York Criminal Procedure Law §§ 170.55, 170.56 (authorizing "adjournment in contemplation of dismissal" for certain non-serious first offenses); and Senate Bill NO. 2491, "Washington State Adult Probation Subsidy Act" (§ 3 of which authorizes diversion). The Massachusetts, Florida and Washington statutes are reprinted in Survival Kit, supra note 22, at Appendix D.

63/ 113 Cal. Rptr. 28, (1974)

64/ Id. at 32

65/ 113 Cal. Rptr. al (1974)

66/ For the text of California Penal Code §§ 1000-1000.4 authorizing drug diversion, see ABA PTI Center Information Bulletin No. 1, Legal Opionions on Pretrial Diversion Alternatives (ABA PTI Service Center, Aug., 1975) at 2

67/ See notes 45-47, supra, and accompanying text

68/ 112 Cal. Rptr. 493 (1974)

69/ For parallel decision in New Jersey, see notes 118-120 infra, and accompanying text.

70/ 43 Ca. App. 3d 66 (1974).

71/ For a discussion of multiple offenses considerations with regard to diversion eligibility decisions, see Pretrial Intervention Legal Issues: A Guide to Policy Development (ABA PTI Service Center, Feb., 1977) at 4-5, and Legal Issues in Addict Diversion: A Technical Analysis (Drug Abuse Council, Inc. and ABA PTI Service Center, March, 1975) at 48-55.

72/ 118 Cal. Rptr. 14 (1974)

73/ Id. at 20

74/ 414 U.S. 417, 94 S. Ct. 700 (1974).

75/ 18 U.S.C. §§ 4251-4255.

76/ 414 U.S. 417, 429 (1974).

77/ see note 20, supra, and accompanying text.

78/ See discussion in Pretrial Intervention Legal Issues, supra note 71, at 4-5 and in Legal Issues in Addict Diversion, supra note 71, at 48-55.

79/ Albuquerque, New Mexico; Alameda County, California; Boston, Massachusetts (adult program) Camden County, New Jersey; Denver, Colorado; Detroit, Michigan; Newark, New Jersey; Richmond, Virginia; and St. Louis, Missouri.

80/ Wilmington TASC was the only drop-out. (For reasons see Preliminary Comparative Evaluation of Five TASC Projects, supra note 51.) For the locations of the others receiving conintuation fundings, see note 50, supra.

81/ See "Justice Department Pusing Diversion in All Federal Districts," in Pretrial Intervention Review, no. 1 (Mrach 1975) (ABI PTI Service Center). at 4, cols. 2-3.

82/ The First Offender Treatment Program (FOT) in the Office of the U.S. Attorney in Washington, D.C. is an in-house program of diversion which offers no

services to divertees and receives no outside funding. Enrollees must complete a specified number of hours of courtroom observation, write an essay on a topic related to the offense charged, and meet certain other, minimal requirements imposed by the prosecutor. A nolle prosequi of the offense is then entered. The FOT program diverted approximately 2,000 misdemeanor defendants in 1976, according to remarks by Chief Judge Harold H. Greene of the D.C. Superior Court in a panel discussion on "The Pretrial Accused: A Multi-Faceted Perspective," May 11, 1977 at the 1977 National Conference on Pretrial Release and Diversion, co-sponsored by the Pretrial Services Resource Center and NAPSA (Arlington, Va., May 10-13, 1977).

83/ ABA PTI Service Center Director of Criminal Justice Diversion Programs, supra note 2, at 12.

84/ Ibid.

85/ Id. at 5.

86/ The original 1974 edition of the Directory is reprinted in its entirely in Source Book in Criminal Justice Pretrial Intervention Techniques and Action Programs, supra note 6, at 2-11.

87/ See note 100, infra, and accompanying text for a list of others.

88/ With the exception of Maryland and, at present, California, all other existing diversion and release state associations are unified. See note 100, infra.

89/ Act No. 346, "Arkansas Pretrial Diversion Act" (March 10, 1975); L. 72 "Colorado Deferred Prosecution Statute" (§ 6-7-401) (1975); House Bill Nos. 204 and 1671, "Tennessee Pretrial Diversion Act" (May 28, 1975). Each of these statutes is reprinted in its entirety in Survival Kit, supra note 22, at Appendix D.

90/ The Kastenmeier-Railsback Bill, H.R. 9332, is reprinted in Resource Materials, 1976 National Conference on Pretrial Release and Diversion (NAPSA and National Center for State Courts, 1976). An earlier House Bill, H.R. 9007 had been unsuccessfully introduced in 1974.

91/ "Third Round" sites included Chatham County, Georgia; Detroit, Michigan; Denver, Colorado; Kansas City, Missouri; Pierce County, Washington; the State of Rhode Island; and Yonkers, New York.

92/ Atlanta, Georgia; Boston, Massachusetts (juvenile component); Compton County, California; Detroit, Michigan; Las Vegas, Nevada; Milwaukee, Wisconsin; Nashville, Tennessee; New Orleans, Louisiana; Phoenix, Arizona; the State of Rhode Island; San Diego, California; San Juan, Puerto Rico; and St. Paul, Minnesota.

93/ See notes 50 and 79, supra, for these locations.

94/ For the original text of the Guidelines, see Resource Materials, 1975 National Conference on Pretrial Release and Diversion (NAPSA and National Center for State Courts, Chicago, Illinois, April 14-18, 1975).

95/ See "Ford Crime Message: Expand Diversion," in Pretrial Intervention Review, no. 3 (June/ July, 1975) at 1, col.3.)

96/ See Conference Proceedings, First Annual Treatment Alternatives to Street Crime Conference (The White House, Washington, D.C., Sept. 11, 1973) at Tab. I.

97/ see note 33, supra.

98/ See "Pretrial Agencies Unite in Michigan, " in Pretrial Intervention Review, no. 3, supra note 95 at 3, col. 1.

99/ The Maryland State Association of Diversion Programs had already been formed. See note 87, supra, and accompanying text.

100/ State associations also exist in California, Colorado, New York, Ohio and New Mexico. See The Pretrial Reporter, vol. II, no. 1 (Pretrial Service Resource Center, Washington, D.C., Jan., 1978) at 11.

101/ 49 Cal. App. 3d 418, 422 (June 26, 1975).

102/ See Morrisey v. Brewer, 408 U.S. 471 (1972) (parole) and Gagnon v. Scarpelli 411 U.S. 778 (1973) (probation).

103/ See discussion in Pretrial Intervention Legal Issues, supra note 71, at 41-45. (California in October, 1975 formally amended its drug diversion statute to specifically require a pre-termination hearing (new § 1000.3).

104/ See note 100, supra.

105/ The Connecticut diversion statute, Public Act 76-179, "Criminal Procedure for Accelerated Disposition," was enacted May 13, 1976. It is reprinted in Survival Kit, supra note 22, at Appendix D.

106/ For the text of the ABA Resolution, see Survival Kit, supra note 22, at 1.

107/ The Standards and Goals twin grant will result in the forwarding of a finalized draft to LEAA for its approval and publication by April, 1978.

108/ See "NAPSA Grant Awarded." in About Time (ABA National Offender Services Newsletter), vol. 1, no. 2 (November, 1976) at 3, col.2.

109/ 354 A. 2d 510 (1976)

110/ Id. at 512.

111/ See notes 72 and 73, supra, and accompanying text.

112/ 71 N.J. 85 (1976)

113/ Id. at 119. However, for a case going the other way, on a separation of powers argument, see the decision of the Colorado Supreme Court in People v. District Court of Larimer County, 527 P 2d 50 (1974).

114/ Id. at 114

115/ 71 N.J. 85 (1976)

116/ Id. at 94-94

117/ Id. at 109

118/ 141 N.J. Super. 528 (Law Div.) (1976)

119/ See notes 68-69, supra, and accompanying text.

120/ See also State v. Kowistki, 145 N.J. Super. 237 (Law Div.) (1977), in which the court ordered Somerset County to initiate a program in response to an equal protection challenge by a defendant denied diversion on the ground that though otherwise eligible, there existed no appropriate program in the County, and therefore he could not take advantage of diversion.

121/ The initial grant application submitted to LEAA by NAPSA specifically mentions the Resource Center picking up on ABA PTI Center activities, which were scheduled for phase-out.

122/ See Final Report, 1977 National Conference on Pretrial Release and Diversion (NAPSA and Pretrial Services Resource Center) at 32-34.

123/ 73 N.J. 360 (1977)

124/ Id. at

125/ Id. at

126/ Id. at

127/ Opinion No. 11640 (decided en banc, Sept. 7, 1977).

128/ Id. at 6

The Present

DEVELOPMENT OF PRETRIAL INTERVENTION IN NEW JERSEY

by

Donald F. Phelan

* * * * *

One of the most controversial tasks in the diversion field today is defining where prosecutorial discretion ends and judicial overview starts. Through promulgated court rules and case law the statewide pretrial intervention system in New Jersey has and continues to clarify this issue. The policies which have resulted and are discussed in this article present a model for other states and local jurisdictions to consider in developing their own policy.

Donald F. Phelan is presently the Chief, Pretrial Services for the State of New Jersey and has worked in the diversion field in New Jersey since 1974. Mr Phelan who chairs the NAPSA Diversion Committee, is currently on leave from the Masters of Public Administration Program at the City University of New York.

This article discusses the issues of judicial overview and prosecutorial discretion through an examination of New Jersey's experience with pretrial intervention. It examines the development of administrative practices and current case law and their respective roles in the evolution of pretrial intervention. In the course of this evolutionary process, New Jersey has resolved critical issues that lie at the heart of the diversionary process.

New Jersey has long been recognized for its pioneering approaches to the development of diversion and intervention alternatives within the criminal justice system. Not long after the passage of the Omnibus Crime Act of 1968, New Jersey joined the ranks of New York and the District of Columbia in establishing a system of pretrial diversion. This system permits defendants, who are identified as amenable to rehabilitation at the complaint or arraignment stage, to participate in a program in which, after successful completion, the charges are dismissed.

ADMINISTRATIVE DEVELOPMENT

New Jersey's diversionary program is provided for by the Supreme Court's Constitutional rule-making authority. The New Jersey Supreme Court adopted R. 3:28 in October 1970 which provided for the establishment of the Newark Defendants Employment Program (NDEP). The NDEP Program was patterned after the Manhattan Court Employment Program and Washington D.C.'s Project Crossroads. It was funded through the Department of Labor and concentrated on the employment problems of the City of Newark's defendant population.

New Jersey Court Rule 3:28 has been amended twice since 1970: once in 1973 allowing for clear application of the rule to both drug and alcohol detoxification programs; and the other in 1974 which resulted in its present entitlement—Pretrial Intervention Programs (PTI Program).1/ The 1974 amendment incorporated certain safeguards and provided for a non-incriminating procedure of relief for defendants who were unsuccessful in program participation. The procedure closely mirrors constitutional and procedural safeguards established under Morrissey v. Brewer, 408 U.S. 471 (1972) and Gagnon v. Scarpelli, 93 U.S. 1756 (1973).

As a creature of the judiciary, PTI in New Jersey has had to concern itself with the concept of judicial overview. Judicial overview has enabled the Court to define the guidelines and establish the necessary procedures to insure the objective and consistent application of diversionary alternatives. As a result, the Court has been instrumental in the development of a unified state system of pretrial intervention. The recognition of judicial overview as an integral part of the system is not meant to imply, however, that the Court in New Jersey does not recognize the constitutional doctrine of separation of powers or the inherent responsibility placed with the prosecutor. Rather, judicial overview recognizes the judicial power vested in the Supreme Court of New Jersey by the Constitution (N.J. Const. (1947) Art. VI, Sec. I, Par. 1; Sec. II, Par. 3).

The Court noted and discussed the separation of powers issue in State of New Jersey v. Leonardis, 73 N.J. 360 (1977) (hereinafter Leonardis II), a landmark PTI case:

> "Inherent in that judicial power is the judiciary's authority to fashion remedies once its jurisdiction is invoked. See Adams v. McCorkle, 13 N.J. 561, 564 (1853). This is not to say that the Court can deprive the Legislature of its right to determine that certain types of conduct constitute substantive crimes. State V. Naglee, 44 N.J. 209, 226 (1965); State v. Holroyd, 44 N.J. 259, 265 (1965). But we have held that: [t]he fact that the Legislature has acted to provide a remedy does not mean that the judicial branch is limited to the boundary lines of strict legislative expression in fashioning or denying remedies in a particular case." State v. Carter 64 N.J. 382, 392 (1974) (footnote deleted) pp. 369-370.

Leonardis II further stated that:

> "the separation of powers doctrine does not require an absolute division of powers among the three branches of government, or a division of government into three water tight compartments; but rather the doctrine necessarily assumes the branches will coordinate to the end that government will fulfill its mission." (supra 370-371).

As a result of the Court's approach, the New Jersey PTI programs utilize a tripartite decision making process. Rule 3:28 requires that in all instances, a recommendation for enrollment in a program be made by the program director, and consented to by the prosecuting attorney and the defendant. If they are in agreement, the matter is presented to a judge designated to hear such motions and he may postpone further proceedings for an initial period of three (3) months, with an additional three (3) months permitted in appropriate cases. The very construction of this process captures the constitutional spirit of judicial overview and engenders the cooperation necessary to effectively operate a successful pretrial intervention process. Much of the recognition for the success of the development of a statewide PTI program in New Jersey goes to the cooperative efforts made by both the courts and prosecutors. They have insured the system's development in an orderly and consistent fashion.

The Supreme Court designed R. 3:28 as permissive, meaning that Assignment Judges, who are the Chief Judges in the various Court vicinages, could consider the adoption of such programs in their area. However, they are required to submit a comprehensive proposal for the establishment of a program prior to Supreme Court participation of several individuals, including prosecutors and staff of the Administrative Office of the Courts.

In early 1974, under the stewardship of Chief Justice Richard J. Hughes and Hon. Arthur J. Simpson, Jr., Acting Administrative Director of the Courts, the State Administrative Office of the Courts established a Pretrial Services Unit. The unit was vested with the responsibility for the uniform development and administration of PTI throughout the state. A Uniform Proposal for the Implementation of PTI in New Jersey, developed by the Administrative Office of the Courts in

December 1974, has served as the blueprint for statewide program development. 2/ This approach has insured uniform programmatic development and has supplied program, prosecutorial and court personnel with the necessary guidance and tools for orderly evaluation and processing of PTI applications. Moreover, the Proposal promulgates criteria and establishes parameters for program counseling regimens, and mandates uniform data collection and evaluation instruments.

All PTI programs in New Jersey must conform to the Proposal edicts with administrative variation permitted only by approval of the Administrative Office of the Courts. 3/

CASE LAW EVALUATION

The line of demarcation between experimentation and the institutionalization of a program is generally marked by a flurry of court cases. These cases often address issues of judicial review, prosecutorial discretion and equal protection.

New Jersey case law has demonstrated that endemic to the issues of judicial review and prosecutorial discretion is the critical issue of equal protection. Equal protection issues affect both the judiciary and prosecutors in their decision making responsibilities. Paramount for New Jersey has been the absence of programs in some counties and the need for common eligibility criteria. 4/

In the application of the tripartite process, the issue of eligibility criteria frequently surfaces. In the early years, interpretation of eligibility varied among prosecutors and program staff. The issue of varying and diverse eligibility criteria amongst the several PTI programs in New Jersey was addressed in the Supreme Court's decision in State v. Leonardis, 71 N.J. 85 (1976) (hereinafter Leonardis I).

Leonardis I dealt with two very significant issues arising out of the rapid development of programs. The first issue was the desirability of programs to develop eligibility criteria consistent with local norms or whether such criteria should be developed to address the issues statewide. The second issue dealt with the Court's right to review decisions made by either program directors or prosecutors.

The Supreme Court resolved both issues in the affirmative:

> "In making these observations, we do not point a finger at either the officials who have proposed those programs or those who currently administer them. We take judicial notice of the fact that the same deficiencies, and others of a comparable nature, exist in PTI Programs throughout the State. While we do not condone these deficiencies, we nonetheless recognize that they are the attendant by-products of a program which is still experimental in nature." (Leonardis I, p. 120).

Moreover, the Court concluded that the role played by the tripartite process (program director, prosecutor and court) has to insure the application of fundamental fairness to criminal defendants. Accordingly, the Court concluded in Leonardis I

that:

(1) Defendants who have been accused of any crime shall be eligible for admission to a program;

(2) Defendant's admission to a PTI program shall be measured according to his amenability to correction, responsiveness to rehabilitation and the nature of the offense with which he is charged;

(3) Although a trial-type proceeding is not necessary, defendant shall be accorded an informal hearing before the designated judge for a county at every stage of a defendant's association with a PTI program at which his admission, rejection or continuation in the program is put in question. A disposition is appealable by leave of court as an interlocutory order R. 2:2-2;

(4) Defendant shall be accorded the procedural protection of a statement of reasons after each determination of his admission, rejection or continuation in a PTI program.

In summary, Leonardis I and Leonardis II established a clear, concise and and direct policy for PTI considerations throughout the State. It resolved the serious and often raised issue of separation of powers and affirmed the authority of the Court to invoke judicial review. 5/

Moreover, a number of cases have been passed on by New Jersey Appellate Courts which have further clarified Leonardis related issues. In one, the issue of judicial hearing parameters has been explored, while in another, reasonableness of guideline interpretation as well as relaxation where appropriate has been suggested.

CONCLUSION

The affirmation of judicial overview in Leonardis I and II has resulted in an effective system of checks and balances, and has given rise to a workable and flexible diversionary system without infringing upon the integrity of the criminal justice system. This has effectively been demonstrated in New Jersey where twenty (20) county PTI programs have been approved for operation. These programs make pretrial diversion available to approximately 98 percent of the State's population. During the last New Jersey court year, which ran from September 1, 1976 through August 31, 1977, there were 16,328 applications filed for diversion on complaints charging indictable offenses. Additionally, programs carried over from the previous court year 990 applications that had been filed but initial enrollment/rejection decisions were still pending. Of the 17,318 applications for initial diversion, 9,308 or 53.7 percent were rejected by either the program director, prosecutor and/or designated judge. The vast majority (92 percent) of all rejection decisions were made by program directors. Of the 9,308 applications that were rejected, approximately 5 percent filed for/or resulted in court hearings on the rejection.

The rejection hearings, as provided for under Leonardis I and II are procedurally defined under N.J. Guideline 8. The hearings are informal in nature and procedurally compatible with parole and probation revocation hearings. The N.J. Guideline 6 provides that:

> "Applications for PTI should be made as soon as possible after commencement of proceedings, but, in an indictable offense, no later than 25 days after original plea to the indictment.". 6/

A large portion of the initial PTI rejection hearings were the direct result of defendants seeking relief against this guideline. Not surprisingly, however, this is most attributable to the period immediately following Leopardis I during which New Jersey experienced the rapid development of 11 county PTI programs. In all cases applications to these programs were limited to defendants who had entered pleas on indictments within 25 days immediately preceding the operational date of the program. Therefore, many defendants who were arraigned prior to the programs' operational deadlines attempted to persuade the courts to relax the application filing deadline. Although in rare instances and fod good cause shown the courts did relax the guideline, such has been the exception rather than the rule.

New Jersey Court Rules provide that a single judge, except in certain instances wherein the Assignment Judge must act, be designated to handle all PTI motions. The underlying philosophy behind this is to enable specialization within the judiciary so that judges are knowledgeable in the diversion process and that guidelines and other applicable procedures are applied equally and uniformly. Although some hearings before designated judges immediately following Leonardis were time consuming, and in some instances both rejection and eligibility application hearings lasted an average of 45 minutes to an hour, such is no longer the case. Across the State the average length of time devoted to both enrollment and rejection hearings is approximately 5-10 minutes. There appears to have been no undue time spent nor has there been any adverse effect placed on the courts as a result of these hearings. On the contrary, cases are being handled expeditiously with a minimal burden being placed on strained court calendars, and, in the final analysis, assistance and relief is being given through PTI.

The New Jersey system has a built-in mechanism to determine program participant recidivism. Each PTI application filed is "flagged" in the State's Criminal History Identification system and subsequent updates to that record ad made available to county programs. Although most of the programs are relatively new and not experiencing a great deal of recidivism, figures compiled on the three or four programs that have been in existence in the State for up to five years give a fairly reliable indication as to the success generated through diversion. The average recidivist rate, based solely on re-arrest without conviction, of successful program participants who have had their complaints, indictments or accusations dismissed, averages 4.7 percent. Comparatively, the rate of recidivism among applicants who were initially rejected from participation is 22 percent while recidivism among the small percentage of participants who are removed from programs because of faulty participation is approximately 37 percent. Moreover, it is especially refreshing to note that in the first category the re-arrests among the successful PTI participants are generally for an offense or crime less serious then the one for which the defendant had initially participated in the program.

Although New Jersey programs are not limited to first offenders, the guidelines contain a presumption that previously diverted defendants should not ordinarily be re-enrolled. At the present time, in order to service the needs of programs to identify re-application, the Administrative Office of the Courts is in the process of developing a statewide central registry.

In conclusion, it can be seen that the resolution of these diversion decision-making issues have provided New Jersey with a viable, uniform system of Pretrial Intervention.

The author sets forth in this article his own personal views which are not necessarily those of the New Jersey Supreme Court, the Administrative Office of the Courts, or the New Jersey Judiciary in general.

FOOTNOTES

1/ New Jersey PTI Programs are administered either as a unit or division of a county probation department, or established under the direct supervision of a vicinage trial court administrator. Persons selected to fill the position of program director, must be approved by the Supreme Court. Rule 3:28(b).

2/ The PTI Proposal has been approved by the New Jersey Supreme Court — see State v. Leonardis, 71 N.J. 85 (1976) p. 101.

3/ Programs have generally been developed through local criminal justice incentive with funding through Federal sources. In at least one instance, however, the trial court ordered the development of such a program and in essence established that a constitutional deprivation exists in the absence of a PTI alternative — see State v. Kowitski, 145 N.J. Super 237 (Law Div.-1976).

4/ The issue of the absence of PTI programs in certain counties is currently contained in litigation before the Appellate Division of Superior Court. Accordingly, the author feels it would be improper to include an exploration of this issue within this article.

5/ Among other clarifications contained in Leonardis II, the court has established as the yardstick for judicial review to be the defendant's responsibility to demonstrate "the prosecutor and/or the program director acted in a grossly arbitrary or capricious manner in denying admission and that his conduct amounted to a patent abuse of discretion".

6/ See footnote 2.

LITIGATION AS A METHOD FOR EFFECTING PRE-TRIAL REFORMS: THE FLORIDA EXPERIENCE

by

Bruce S. Rogow

* * * * *

Perhaps the key element in improving the system of justice available to the pretrial accused is the realization that change is necessary. When Louis Schweitzer first entered the Tombs in New York City to study the pretrial defendant held there he realized that the surety bond system, so firmly entrenched in the United States at the time, was not working properly—change was needed. Since then, other proponents of change have attempted to improve the lot of the pretrial incarceree by establishing programs based on the early Vera model developed by Schweitzer. The need for more basic change became evident—the establishment of a pretrial release program does not necessarily insure that the treatment accorded to the pretrial population will improve, or that the determination of pretrial release conditions, including money bail, will change. This realization has led to attempts to change the legislation governing the pretrial release determination. However, this is not the only method available to bring about the desired effects. In the following anecedotal article, the author discusses how case law can be an effective weapon in bringing change to the pretrial practices in a state or local jurisdiction.

Mr. Bruce S. Rogow, a Professor of Law at Nova University in Fort Lauderdale, Florida, has argued five cases befor the United States Supreme Court (including the famous Argersinger v. Hamlin case) and has been counsel in over fifty cases at the appellate level in the Florida state system and the federal system, including Pugh v Rainwater. Mr. Rogow is on the Board of Directors of the Broward Legal Aid Society and the Seminole Tribe Legal Advocate Program as well as serving in a consultant capacity to several public defender and legal service offices in Florida. In 1972, the National Legal Aid and Defender Association awarded Mr. Rogow the Reginald Heber Smith Award for his work in the area of Poverty Law.

Throughout the proceedings covered in this article, the former Public Defender of Dade County, Florida, Phillip Hubbart, and the present Public Defender, Bennett Brummer, were co-counsel.

When I was asked to write this article I responded by saying that it would be anecdotal, because a reassessment of the cases would do little to encourage litigation as a tool for reform of pretrial procedures. Since we in Florida have had some success in changing pretrial procedures, I thought that sharing experiences might provide some insights and induce others to attempt similar actions. If this is printed, I assume the editors believe the approach to have some value.

For those interested in reading the reported decisions, you should see the following cases:

Gerstein v. Pugh, 420 U.S. 103 (1975)

Pugh v. Rainwater, 557 F. 2d 1189 (5th Cir., 1977)
(reheard en banc, January, 1978)

Pugh v. Rainwater, 511 F.2d 528 (5th Cir., 1975)

Pugh v. Rainwater, 422 F.Supp. 498 (S.D. Fla. 1977)

Pugh v. Rainwater, 355 F.Supp. 1286 (S.D. Fla. 1973)

Pugh v. Rainwater, 336 F.Supp. 490 (S.D. Fla. 1972)

Pugh v. Rainwater, 332 F. Supp. 1107 (S.D. Fla. 1971)

Ackies v. Purdy, 322 F.Supp. 38 (S.D. Fla. 1970)

DADE COUNTY, FLORIDA, 1969 - LAWSON ACKIES

Twenty-seven municipalities comprise Dade County, Florida. The best known cities are Miami and Miami Beach, but the population of Dade County is extremely diverse. In small farming communities like Homestead, Florida City and Goulds, migrant workers and minorities live a life far removed from the glitter of the tourist communities. Poverty was a way of life for most, living in dilapidated shacks just off U.S. 1, the highway to the Florida Keys.

Lawson Ackies was one of that group. He had lived in Goulds for nearly all of his 30 years, working now and then as a tomato picker. When he was arrested in 1969 on some minor theft charges, he was booked into the Dade County Jail and bond was set by a booking officer according to a "master bond list". Unable to make the bond, Ackies sat in jail.

For several years it had become apparent to Legal Services lawyers in Dade County that an inordinate amount of time was being spent calling the criminal court judges to request bail hearings for people unable to post bond after their

arrest. Since the Office of Economic Opportunity funded law offices operated in the poor communities of the county, it was the Legal Services lawyers who received the calls from people complaining that their relatives had been arrested, were unable to make bail and no court date was set. At that time, there were no prohibitions against Legal Services lawyers handling some criminal matters, and since providing immediate service to poor people with critical needs was a good way to build community support for Legal Services programs, the poverty program lawyers acted.

When Ackies' cousin called a Legal Services lawyer, the seeds of an idea for attacking the system for setting bond in Dade County had already begun to germinate. The system was based on a "master bond list". Each of the five Justices of the Peace and the Criminal Court judges had set a dollar amount for each crime on the list. The amount of bail could vary depending on how seriously the respective judges viewed the crime. For instance, the Justice of the Peace in Southern Dade County was not offended by gambling charges and his master bond amount was $250. In Miami Beach the Justice of the Peace took a dimmer view of gambling and a person arrested there for such a violation faced a $1,000 bond.

No matter where in the County one was arrested for a violation of a state statute, the Dade County Jail became home. Upon arrival the booking officer would look at the arrest form, decipher the charge, look at the master bond list and tell the defendant the amount of his bond. If he could not post it, the defendant was processed and placed in a cell with 18 to 20 other persons awaiting trial.

While the jail officials knew the names of their prisoners, the state attorney's office and the clerk of the courts did not learn those names until the arresting officer presented himself to an assistant state attorney to request that an information be filed.

In Florida, all crimes, other than capital offenses, can be proceeded upon by the filing of an information—a formal document in which the state attorney alleges that a crime has been committed and the defendant committed it. Police officers often waited until they had several cases to present before they went to the state attorney's office. Thus, a defendant, unable to post bond, could remain incarcerated for weeks without a formal charging document having been filed merely because the arresting officer was lazy, vindictive or both. Until the information was filed, no case existed and therefore no court hearing could be set by the court clerk's office. As we subsequently learned, between January, 1968 and February, 1970, "a minimum of 680 persons were incarcerated in the Dade County jail because of their inability to post the master bond bail for approximately 30 days between the time of their first arrest and their first appearance before a judicial officer." Ackies v. Purdy, 322 So.2d 38, 40 (S.D. Fla. 1970).

Lawson Ackies was not one of that group for long. His cousin's call for assistance resulted in the filing of a federal civil rights action against the Dade County Sheriff, who, at the time, was responsible for the operation of the booking desk at the jail. The suit was filed by Legal Services lawyers in conjunction with the Dade County Public Defender, whose responsibility for indigent defendants enabled him to participate in affirmative litigation as well as criminal defense. Ackies was released soon after the filing of the suit, but since it was brought as a class action, the case remained alive.

For the first time the decades old methods for arrest and setting of bail were being challenged in Dade County. In order to assuage the concerns of some elements

of the community, we approached the Dade County Bar Association and told them the nature of the suit and our legal rationale. Our conception of the case was simple. Since the fundamental requisite of due process of law is the opportunity to be heard, Grannis v. Ordean, 234 U.S. 385, 394 (1914), the use of a master bond list for indigents and the absence of a judicial determination of the conditions of release, deprived them of their liberty without an opportunity to be heard and thus violated the Fourteenth Amendment to the United States Constitution. We made that argument more palatable by pointing out that master bond lists deprived the state of an opportunity to be heard too. If a defendant had no ties to the community and could not be counted on to appear for trial, he could simply post the master bond bail, leave town, and elude further proceedings. So the failure to conduct a hearing on bail was detrimental to individual liberties and state interests.

We also contended that money amounts of bail set solely by the preferred charge created two categories of persons: those who could afford the amount and were released, and those who could not afford the amount and remained incarcerated. Since fundamental rights were involved, we argued that the state had to show a compelling reason to justify the discrimination based on wealth. Failing that, the practice of using a master bond list violated the equal protection clause of the Fourteenth Amendment.

The simple logic of the arguments and the unfair results of the use of a master bond list attracted the Dade County Bar Association to our side. They became an ally in the Ackies case and stood fast with us throughout the Pugh v. Rainwater cases by filing supportive amicus curiae briefs. There is little doubt that the Bar's position helped alleviate some of the judicial trepidation which naturally results when new law is made.

Ackies was decided by the Chief Judge of the United States Court for the Southern District of Florida. He agreed with the Constitutional arguments and ordered that the booking officers must advise an accused being booked into the Dade County Jail that:

> (1) He is entitled to have conditions of release set by a magistrate;
>
> (2) That the conditions of release will be set by the magistrate upon the consideration of the accused's past record of appearance, community and family ties, employment and the offense charged;
>
> (3) That he will be presented to the magistrate without unnecessary delay after these advices are given;
>
> (4) That he may waive his right to such a release hearing by posting the master bond bail in the amount set by the master bond lists. (However, the prosecuting official, upon good cause, may require that a defendant appear before a magistrate without unnecessary delay for the setting of pre-trial release conditions).
>
> Ackies v. Purdy, 322 F.Supp. at 42

The terms "conditions of release" was purposely used. We suggested it in an

attempt to avoid the monetary connotation which attaches to "bail". The retention of the master bond list for those who wanted to secure immediate release was inevitable. Some defendants can afford the luxury of avoiding a night in jail and it appeared a bit perverse to force them to remain incarcerated so they could have a hearing.

The Ackies decision gave the Sheriff one week to implement a system which would provide the required hearings. To the state's credit, the local judiciary agreed to daily bail hearings and within a week defendants who had previously waited as long as 60 days to appear before a judge found themselves presented to a magistrate within 24 hours of arrest for a determination of the conditions of their pretrial release. While we had hoped for even speedier presentation to a magistrate, the 24-hour figure was viewed as practical and the chances of an appellate court shortening the time were too slim to pursue. Neither side appealed.

Lawson Ackies was sitting on the stoop of a country mini-mart in Goulds watching a dice game when he was shown the order his case wrought. He was pleased.

DADE COUNTY, FLORIDA, 1971 - ROBERT WILLIE PUGH

As we watched the daily bond hearings unfold, two other issues became apparent. First, some people still had monetary conditions of release set and were unable to make them. Second, those people continued to remain incarcerated even though no determination of probable cause had been made. In other words, there was no way to know if those defendants had indeed committed a crime. The only force holding them was the police report.

Focusing on that, we began to file state habeas corpus petitions in selected cases alleging that the detention of a defendant absent any judicial determination of probable cause resulted in a deprivation of due process of law. Once again, the right to be heard before one is deprived of liberty was the crux of the argument. But now we were not talking about bail, but about whether indeed the defendant did the act resulting in his arrest. If one were released prior to trial the same issue of probable cause existed, but it was much more critical in the case of a person who, unable to meet pretrial release conditions, faced the loss of job, home, and family, because he was going to remain in jail until trial.

Each time a habeas corpus petition was filed alleging that the defendant was held without legal authority, the state attorney's office responded by filing an information. At that time a prosecutor's information was sufficient to show probable cause. The prosecutor was, in effect, a one-man grand jury. Via an information, he could hold someone until trial. Florida law was absolute on the issue.

The problem boiled down to a situation in which a person was deprived of his liberty in a non-adversarial setting by a prosecutor who was clearly not the "neutral and detached" party required by the Fourth Amendment or by the decisions detailing the pre-requisites for procedural due process.

Meeting in the offices of one of the lawyers representing the Dade County Bar Association, we began to map a new strategy. The procedural issues were substantial. Questions of federal-state relationships entered into play, commonly called "abstention" and "comity" in legal parlance. There was also a discussion about the scope of the suit. Should we focus only on the probable cause issue for persons

unable to make bail? Should we argue that everyone, released or not, should be entitled to an adversary probable cause hearing? Should we include an attack on the money bail system, raising equal protection arguments against a system which kept the poor in jail solely because they were poor?

We decided to pursue both the probable cause and the bail issues. We went to the Dade County Jail to interview potential plaintiffs. Several fitted into the categories of persons who were unable to make bail and were incarcerated awaiting trial solely because of their indigency and because an information had been filed, denying them any opportunity for an adversary hearing to determine probable cause. The man we chose as the lead plaintiff was Robert Willie Pugh, 26 years old, no family, who like Lawson Ackies, lived in South Dade County, near Goulds, Florida. For the defendants, we listed a host of officials, but the lead defendants were judges of the lower courts who were empowered to set bonds and to hold preliminary hearings if no informations were filed, and Richard Gerstein, the then State Attorney of Dade County, Florida. From the outset, the defendants realized that the suit, Pugh v. Rainwater, would test some fundamental problems which had been tolerated in the low visibility of the criminal justice process for years. But no one realized on March 22, 1971, when the complaint was filed, that the case would spawn seven written opinions in these courts, be argued twice in the Supreme Court, three times in the Fifth Circuit (once en banc before 16 judges) and still not be finally resolved in March, 1978.

Nor could anyone have predicted that the decisions in Pugh would have resulted in drastic changes in the Florida Rules of Criminal Procedure for adults and juveniles, with the Florida Supreme Court conceding that the rules for speedy presentation to a magistrate were adopted to conform to decisions in Pugh and Ackies. State Department of Health and Rehabilitative Services v. Golden, 350 So.2d 344, 347 (Fla. 1977). Another surprise was the decision, after years of patience, that monetary bail can only be used if all other nonfinancial methods of guaranteeing a person's appearance at trial are shown to be unworkable. Pugh v. Rainwater, 557 F.2d 1189 (5th Cir. 1977). However, that decision may be short-lived, since the original panel opinion prompted a rare en banc rehearing in January, 1978.

Detailing the history of the Pugh litigation has limited benefits. The important thing to understand is that the original Pugh v. Rainwater became two separate cases when the District Court declared unconstitutional the information system, but upheld the state's argument that its method of setting bail did not violate the equal protection clause. The state appealed that portion of the Court's order requiring determinations of probable cause by a neutral and detached magistrate. We appealed that portion of the decision upholding the defendant's bail practices.

The state's appeal led to the Supreme Court decision in Gerstein v. Pugh, 420 U.S. 103 (1975) that a prosecutorial information could not be the sole arbiter of probable cause. Probable cause had to be established by a neutral and detached magistrate by fair and reliable means within a relatively short time after arrest.

Pugh's appeal led to the Fifth Circuit panel decision at 557 F.2d 1189 which held that money bail could not be imposed on an indigent until the state shows that other conditions of release "which do not condition pretrial freedom on the ability to pay" are unavailing.

Both sides of the case are still pending. On remand from the Supreme Court order in Gerstein v. Pugh, the District Court forced the Dade County judicial authorities to improve the quality of their probable cause determinations by adhering

to strict requirements in the affidavits filed by police officers to support their arrests. A final order on the Dade County magistrate's system should be forthcoming shortly.

In its present posture, the system works this way: within 24 hours of arrest, a defendant in custody is brought before a magistrate for a first appearance hearing, during which the magistrate, after informing the defendant of his rights, determines probable cause from the complaint affidavit. If the affidavit does not show probable cause, the officer is required to appear in court within 72 hours to provide sworn testimony. If the affidavit does show probable cause, a non-adversary preliminary hearing is set within fifteen days at which the state must present the material witnesses to give sworn testimony before the magistrate. These methods can be severely criticized because of their tendency to render probable cause determinations to be rubber stamps of police action. However, the key to effectuating any court decision is to constantly monitor the persons responsible for effectuating it to insure their accountability. That is being done in Dade County by the public defender's office. In other places throughout the state, more needs to be done.

The continuing vitality of the bail side of Pugh depends upon the en banc Fifth Circuit decision. However, the effect of the panel decision was to prompt the Florida Constitutional Revision Commission to prepare an amendment to the Florida Constitution doing away with the concept of money bail for all arrestees unless no other methods will assure trial appearances. The panel decision at 557 F.2d has also led to several unpublished decisions striking down the theory that a person charged with a capital or life imprisonment offense is not entitled to release unless he shows that the proof of guilt is not evident, nor the presumption great, that he committed the crime. Whatever the outcome of the en banc review, new directions in the bail area were forged by the panel decision.

CONCLUSION

Robert Willie Pugh is still in prison in Bushnell, Florida. He has been recommended for work release and may soon be paroled. He has been kept aware of his role in the changes generated by Pugh v. Rainwater.

More must be done to insure that pretrial practices are fair, reliable and do not discriminate against the impecunious. In seven years Florida has undergone dramatic changes in seeking to create such a process. Much of the credit goes to public officials who, once faced with orders to change, attempted in good faith to implement those commands. The competing interests make any change a balancing process. Economic factors are relevant even though they should not determine whether or not one's constitutional rights are going to be protected. But little is accomplished without some sense of the realities of life, government and judicial authority.

Litigation is a potent tool for reform. But it is not the most important one. The crucial element is human energy harnessed to achieve equality in the administration of the low visibility processes of the criminal justice system. It is a worthwhile endeavor.

THE MULTI-PURPOSE COMPARISON GROUP: AN EFFECTIVE EVALUATION TOOL FOR DIVERSION

by

Peter G. Beeson
Eric A. McMasters

* * * * *

In the pretrial field or in other criminal justice areas a particular problem sometimes surfaces when the subject of evaluation is discussed. Administrators of programs often do not see the need for investing the amount of time and energy into an evaluation that the evaluator suggests might be necessary. One of the main reasons for this "loggerhead" is a language barrier. Administrators sometimes define evaluation according to the needs of their agency as they perceive them. Evaluators or researchers on the other hand often look more to numbers and methodology for their definition. As a result, two individuals with the same goal can become frustrated, resulting in a needed evaluation being aborted.

In this article the author discusses one method of evaluation that can be used by diversion agencies, but there is an interesting dichotomy presented; while principally authored by a program researcher, the program administrator comments on each of the major issues giving his view of the points being discussed (these comments are included in the text).

Mr. Peter G. Beeson is in charge of Research and Evaluation for the Lancaster County Pre-Trial Diversion Program in Lincoln, Nebraska. Prior to assuming this position in January, 1977, Mr. Beeson was an instructor at the University of Nebraska-Lincoln and Doane College in Crete, Nebraska. Mr. Beeson holds a M.A. from the University of Nebraska-Lincoln and will be awarded his Ph.D. in August of this year.

Mr. Eric McMasters has been the Director of the Lancaster County Pre-Trial Diversion Program since July, 1975. Mr. McMasters, who completed his undergraduate degree work at Central State University in Edmond, Oklahoma, was a member of the Diversion Standard and Goals Committee of the National Association of Pretrial Services Agencies in 1976 and 1977. Prior to assuming his present position, Mr. McMasters was Assistant Director of the Lincoln, Nebraska, Council on Alcoholism and Drugs.

As budgets become tighter and the notion of program accountability becomes more widespread, more and more diversion programs are being asked to justify their existence through some sort of program evaluation. 1/ For larger programs with adequate resources this becomes simply a matter of hiring a private agency, a university research group or an in-house evaluator. Many programs do not have the resources to buy this kind of technical expertise. As a result, numerous efforts to evaluate diversion have failed to employ research designs or have utilized inadequate forms of evaluation designs, leading to essentially useless information on some programs and very questionable information on many programs. Our contention is that even the smallest diversion programs can develop valid and adequate research designs, providing themselves and other interested parties with sound data for decision making. 2/ The purpose of this paper is to discuss one such design.

DESCRIPTION VS. EVALUATION

The evaluation reports of many diversion programs reflect no basic research design, giving only narrative and numerical descriptions of program activities. They report the number of males and females diverted, the average age, a breakdown of the offenses involved, how many made it through, how many got rearrested, etc. This information is indeed necessary but by itself is not adequate for program evaluation. It exists in isolation with no meaningful reference point or context for interpretation. The classic example of this is data on recidivism. What is meant by a rearrest rate of 10% for diversion clients? Without having some notion of what the rearrest rate would have been without diversion the figure of 10% doesn't really say much. Faced with this interpretative problem, some agencies have compared their data to those gathered by other pretrial agencies or other groups within the system (e.g., local probation or parole statistics, national figures, etc.). These comparisons are questionable at the least and at the most simply invalid. This is true for two reasons: (1) pretrial agencies differ greatly in their criteria, requirements, and the criminal justice system they serve; and (2) diversion programs are generally much more selective in their clients than other parts of the criminal justice system. In other words, the groups involved just aren't comparable.

A good evaluation design creates a context within which the descriptive data of the diversion program can be interpreted and assessed. The ideal is the classical experimental design which, in the case of diversion, would randomly assign potential clients to two groups, one group getting diversion and the other going through the traditional criminal justice system. Both groups would be followed and the data on the group that went through the traditional criminal justice system would be used to understand the data on the diversion group. Then a rearrest rate of 10% would have some real evaluative meaning when compared with the rearrest rate for the group who followed the traditional route through the system.

Unfortunately, the amount of resources required and the legal and ethical issues involved in the denial of diversion on a random basis to people otherwise eligible make this type of design not very feasible for most programs. 3/ Fortunately, there is a research design which is both practical and feasible and which can provide valid evaluation data for diversion. This is a quasi-experimental method known as the comparison group design. 4/

> FROM THE ADMINISTRATOR'S EXPERIENCE: A good evaluation design has many indirect benefits. For example, sound program information has been extremely useful in disarming program critics, of which there are some. If not critics, at least skeptics. I have yet to recall a single instance when a question raised by a local government official, steering committee member, or criminal justice policy maker was not being addressed by the program in its evaluation. When a program administrator knows what his or her program is actually doing—and what it is not —then policy makers gain confidence and rely more and more on the administrator. Over time, the credibility and integrity of the program is recognized. The battle then is half won. 5/

THE COMPARISON GROUP DESIGN

The comparison group design approximates the conditions of the experimental design by creating a group that is as equivalent as possible to the group under study (in this case diversion). This is done by selecting people who met the criteria for diversion, but who did not receive diversion either because it was not in existence when they were charged or because, for one reason or another, they did not take part in an existing program. A possible further step is to create a "matched" comparison group. This involves selecting individuals in terms of program criteria and also matching them with the individuals in the diversion group on selected criteria, e.g., age, sex, race, offense, prior record, etc. This matching approach creates a more valid comparison group than an "eligibility" approach. However, it involves the expenditure of a great deal more resources and requires a large universe of potential comparison group individuals, making it of limited feasibility for most diversion programs. 6/ Therefore, this paper will concentrate on a design which utilizes the elibigility approach which is valid and adquate for most research on diversion.

The first point in selecting individuals for a comparison group is to decide from what source to get them. 7/ Kirby 8/ has indicated four possible sources of individuals for a comparison group:

1. A group of defendants chosen from a time period before the program started who would have been eligible for diversion had the program been in existence.

2. A group of defendants eligible for diversion who were rejected by the judge and/or opted for a trial rather than diversion.

3. A group of defendants who would have been eligible for diversion but were not screened by the program because it was not operating at a particular time of day or week.

4. A group of defendants who would have been eligible for diversion but were not referred by their attorney or other sources because of lack of knowledge about program eligibility.

The first option is perhaps the best for smaller and newer diversion programs in that the data is already present and the last three options may not generate a large enough group for a solid comparison. 9/ The main problem with the first option is that criminal justice systems change and persons selected under the same eligibility criteria, but at different points in time, may be significantly different. With options two through four, the possibility exists that people who were eliminated from diversion consideration through self-selection, ignorance, judicial discretion, or happenstance may be significantly different from those getting diversion. In choosing a source, consider its accessibility, whether it can provide an adequate number of individuals, and its likelihood of divergence from the diversion group.

Having chosen a source for the comparison group, a time frame needs to be selected. There are two basic options: (1) A fixed period, such as the one year period just before the diversion program began operations for the first source, or the first two years of program operations for sources two through four; (2) A sampling of time periods within a fixed period, such as every other month during the first two years of program operation.

In conjunction with a decision on a time frame, one needs to decide whether to include all people from that source and time period or to take a sample of them. 10/ A problem may arise in getting an adequate number for the comparison group without overtaxing resources. Therefore it is necessary to determine just how many people meet the eligibility criteria within the parameters (source and time frame) selected. If this number is larger than desired, some further selection (sampling) is necessary. The most appropriate method is some form of random selection, e.g., decide on a sequence such as every third person (if you have twice as many as you want the sequence would be every other one) and start the selection at a random point. 11/

Once the group has been identified, a decision must be made on the method of data collection. A basic decision here is whether to make direct contact with the individuals involved through an in-person interview, a telephone interview or a mail questionnaire or to confine the approach to existing records. Utilizing direct contact is an extremely difficult and arduous task. The success rate of tracking people down once they've left the criminal justice system is very low, and even if contacted, the probability of getting cooperation and good data is not high. The big advantage of employing direct contact is that the information possibilities are much greater than those associated with archival sources. With direct contact, more personal information can be gathered. Utilizing archival data limits the information to data primarily on criminal justice involvement plus a few demographic characteristics. However, for most agencies direct contact is not possible due to the amount of time and resources it demands.

It is important to remember that the comparison group serves only as a basis for a good evaluation design. A well constructed comparison group without adequate data on the diversion group is just as useless as good program data with no comparative context. Although this may sound redundant, it is important to keep in mind that the comparison group and the diversion group are going to be compared. You need to be sure that the important variables are included in each group and that they are consistent in definition, operationalization, and measurement across groups and over time.

The careful selection of variables is important; pay close attention to your ability to measure them and their utility in answering evaluation questions. They should be defined as clearly and unambigiously as possible. For example, "prior juvenile record" could refer to all offenses under a certain age or to offenses handled by a separate juvenile court. Specific guidelines in the measurement of each variable must be set forth. Again, using "prior juvenile record", data collectors must have rules on how to record instances of a juvenile arrested but not charged, a juvenile arrested and tried as an adult, a juvenile arrested and arraigned in adult court but later transferred to juvenile court, a juvenile arrested and released subject to call, juveniles arrested for minor ordinance violations (e.g., undersize game fish or dog without leash), juveniles charged with status offenses, etc. Finally, these decisions must be adhered to over time and across research groups. If for one group prior juvenile record is measured as all offenses under the age of eighteen, while for the other group only those offenses remanded to a separate juvenile court are considered, the comparability of the two is destroyed.

THE SCOPE OF THE COMPARISON GROUP

Once a program has decided to employ a comparison group design one of the most important questions is: What information are they going to collect on the individuals in the comparison group? Unfortunately, there is a tendency to view the comparison group as simply a frame of reference for recidivism data. It is our contention that the comparison group can be used as a basis for other major aspects of program evaluation as well. These would include: cost effectiveness, system impact, refiling rates, the personnel cost of traditional processing, and program impact on the person.

Recidivism

Recidivism comparison allows one to make some assessment of the impact of diversion on further criminal involvement. Recidivism needs to be clearly defined and measured in the same way for both comparison and diversion groups. One needs to determine if arrests or convictions or both are going to be used and if one is going to differentiate according to seriousness of offense. 12/ Further, these recidivism figures must be examined over equivalent time periods. Time blocks (e.g., 6 or 12 months) need to be set out from the same point (e.g., arrest date) in both groups and extended through time as far as feasible (at least one year after a person has completed the program).

Cost Effectiveness

Most diversion programs need a solid estimate of the cost of diversion as compared to traditional criminal justice processing. In figuring the costs of traditional processing most programs have used rather gross and questionable approaches. 13/ The first and often neglected step in assessing cost is to determine the degree of involvement in traditional processing diversion clients would have had if diversion had not existed. Many programs have used estimates based on the entire criminal justice system (e.g., so many people get jail, so many probation, so many fined, average court time per case, etc.), ignoring the uniqueness of "diversion type" clients and cases. The comparison group design provides the opportunity for a much more accurate picture of traditional processing of "diversion type" cases. Utilizing court and prosecution records, the following information can be gathered for every member of the comparison group: number of appearances in court, trials, preliminary hearings, pre-sentence investigations, dispositions, sentences, special conditions of sentences, warrants issued and public defender usage. Given this data, one has a very good estimate of the amount of court time, prosecutor time, jail time, probation time and public defender time involved in the traditional processing of diversion type cases. One can use this information with cost estimates to provide a good assessment of what it would cost if diversion cases went through the traditional criminal justice system.

System Impact

The information mentioned above in conjunction with cost effectiveness also doubles as an excellent estimate of the impact of diversion on the criminal justice system. These figures allow assessment of the extent to which the system's resources are "freed up" by diversion programs. For example, a major appeal of the comparison group analysis lies in its utility to address such concerns as diversion programs having only minimal impact on jails and prisons, because only those people who would receive probation or fines are diverted. 14/

Refiling Rates

A criticism of diversion and a concern of many programs is that diversion could be used as a "dumping ground" by prosecutors for cases that would ordinarily have been dismissed. One way to assess this is to look at those cases which do not make it through the program and are remanded back for prosecution. The refiling rate refers to what happens to these cases, e. g., how many are dismissed, amended down, convicted, receive jail time, are fined, are not filed on, etc. Compiling similar information on the comparison group allows the program to determine whether the court action against their unsuccessful clients is reasonably close to court action under similar circumstances without diversion. This can also be used to see if the dispositions received by unfavorably terminated cases are more severe than if the cases had not participated in diversion.

Personal Impact of the Program

The first diversion programs were geared to impacting on an offender's employability and earning potential. Most programs continue to have similar interests, with emphasis on vocational counseling and educational upgrading. Programs often try to assess their impact on the person's employment, education, income, drug use, etc., by the use of a "before and after" design measuring these variables at intake into the program and upon termination. This is an important and useful approach, but it raises the question of whether reported changes would have occurred over time without diversion. One way to address this question is to obtain this sort of data on the comparison group (at comparable time points) and see if over equivalent time periods they make similar changes. However, most of the program impact type variables can only be obtained through some form of direct contact, whereas most of the previously discussed data is available in official records. 15/

The above sections provide only some of the potential information which could be involved in the scope of a comparison group. Even with the limitations of archival data many different types of information can be gathered and utilized to more effectively evaluate diversion programs. The scope of a comparison group design ultimately depends upon the needs and resources of a program in question. But, a word of caution; there is a natural tendency for managers and evaluators to include a lot of "it would be nice to know this or that". This results in information overload which is often difficult to interpret, expensive to collect, analyze and store, resented by the staff responsible for collecting it, and confusing to others. Therefore, when designing a management information system and evaluation design, limit it to the most basic information necessary.

> THE ADMINISTRATOR'S EXPERIENCE: There is a far greater probability of repercussions from reporting too much information than too little. Policymakers at all levels recoil at the sight of thick reports, extensive charts and graphs and complicated formulas.

GATHERING THE DATA

After deciding what information is to be collected on the comparison group, one needs to design an instrument for the collection of that data. 16/ A questionnaire or interview schedule is necessary for the direct contact approach and some form of data sheet for the archival method. 17/ Next, one must decide where to get each piece of information on the instrument. 18/ Once these data sources have been identified, contact should be made with persons in charge of the data and arrangements made to obtain the necessary information. Having gained access to data sources, one must check the manner in which the information was gathered and recorded. What at first seems to be a complete and accurate record may turn out to be a rather haphazard compilation, forcing one to look elsewhere for the

information. 19/

Obviously, evaluation is only as good as the people who are responsible for the data collection. Care should be taken in training personnel who will be collecting the data, making sure they understand why the information is needed and how it is to be used. There is nothing so disheartening as discovering half-way through a data collection effort that one or more of the data collectors has been tabulating certain items in novel ways.

FROM THE ADMINISTRATOR'S EXPERIENCE: Some programs have staff people whose primary responsibility is data collection. Even so, much, if not most, of the information gathered is done by the direct service staff. From a purely economic view, if evaluation is to be an on-going function of a diversion program, few programs are going to have the luxury of a separate evaluation staff. This brings up the problems of conflict between the goals of evaluation and that of direct service. There seems to be an inherent conflict here, making the administrator's role crucial. Management must actively support the evaluation effort and must seek and gain a commitment from the direct service staff in this regard. A climate must be created whereby the direct service staff can recognize the benefits of evaluation, rather than perceive it as a potential threat. On the other hand, a manager has to be aware of the administrative demands put on direct service staff. A good rule to keep in mind is to stress quality of data over quantity.

ANALYSIS OF THE DATA

When one has the data gathered and tabulated, the next step is to compare the two groups (comparison and diversion) on basic characteristics such as age, race, sex, offense, and prior record. Once it is established that the groups are reasonably comparable, one can move on, comparing other variables. Constructing percentage tables with comparisons between the two groups on each variable is probably the best way to get an impression of what's going on and to communicate the results to others. Statistical tests can be used to test the significance of differences between the groups in cases where there is concern that the differences are due to chance. 20/

PROBLEMS AND SUGGESTIONS

The first problem that usually comes up in regard to a comparison group design is the question: Do I have the resources to attempt it? The answer is YES. First of all, one need not attempt a full blown "matched sample—two hundred case —interview type" design. The well designed but limited comparison group is still

quite valid and valuable, providing much more meaningful evaluation than a straight descriptive approach. By limiting the size of the sample and scope of the data collection, and determining method of data collection (archival versus direct contact) an agency can come up with an adequate research design which can be achieved within their resources. Second, the comparison group does not have to be created over night. Once designed, it can be slowly accumulated over a long period of time, utilizing it as a filler task for those slower periods of agency operations. Third, technical advice is available through the Pretrial Services Resource Center and often through local colleges and universities 21/ or government agencies. 22/ Finally, one can always utilize volunteers to assist in the gathering and tabulating of the data. 23/

> FROM THE ADMINISTRATOR'S EXPERIENCE: While a solid evaluation design is an important asset in seeking funding and support on the national and state level, its utility in this regard at the local level is questionable. Most local policymakers do not read evaluation reports carefully and they only infrequently base funding decisions on what is in the reports. Quite frankly, at times, it seems that most efforts at evaluation are done mainly to satisfy the needs of the administrator for information on program effectiveness and answers to critics. However, efforts should be made to educate policymakers to the benefits of data-based decision making and hopefully the future will bring a more rational approach to program funding.

In developing a comparison group design, one can often run into the problem of not being able to utilize a data source that one was counting on; either because of being denied access to it, 24/ because it is incomplete, or because it is of questionable validity. The best response to this problem is to look for other sources where the data might be available. There is a great deal of duplication in most criminal justice record keeping and one can often find the same information in many different places (e.g., the prosecutor's office and the Clerk of the Court often keep essentially the same file on each case; information on probation orders and pre-sentence investigations can often be found in the court files as well as at the probation office).

In analyzing the data one might find that the comparison group does not match completely with the diversion group on certain variables. This certainly isn't cause to throw out the design, but nor must it be ignored. The first step is to see if you can ascertain the degree to which this mismatch will affect the comparison design. For example, suppose you have more property offenders and less drug offenders in your comparison group than in your diversion group. You can compare drug offenders and property offenders within each group to see if they are significantly different on the evaluation variables (e.g., recidivism). If there are no significant differences, these must be taken into account in any interpretation and every effort made to ascertain the type and magnitude of possible bias. In any event, all aspects of the design should be part of any report, including all information on the comparability of the two groups.

CONCLUSION

This paper has been a limited overview of prospects and possibilities within the framework of one type of evaluation design. We have focused on those aspects of the design we believe to be most appropriate and useful to those agencies which do not have the resources to contract for research. We have gone this route because we believe that even the smallest agency can do an effective evaluation design utilizing a comparison group approach. If more diversion programs incorporate adequate research designs in their evaluation efforts, they and all other programs will benefit.

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FOOTNOTES

1/ Program evaluation has long been stressed as sound program management and it is one of the national standards for Pretrial Diversion.

2/ For a good discussion of the reasons for research in diversion, see Michael P. Kirby, Suggested Research Practices in Release and Diversion, Washington, D. C.: Pretrial Services Resource Center, Forthcoming.

3/ For an example of the experimental design in evaluation research in diversion, see the discussion of the Vera experiment in Michael P. Kirby Findings 2: Recent Research Findings in Pretrial Diversion, Washington, D. C.: Pretrial Services Resource Center, 1978.

4/ For a more complete discussion of the variation in research design see Donald T. Campbell and Julian C. Stanley Experimental and Quasi-Experimental Designs for Research Chicago: Rand McNally, 1963.

5/ This paper attempts to incorporate the views of both evaluation and administration in the utilization of a comparison group design. We have adopted this framework to distinguish those comments relating strictly to administrative experience.

6/ For a good example of the comparison group design utilizing the matching approach see Donald Pryor PreTrial Diversion Program in Monroe County, N. Y.: An Evaluation Rochester, New York: Center for Governmental Research, 1977.

7/ Although we present this material in sequence, all aspects of the design must be considered in making any decisions about particular parts of the design.

8/ Michael P. Kirby Suggested Research Practices in Pretrial Diversion, Washington, D. C.: Pretrial Services Resource Center, Unpublished.

9/ There is no magic number in terms of comparison group size but less than 50 creates some questions about representativeness and may lead to problems later in the analysis.

10/ Obviously, this question must be addressed to some extent in selecting a source.

11/ Use of a table of random numbers is often helpful in this regard, see the Rand Corporation A Million Random Digits Glencoe, Ill: The Free Press, 1955.

12/ See the Urban Institute's Monitoring the Impact of Prison and Parole Washington, D. C., 1977, Chapter 3.

13/ For a discussion of the problems of figuring cost effectiveness see Michael P. Kirby and David Corum, "Cost Effectiveness Analysis: A Case Study," The Bellringer, III, November, 1977.

14/ Some programs have attempted to speak to this concern by pointing out the jail and prison sentences received by their unfavorable terminations. There are two substantial reasons why this is a questionable practice:

(1) Judges, aware of a person's unfavorable termination from diversion through pre-sentence investigations or other sources, often take this into account and impose a stiffer sentence than they would have otherwise. (2) Generally speaking, unfavorable terminations are not representative of diversion clients as a whole, as many of them are terminated for new offenses or were the least motivated participants.

15/ See prior discussion on method of data collection under "The Comparison Group Design".

16/ In designing the instrument for data collection thought should be given to the method (manual, sort punchcards, computer, etc.) which will be used to tabulate the results. We believe that all programs should seriously consider computerization in their management information system and evaluation efforts. The capabilities for data analysis are well justified and not as expensive as most people think. This is especially true with ever increasing pressure on funding sources. It is less expensive to establish a relatively simple on-going computerized data collection system than to pay the personnel costs for doing this work manually. Even if a program cannot implement computerization initially, it would be wise to design the data collection system with future computerization in mind.

17/ Since the direct contact approach is unlikely except for the larger and more established programs, we will not discuss it further.

18/ Common sources of data in this regard are the records of police, courts, prosecutors, probation, correction agencies, social service agencies, etc.

19/ Usually the best way to evaluate a data source is to talk directly with the people involved in the day to day gathering and recording of the information with which you are concerned.

20/ See Hubert M. Blalock, Jr. Social Statistics 2nd Edition New York: McGraw-Hill, 1972, Chapter 13.

21/ At universities check with departments of sociology, psychology, criminal justice, political science, etc. Also, one can investigate the possibilities of graduate students doing all or part of the programs evaluation design for partial fulfillment of their degree requirements.

22/ Government possibilities are local corrections departments, state crime commissions, Law Enforcement Assistance Administration, etc.

23/ Again local colleges and universities are good places to look for volunteers. If volunteers are used, careful selection and training should be employed to insure sound data.

24/ In terms of denial of access for reasons of confidentiality, one can investigate the possibility of getting the data in aggregate form—in other words, giving the agency or department a list of people in the comparison group and asking them to tell you how many were Xs and how many were Ys, how many received Z, how many got Q, etc.

PRETRIAL DIVERSION PROGRAM IN MONROE COUNTY, N.Y.: AN EVALUATION OF PROGRAM IMPACT AND COST EFFECTIVENESS

by

Donald E. Pryor
Pluma W. Kluess
Jeffrey O. Smith

* * * * *

A time for concern for any new criminal justice program is when grant funds are depleted and the local jurisdiction is asked to absorb the costs of the program. Already strained budgets, political influences, and other factors can weigh heavily against the program receiving the needed funds to continue. One of the most effective balancing tools available to the program is a methodologically sound evaluation that demonstrates the program is indeed effective in improving the local criminal justice system.

Too often diversion programs have not been able to provide this tool to the important decision makers. Many good programs have been discontinued because they were not able to clearly demonstrate their worth, either because no evaluation was prepared, or one was poorly done from a methodological point of view, thereby casting doubt on the findings and conclusion.

Conversely, a well prepared, conservative evaluation can often override the effects of political infighting and fiscal conservatism in the final decision making process.

The following article describes a methodology employed in an evaluation of the Monroe County Pretrial Diversion Program. Conservative in its expectations from the beginning, the evaluation answered the question of whether the program had a positive impact on the criminal justice system (it does) and whether the program could be accurately described as cost effective (it can).

The experiences and methodology described in this article should be considered by any diversion program that is planning an evaluation—the positive results cannot be overemphasized.

The authors of this article all worked on the evaluation of Monroe County and are employed by the Center for Governmental Research Inc., in Rochester, New York, Mr. Pryor and Mr. Smith as Senior Research Analysts and Ms. Kluess as a Research Analyst.

Donald E. Pryor was the Project Director of the Monroe County Evaluation. Mr. Pryor did his graduate work at Purdue University receiving his Masters Degree in 1968 and his Ph. D. in Industrial Psychology in 1974. Mr. Pryor has served as project director for many major research projects in both the public and private sectors since joining the staff of the Center for Governmental Research, Inc., in 1970.

Pluma W. Kluess has been with the center for four years. A graduate of Cornell University, Ms. Kluess worked at the University for two years following graduation as a Research Technician, co-authoring two research reports on poverty in New York State.

Since joining the Center staff in 1973, Jeffrey O. Smith has been involved in seven research projects that examined issues in Monroe County, including youth services, tax reform, governmental reorganization, drug abuse, and the instant pretrial diversion evaluation. Mr. Smith received his B.A. in Economics in 1970 and his M.B.A. in Finance from Ohio State University in 1972.

INTRODUCTION

Pretrial diversion or intervention programs have become increasingly popular nationally within the past ten years. 1/ This is despite the fact that systematic reviews of published research have raised serious questions about diversion programs and methodologies which have been employed to evaluate them.

Most published evaluations have reported positive program impact on participants and on the criminal justice system, but the validity of these assertions—and in fact, the validity of diversion programs as viable alternatives to the existing system—has been called into question in the past few years.

It is in this context that the evaluation of Monroe County's three-year old Pre-Trial Diversion Program becomes particularly significant. This evaluation recognized the reservations and criticisms raised concerning research designs of earlier evaluations of similar programs, and attempted to avoid or correct for limitations of those designs. Using a conservative evaluation strategy, the evaluation nonetheless resulted in positive impacts attributable to the program.

Description of Monroe County Program

The Monroe County Pre-Trial Diversion Program operates in upstate New York. Monroe County had a 1970 population of about 712,000, including the city of Rochester (1970 population of about 295,000).

The program began operation in late 1974. Until June 30, 1977, it was funded through a federal Law Enforcement Assistance Administration (LEAA) grant coordinated by the New York State Division of Criminal Justice Services. Beginning July 1, Monroe County assumed responsibility for funding the program, based on the results of this evaluation's cost effectiveness analysis. The program now operates under contract with Monroe County as part of the non-profit Monroe County Bar Association Pre-Trial Services Corporation, which also operates the Pre-Trial Release program. The Diversion staff includes a Director, three counselors, and a secretary. The program has averaged almost 300 official clients for each of the three years of its existence, with the numbers increasing each year.

The Diversion program is designed to provide an alternative to prosecution by offering a defendant an opportunity for counseling and other supportive services, provided both by program counseling staff and through referral to various community service agencies. Dismissal or reduction of charges and avoidance of court prosecution is possible if successful progress is made by the defendant on a contract agreed to by the defendant, District Attorney, defendant's attorney, and judge. The contract period is typically for three months, although an extension is occasionally granted by the court upon request.

The program's criteria for entry are flexible, and counselor discretion at intake is encouraged, but in general, those persons eligible for the program are defendants at least 16 years of age who have been formally charged with misdemeanors or selected non-violent felonies, and who are either first offenders (about 50%) or who have a relatively light prior record (although 37% in the study sample had been previously convicted on an adult charge). Both males and females are eligible. Defendants must be considered by staff to have need for services and to be motivated to work on specified problems, and must be considered likely to commit subsequent crimes in the absence of such services. They are accepted into the program only with the knowledge and consent of the defendant's attorney (who typically initially refers the defendant to the program), and after approval by the District Attorney and judge. Not eligible is anyone who is on probation or parole, who has charges pending in another court (although occasionally exceptions are made to this), who is an identifiable drug addict, or who is charged with either a violation, a violent crime, or one requiring a mandatory jail sentence upon conviction.

Literature Review: Key Research Findings

The evaluation literature on diversion was summarized in two oft-quoted and respected studies published by Mullen and Rovner-Pieczenik in 1974. 2/ The findings of those reports which are most applicable to the focus of this article are reviewed briefly below.

Low recidivism rates reported for many programs were attributed in part to program selection strategies. Specifically, it was charged that most programs select primarily minimum-risk defendants who have relatively little likelihood of recidivating even without program intervention, and provide them with various services that are by implication not necessary. 3/ Moreover, the reported recidivism rates were primarily limited to the period of program participation, with research problems limiting the ability to generalize these findings to the post-program period. 4/

Available data were inadequate to justify conclusions as to whether there were net costs or benefits to the local communities and criminal justice systems.5/ Mullen went further, indicating that since most diversion programs had relatively small caseloads and were relatively costly to operate, it was difficult to justify diversion on cost effectiveness criteria. 6/ The Governor's Commission on Crime Prevention and Control in Minnesota concurs, stating that it would be unlikely that diversion programs could be cost effective compared to traditional court processing, particularly if the programs were (as recommended) to take higher-risk clients with a greater need for services, provide only minimal supervision for those not in need of services, and protect the defendants' legal rights by providing for court supervision and access to defense counsel. The Commission concluded, "A workable pretrial program is not a viable management tool." 7/

In a more recent review of the diversion literature since 1974, Kirby 8/ concludes that subsequent research still leaves many of the same unanswered questions. He notes that many say "that the diversion concept has been invalidated", but he disagrees, stating, "Rather, it means that research does not exist to demonstrate whether or not diversion has an impact on clients." 9/ This is due to the continuing problems in designing sound research strategies, although he does note the existence of a few research efforts "using the proper methodology". 10/

Literature Review: Methodological Problems

The most pervasive and significant research problems noted in the reviews of diversion evaluations were related to sampling difficulties. Some studies included in their program samples only those who successfully completed the program, thereby artificially improving program statistics by not including the "program failures". In other studies, no control group or comparison group was used, and in many others, those used were inappropriate or flawed for various reasons. These difficulties with sampling in turn called into question many of the findings of positive program impact and impressive cost-benefit results. 11/

Many of the evaluations have been attacked because they did not use an experimental design, with random assignment of people to the program and to a control group. This is generally considered the ideal basis for evaluating program impact. However, rarely is there the opportunity to conduct such an evaluation, because of a variety of practical constraints. Even in some cases where the design has been attempted, there have been problems suggesting that it is not by itself a panacea for curing all research problems. 12/

In the absence of a controlled experiment, it is generally agreed that a quasi-experimental design is the best approach, with a comparison group selected on the basis of characteristics similar to those in the program. The difficulty with such samples is that they are usually based on "paper matches" and therefore cannot be sufficiently matched on more intangible variables such as motivation. Also, in many cases even the "paper matching" has been done without sufficient attention to determining equivalence of samples on key characteristics. Nonetheless, there does appear to be increasing recognition that carefully selected, equivalent comparison groups can be developed and used as part of well-executed quasi-experimental designs to substitute for the controlled experimental design in providing rigorous research methods to assess diversion impact. 13/ As one reviewer has noted, "Given equal care in design and implementation, there is no reason why the quasi-experiment cannot perform significant tasks in correctional evaluation, carrying out many assignments now thought possible only by use of the controlled experiment." 14/

METHODOLOGY

The evaluation was designed to determine the impact and cost effectiveness of the Monroe County Pre-Trial Diversion program. Primary emphasis was placed on measuring (1) program impact on dispositions and overall criminal justice system processing (including sentences) associated with the charges leading to entry into the program, and (2) impact on recidivism rates and associated processing. Dollar figures were ultimately assigned to the various events and processes associated with the impacts, thereby leading to conclusions about the cost effectiveness of the program. The basis for assessing program impact and cost effectiveness was a comparison between samples of program participants and matched comparison samples of persons not exposed to the program.

In actuality, there were two program samples: (1) official clients, officially admitted to the program; (2) defendants not officially admitted to the program because of apparent lack of need for services, but who were interviewed by Diversion staff and for whom recommendations were made to the court. For each of

these two program samples, a matched comparison sample was developed. These four groups, with sample sizes, are as follows:

- Clients receiving services (official clients)
  - Program sample (N=137)
  - Comparison sample (N=137)

- Clients not receiving services
  - Program sample (N=35)
  - Comparison sample (N=32)

These samples, and the methods used to assess impact and cost effectiveness, are described in more detail below.

Selection and Composition of Program Samples

As noted above, two samples of program clients were included in the research. (1) The first and largest (N=137) included official program clients: those who were officially accepted into the program and for whom a contract to undertake specific activities was jointly approved by the client, his or her attorney, the District Attorney, and the judge on whose docket the case appeared. (2) The second sample (N=35) included cases for whom the program made a favorable recommendation to the District Attorney and court, but who were deemed by program staff to be Not in Need of Services (NNS), and who therefore never became official clients with contracts.

Each of these samples includes all persons in the two respective categories who were initially interviewed by program staff in alternate months between January, 1975 (when program intake officially began) and the end of March, 1976. Thus, every person designated as either an official client or NNS during those eight alternate months was included in the samples. The strategy of selecting samples over a 15-month intake period was adopted to assure that sample composition would accurately reflect any changes in patterns and sources of referrals and in resulting client composition during the start-up year of the program. March, 1976 was set as the cutoff point for inclusion in the program samples, to allow a minimum of a one-year follow-up period for measuring recidivism and related processing.

As noted earlier, the evaluations of several pretrial diversion programs cited in the literature have used the approach of including only successful terminations in their participant samples, thereby biasing results in favor of the program. Our official client sample, however, included all program participants entering in the months specified, regardless of their ultimate performance in the program.

Selection and Composition of Comparison Samples

In order to determine whether the program had any impact on program participants or on the criminal justice system's processing of the participants, it was necessary to select comparison groups of non-participants which were as equivalent as possible on relevant variables to the participant samples.

Comparability of Samples

For the impact and cost effectiveness analyses to be meaningful, it was essential that the matched samples used in the comparisons exhibit a high degree of comparability to their respective program samples (Official and NNS). Otherwise, any differences found could have been attributable to factors other than program effects. Thus, the information presented in Table 1 is quite important in that it indicates almost exact comparability or equivalence between the respective program and comparison samples on the six primary matching variables.17/ Chi Square statistical significance tests indicated no significant differences between either the Official program and comparison samples or between the NNS program and comparison samples on any of those variables. 18/

This comparability is particularly important because of admitted problems with retrospective matching of "paper eligibles" based on characteristics appearing to be comparable on paper. Reviewers of other evaluations have raised the legitimate point that this does not account for the "non-paper" intangibles, such as motivation and need for services, which are determined in part at least in an interview setting. Nor does it take into account the discretion the District Attorney's office, judge, and Diversion staff have in whether or not to accept cases into the program. There is no good response to that concern. It is a problem which clearly negatively affects the "equivalence" of the comparison and participant samples. On the other hand, by having matched on an individual one-to-one basis, and on more variables than did the earlier studies which used this "paper-matching" approach, the authors conclude that the best possible "paper-matching" job has been done, thereby neutralizing much of this problem.

Further support for the judgment that the samples are virtually equivalent, even on more intangible variables not directly measured, comes from an analysis of certain behavioral problems of people in the respective samples. Names in each of our samples were subsequently checked against the county's Psychiatric Register 19/ to determine if comparable proportions of various problems (e.g., emotional, personality, or mental disturbances) existed in each sample. As with the matching variables, almost exactly comparable proportions resulted, with about 30% of both the Official program and comparison samples having had various disturbances recorded prior to the time of the respective arrests which brought the individuals into the samples. Not surprisingly, there were fewer people listed in the Register for the NNS samples (about 15% in each of the program and comparison samples). Furthermore, the patterns of specific diagnoses within the comparable samples were also quite similar.

Such similarity of behavioral problems suggests that decisions made in terms of acceptance into the program by District Attorney, judges, and Diversion staff would have been similar for the comparison samples to those made for the actual program samples, had the comparison samples had the benefit of an existing Diversion program. This cannot, of course, be proven, but it does provide further evidence in favor of the overall similarity of the samples, and thereby further increases the level of confidence which can be placed in the conclusions drawn from the impact and cost effectiveness analyses.

Assessment of Program Impact

For each person in each of the four samples, the disposition (whether or not convicted) on the original charge was recorded. Arrest and conviction information was also collected on each crime for which any person in the participant or comparison samples was arrested within the year following the charge which led to his/her inclusion in the Diversion program or the comparison sample. In addition, the nature of the sentence was determined for all convictions, as was the amount of time actually served for jail or probation sentences. These data served as the primary measures of program impact on clients and the criminal justice system, and were also instrumental in determining the costs and benefits attributable to the program.

Initially, it was intended that an analysis of change in each individual's economic status would be undertaken, including changes in employment status, in earnings and skill levels, and in public assistance (welfare) status. However, it proved impossible to obtain reliable, complete information on employment and earnings, so the economic analysis focused on changes in public assistance status. Using the one-year periods immediately preceding and immediately following the original arrest for each person, changes from the first to the second year in the numbers of persons on public assistance rolls, and changes in the total public assistance expenditures associated with those years were compared for the respective samples.

Attempts were also made to measure program impact in bringing about progress in various types of social or behavioral problems that program clients had at entrance to the program. Some tentative initial analyses of impact in these areas were begun by the authors, but since there was no way of determining progress on such problems for the comparison samples, no real conclusions were possible.

Assessment of Cost Effectiveness

As noted earlier, the cost effectiveness analysis was designed in broad terms to determine whether diversion of cases to the diversion program resulted in (1) reduced costs to the criminal justice system as a direct result of diverting cases from the normal court processing for a particular arrest, (2) reduced future costs as a result of reduced recidivism rates, and (3) reduced public assistance expenditures as a result of helping remove people from the public assistance rolls. It was hypothesized that each of these reductions would in fact occur as a result of the program.

Instead of including in the cost effectiveness analysis those fixed criminal justice system personnel, facility, equipment or overhead costs which are not subject to actual savings or reallocation in the short run (fixed costs which have often been included in other cost/benefit studies throughout the country), our approach was to include only those marginal costs which could be directly saved or potentially reallocated in the short run. An average cost approach (including fixed costs) for estimating costs of arrests, trials, probation, etc., would not have reflected the potential change in demand for resources in the criminal justice system which could be generated by changes in the number of crimes, trials, jail sentences, etc.

Table 1

DEMOGRAPHIC CHARACTERISTICS OF SAMPLE GROUPS
(% OF TOTAL SAMPLE)

Characteristics	Official Samples		NNS Samples	
	Program (N=137)	Comparison (N=137)	Program (N=35)	Comparison (N-32)
SEX:				
Male	75%	75%	86%	84%
Female	25	25	14	16
RACE:				
White	68	68	77	78
Black	30	30	20	22
Hispanic	2	2	3	0
Other	1	1	0	0
AGE:				
16	13	13	14	9
17	15	16	6	22
[illegible]	14	13	29	16
[illegible]-20	14	18	17	16
21-22	15	14	17	6
23-29	20	19	3	19
30-39	6	6	14	6
40+	4	2	0	6
PREVIOUS ADULT RECORD:				
None	50	45	71	56
Misd. arrest, no conviction	10	10	11	19
Felony arrest, no conviction	3	4	3	3
Misd. + Fel. arrest, no conviction	0	2	0	3
Misd. arrest with conviction	18	18	11	13

Felony arrest with conviction	1	5	0	3
Misd. + Felony arrest with conviction	18	15	3	3
CHARGE/OFFENSE:				
Personal Misdemeanor	5	6	12	6
Property Misdemeanor-Petit Larceny Only	29	29	31	35
Property Misdemeanor-Other	6	7	11	9
Bad Checks-Misdemeanor	1	1	0	0
Criminal Mischief-Misdemeanor	3	4	0	0
Crim. Poss. Dangerous Weapon-Misdemeanor	1	1	0	0
Prostitution-Misdemeanor	1	1	0	0
Other Sex-Related Misdemeanor	4	4	3	3
Traffic-Related Misdemeanor	2	2	3	3
Property & Personal Misdemeanor	3	2	0	0
Forgery-Felony	6	4	0	0
Criminal Mischief-Felony	1	1	0	0
Burglary-Felony	2	1	3	3
Personal Felony-Robbery	1	0	0	0
Property Felony	29	30	9	9
Drug-Related Felony	3	2	6	6
Drug-Misdemeanor & Felony	4	5	23	25
COURT:				
City	29	29	26	23
Town	71	71	74	77

NOTE: Totals may not add to 100% due to rounding.

Marginal cost estimates used were generally based on the cost of labor; 20/ however, included were only those labor costs directly associated with processing cases—costs which presumably could have been either eliminated or reallocated had a particular case not come through the system. Thus, supervisory costs, for example, were not included on the assumption that these were fixed overhead costs that would be affected very little, if at all, by the presence or absence of a particular case coming through the system. In short, in using manpower costs it was assumed that at least two changes could be made if there were a future decrease in the demand for judicial services: either fewer personnel would be needed or the quality of services could be altered. In either case there would be a clear savings—in that the community could reallocate these human resources to satisfy other existing needs.

Only direct costs to the jurisdictions involved—that is, internal costs absorbed only by the public sector, rather than private costs—were included, thereby excluding related societal costs or benefits associated with reduction in crime. That is, such things as the value of stolen property, costs of private expenditures to prevent crime or call attention to it if it occurs, the psychological costs to the individuals involved and the community at large, etc., all are difficult to quantify, and their absence from the cost effectiveness analysis tends to understate the program's benefits somewhat.

Potential benefits derived from the existence of the Diversion program were considered as being attributable either to direct diversion benefits or to longer-term recidivism benefits.

The diversion benefit is the immediate return to the community resulting from diverting defendants from the traditional judicial and correctional system into the Diversion program, to the extent that their cases are dismissed by the court after program participation. The value of this diversion from the criminal justice system depends on the number of cases dismissed that otherwise would not have been, the cost of judicial proceedings, the cost of sentences (including actual time spent in jail or on probation), and the costs of public assistance associated with those in the program. The recidivism benefit depends on the number of rearrests prevented. In addition to the costs of judicial proceedings and sentences, marginal costs of police processing, lower court intake, and presentence custody are included in the recidivism benefit estimates. Costs of these items are included for rearrests but not in the diversion benefit analysis because these events have already occurred by the time the Diversion program intervenes in a case, and therefore could not be affected by the program. Obviously such costs could be prevented in the future, however, by preventing subsequent arrests.

For each event or process included in the calculation of costs or benefits, the marginal cost was multiplied by the difference in respective probabilities between the program and comparison samples, and the resulting figure was projected to a full annual client load (N=295 in 1976). All diversion and recidivism benefits were summed (including any "negative benefits", or costs, where the participant sample yielded higher costs than the comparison sample). Annual costs of the Diversion program and marginal cost estimates of services rendered by the Public Defender and District Attorney offices (in referrals to the program) 22/ were determined and added to "negative benefits" to yield a total cost figure, and this was matched against the benefits to determine the net cost or benefit to the community associated with the program's existence.

Conservative Research Assumptions

It should be noted in the context of the overall evaluation approach that the results are judged by the authors to be on the conservative side. The net effect of the methodology used and of decisions made throughout the study is to have made it difficult for the Diversion program to appear cost effective. But this approach was agreed upon early in the evaluation as the most honest, rigorous approach possible and the approach that would ultimately be the most valuable to persons deciding the future of the program. 23/ By focusing exclusively on the "real" benefits of the program and its total impact—and not looking at extraneous cost savings or at too restricted a group of "favorable"clients—we indeed made it harder for the program to appear cost effective. But our approach assured that if the program did survive this rigorous, conservative evaluation, there should be no question that it would have proved its case for continuation beyond any reasonable doubt.

Moreover, because the primary data analyses, of necessity, were based on data from the early stages of the program (to provide adequate time for post-program follow-up), the impact and cost effectiveness measures were based on clients who entered the program prior to its"stabilization" and during the time when differing procedures were being "experimented" with. Available evidence suggests that this fact led to an additional conservative, underestimated statement of the program's impact and cost effectiveness.

RESULTS

This chapter concentrates primarily on the differences between the Official program and comparison samples. The NNS sample data will be noted as appropriate, but the real focus of the analyses is on the two Official samples, since those allow the best assessment of what happens to matched equivalent groups, one of which experienced the full range of program services, the other of which did not.

Diversion Impact

As shown below in Table 2, the program had a significant impact on its client's ultimate conviction rates on the original charges (those that led to inclusion of a person in the program or in the comparison sample).

Almost 2/3 (64%) of the comparison sample were convicted of charges almost identical to those for which only 21% of the program sample were convicted. Of the 80% of the program sample who successfully terminated from the program, only 7% were convicted on the original charges. Of the remaining 20% who terminated unsuccessfully, 70% were found or pled guilty. This conviction rate was essentially the same as the 64% convicted in the comparison group not exposed to the program, thus suggesting that there is no apparent prejudicial "double jeopardy" negative treatment given by the courts to unsuccessful terminees from the program.

Table 2

CONVICTIONS ON ORIGINAL CHARGES

Sample	% Convicted
Official Clients (Receiving Services)	
Program Sample (N=137)	21%
Comparison Sample (N=137)	64%
NNS (Not in Need of Services)	
Program Sample (N=35)	54%
Comparison Sample (N=32)	59%

On the other hand, as seen in the table, there were no significant differences in numbers of convictions between the two NNS samples. Thus, it would appear that the implication of a favorable recommendation from the program to the courts, which is supposed to be associated with NNS cases, does not in fact carry any particular weight in court, since 54% of the NNS cases wound up being convicted.

Public Assistance Impact

The Diversion program had a reverse impact on the public assistance caseload. Despite the fact that increases in employment did occur for some while in the program, there also was an increase in public assistance caseloads among the program sample. As shown below in Table 3, in the year prior to the original arrest, 19 cases (14% of the Official client sample) had been on public assistance. In the year following the arrest, this increased to 26 cases (19%), a 37% increase in number of cases. The total assistance received increased 30% to $58,425 in the follow-up year. In the Official comparison sample, on the other hand, the number of cases declined over the two years (from 15 to 13, a 13% reduction), and the amount of total assistance increased only $1,686 to $26,826 (a 7% increase).

There are several possible explanations for this increase in public assistance expenditures. In part, the increase is related to the difficult economic times in which the program has operated and the uncharacteristic (for the Rochester area) high levels of unemployment which have severely limited the job placement opportunities for the program, while simultaneously, as costs rose, creating the need for more public assistance for many. Also, the comparison sample had a higher percentage of defendants who served time in jail during the second year (20 more persons than in the program sample served jail sentences in the second year). Finally, it is important to note that the program deliberately helped place some eligible clients on public assistance, a legitimate program function which by definition increases public costs for those clients.

Table 3

IMPACT OF DIVERSION ON PUBLIC ASSISTANCE

	Comparison Sample		Program Sample	
	Year Prior To Arrest	Year Follow. Arrest	Year Prior To Arrest	Year Follow. Arrest
Cases Receiving Basic Assistance:				
#	15	13	19	26
% of Sample	10.9%	9.5%	13.8%	18.8%
Total Assistance Received:	$25,140	$26,826	$45,085	$58,425
Average Received Per Case:	$ 1,676	$ 2,063	$ 2,373	$ 2,247

Recidivism Impact

Table 4 below indicates the impact the program has had on recidivism rates:

Table 4

RECIDIVISM RATES: SUBSEQUENT ARRESTS AND CONVICTIONS WITHIN ONE YEAR

Sample	% Rearrested	% Convicted on Rearrests
Official Clients (Receiving Services)		
Program Sample (N=137)	24%	12%
Comparison Sample (N=137)	37%	22%
NNS (Not in Need of Services)		
Program Sample (N=35)	9%	3%
Comparison Sample (N=32)	19%	6%

The figures in the table indicate that the program has led to a 35% reduction in the one-year rearrest rate for official clients from 37% to 24%), and a 45% reduction in the conviction rate on those arrests (from 22% to 12%).

Not surprisingly, those persons who had been successfully terminated from the program had a much better rearrest and subsequent conviction record than did those unsuccessfully terminated. Of those successfully terminated, 19% were rearrested and 8% were convicted on those arrests; 44% of the unsuccessfully terminated were rearrested and 30% were convicted. In fact, those who had been unsuccessfully terminated had proportionately more rearrests and convictions than the Official comparison sample that had no contact with the program. This is partially

explained by the fact that in many cases, a rearrest itself is sufficient reason for unfavorably terminating a client (with the decision left largely to the discretion of program staff and D.A.'s office, depending on the individual circumstances of the person and the rearrest).

Finally, as the table indicates, there were slight but consistent differences in rearrest and conviction rates between the NNS samples, in favor of the program sample. Although these differences and the number of NNS cases were too small to have a major impact on the program's cost effectiveness, the differences did contribute slightly to the benefit side of the program's cost/benefit ledger.

It was considered important to note when the rearrests occurred during the one-year follow-up period, in order to assess the longevity of any recidivism benefits. the number of rearrests in each three-month period during the follow-up year was recorded for each sample (several persons were rearrested more than once during the year and each subsequent arrest was recorded). The results for the Official samples are shown in Table 5 below.

Table 5

NUMBER OF REARRESTS (AND % OF SAMPLES) BY QUARTER

3-Month Interval	Program (N=137)	Comparison (N=137)
1st Quarter	7 (5.1%)	26 (19.0%)
2nd Quarter	19 (13.9%)	19 (13.9%)
3rd Quarter	15 (10.9%)	21 (15.3%)
4th Quarter	8 (5.8%)	19 (13.9%)

Not suprisingly, the biggest difference in rearrest rates between the program and comparison samples occurred within the first three months (when the program presumably has the greatest amount of control or impact on the lives of the participants). During that time, 5% of the program sample was rearrested, and 19% of the comparison sample. But, even though the differences in rates were less through the remaining nine months of the follow-up year, the comparison sample continued to have more rearrests throughout the year (e.g., 14% vs. 6% in the last three months), which suggests that the program's impact on recidivism does indeed extend well beyond the life of the program (most program clients are terminated within five months of the arrest date). In fact, the rearrest rate difference increased in the last three months over the preceding six months.

Sentencing Impact

Table 6 indicates the time spent in serving jail and probation sentences. These represent the terms actually served, rather than the sentenced time. Pre-sentence custody is not included in the table. 24/ The table isolates time served on the original charge from that spent for convictions on any rearrests. Clearly the biggest program impact in terms of reduced time was associated with the original charge.

Table 6

JAIL AND PROBATION SENTENCES ACTUALLY SERVED
(AND NUMBER OF PEOPLE SERVING)

Sample	Jail Sentences Served (Days)			Probation Sentences Served (Weeks)		
	Original Charge	Rearrests	Total	Original Charge	Rearrests	Total
Official Clients (Receiving Services)						
Program Sample (N=137)	274 (2)	721 (5)	995 (6)*	709 (9)	286 (3)	995 (11)*
Comparison Sample (N-137)	2,412 (18)	1,492 (10)	3,904 (26)*	1,869 (23)	836 (8)	2,705 (31)
NNS (Not in Need of Services)						
Program Sample (N=35)	-- (0)	-- (0)	-- (0)	92 (2)	-- (0)	92 (2)
Comparison Sample (N=32)	-- (0)	-- (0)	-- (0)	373 (5)	80 (1)	453 (6)

*Total number of people is less than the sum of original charge plus rearrest because some defendants served time for both original charge and rearrest

Program Impact by Personal Characteristics

Some observations are offered here which summarize by personal characteristics the impact of the program across several criteria: program termination, convictions on original charge, rearrest and convictions, and sentence time. The program appears to have had its most significant overall impact on those arraigned in Rochester City Court, particularly males. It has had relatively impact on female clients, perhaps in part because of the absence of female counselors in the program (except for the Director, who takes a few cases). The program has been successful with both whites and blacks, though less so with blacks in town courts. It has been effective with young and old alike, but particularly with those under 20 (and especially those under 20 arraigned in City Court). It has been most effective with those with no previous arrests in preventing future arrests and in reducing probation time, and most effective in reducing jail time for those with previous convictions. It has also had its greatest impact in those cases originally charged with felonies, despite the fact that the majority of its clients were charged with misdemeanors. In terms of residence, the program's greatest impact has been on city, rather than town residents.

Those employed at program entry and at the end of their stay in the program were more likely than those unemployed to terminate successfully and without a conviction on the original charge. Those employed at entry were less likely to be rearrested or convicted on rearrests than were those not employed. Employment status at the end of the program was somewhat less related to rearrest likelihood, however, as even the increased numbers of persons in full- or part-time employment had higher proportions of rearrests than was the case for full- or part-time employed at entry to the program. This would seem to suggest that the limited employment services now available through the program have relatively little long-term recidivism impact in this type of economy. Nonetheless, those employed full-time at the end of the program did have significantly fewer convictions on those rearrests than did those with no employment or part-time work, perhaps suggesting that the ultimate disposition is at least somewhat affected by employment status.

Cost Effectiveness of Program

The results of the cost effectiveness analysis show the Pre-Trial Diversion Program to have a benefit-to-cost ratio of 1.3 to 1, based on one year of diversion and one year of recidivism benefits. 25/ Thus, the ratio indicates that the program has been an efficient use of community resources.

Most of the impact data upon which the cost effectiveness analyses were based have already been presented. The major portion of the program benefits was attributable to savings from reduced probation and jail sentences, reduced pre-sentence jail custody, and reductions in the number of pre-sentence investigations needed (from 65 to 25 in the Official samples). The resulting savings equalled the approximate costs of salaries and benefits for two full-time probation officers, and the jail benefits were large enough to total three jail guards who would not have to be hired—or the equivalent of three person-years savings in guards serving on overtime.

Other significant cost savings resulted from reductions in the number of trials and grand jury presentments. The number of trials was reduced from seven

in the comparison sample to one for the program participants. The comparison sample had 31 cases sent to the grand jury, 24 of which resulted in indictments; for the program sample the corresponding numbers were 22 and 15.

Other than the administrative costs of actually running the Diversion program ($92,041 in 1976), the main costs or "negative benefits" against the program were (1) the marginal costs of the Public Defender, D.A., and courts related to time spent in referring a person to the program and other activities related to intake, and (2) the public assistance costs. Even with a correction to adjust for increases in total welfare caseloads during the period of program operation, the increases in numbers on welfare and in the total amount of assistance received were substantial enough for the program sample to represent a significant cost against the program, as indicated earlier. Some have suggested that this item should not be held against the program because of the reasons outlined in the impact section above, but the authors believe that this cost must be included if all true costs and benefits to the community are to be assessed.

Our basic cost/benefit approach was conservative in that it only included first-year recidivism benefits. Rearrest information could only be obtained for a one-year period following program intake because of the timing of the evaluation, but with the continuing differences in recidivism rates between the program and comparison samples throughout the year, it is possible to realistically estimate additional savings attributable to further reduction of arrests in a second year for the same group of clients. Conservative projections made as part of the evaluation indicated that including a second year of recidivism benefits for the same clients would increase the benefit-to-cost ratio to 1.6. 26/

Summary

The evaluation indicates that the Monroe County Pre-Trial Diversion Program has had significant impact in the following areas:

- reduction in convictions on original charges;
- reduction in numbers of people rearrested and in total number of subsequent arrests;
- reduction in subsequent convictions; and
- reduction in jail and probation time served.

The program has been shown to be cost effective. Given the extremely conservative approach used in the evaluation, one which stacked the odds against the program, this conclusion strongly supports the continuation of the program in the future. Moreover, the fact that recidivism benefits held up and even improved toward the end of a year suggests the potential for longer-range program benefits.

CONTINUED

1 OF 2

CONCLUSIONS

This article began with a review of some of the major criticisms which have been leveled at pretrial diversion programs and their evaluations. This concluding chapter assesses the Monroe County Pre-Trial Diversion program and this evaluation in the context of those criticisms.

Level of Client Risk

The charge has been that most diversion programs have traditionally selected mainly low-risk defendants having little likelihood of recidivating even in the absence of program intervention, and have provided them with unnecessary services.

The Monroe County program stresses that it is looking for the individual who would otherwise have been prosecuted, with a high probability of being convicted; and it stresses that it is aimed at individuals who have some problems which, if not resolved, are likely to lead to further involvement in the criminal justice system. How well has it met those objectives?

From examining the comparison sample data, it is clear that not only would the program participants have been prosecuted in the absence of Diversion, but they would also have had a high probability of conviction on the charge (64% of the comparison sample were convicted).

The program is quite flexible in its use of its entrance criteria and appears less exclusionary than many other diversion programs reviewed during our evaluation, especially in admitting those with prior records. The program has granted the counselors discretion in waiving certain criteria of ineligibility if upon their assessment they feel that the defendant needs and would benefit from the program.

Accordingly, data from the evaluation indicate clearly that the program does in fact accept "higher-risk" defendants with more serious criminal records than even some major program referral sources in the county are aware of. Despite the tendency of many diversion programs to be primarily first-offender oriented, fully half of this program's clients in the Official study sample were not first offenders. Moreover, 37% had previously been convicted, 7% at least twice within the preceding five years. Almost 1/4, 23%, had been arrested at least twice within that five year period; 19% had previously been arrested on a felony charge (2% with two or more such charges), and 3% (four cases) had been convicted of felony-level charges within the previous five years.

The NNS classification was initially intended to select out those who did not need to be involved further, either in the program or in court prosecution, and a determination of NNS was to be considered a favorable recommendation by the program to the D.A. and court. 27/ Rather than take on those who didn't need any services or who would be unlikely to be rearrested even without any program, Diversion took the position at the beginning that it would not accept these low-risk persons. The NNS classification, supported by a letter explaining the designation to the D.A., was devised as a special mechanism to safeguard against the tendency to accept them.

Program data support the claim that Diversion's clientele have indeed been a relatively high-risk population:

Sample	% Rearrested
Matched official comparison sample	37
Diversion NNS sample	9

The matched or comparison sample—whose members were selected by matching against the Official program sample on six key variables, and who presumably therefore reflect what would have happened to the Diversion sample without the program—had a rearrest rate of 37% in the year following the matched arrest. Those persons were rearrested an average of 1.7 times each in that year. On the other hand, the Diversion NNS group, who were referred to but rejected by the program because they were identified as not needing program services and as unlikely to be rearrested, had a rearrest rate of only 9%.

Conclusion: Taken together these figures support the contention that Diversion has received and retained higher-risk defendants and, to the extent that some lower-risk referrals have been made, has been willing not to "pad" the program statistics by accepting them as official clients.

Artificially-Improved Recidivism Rates

The charge has been that many of the low recidivism rates reported in the literature have been primarily limited to the period of program participation. Furthermore, some reported evaluations included in their program samples only those who successfully completed the program.

In this evaluation, all program participants from the sample period, whether successfully terminated or not, were included in the program sample. Earlier in this article, differential rates for successful and unsuccessful termineos were noted for several criteria, clearly indicating the artificial improvement in program statistics which would have resulted had we examined only the successfully terminated clients.

Recidivism rates reported in this evaluation were clearly not limited to the period of program participation. The program sample's superiority over the comparison group was at its greatest during the first three months after the original charge, when the program would be expected to have its greatest impact on its clients. However, that superiority, though reduced, was maintained throughout the one-year follow-up period, and in fact increased in the final three-month quarter. The impact of the program thus appears to last well beyond the point of program participation.

Conclusion: Reduced recidivism rates found in the evaluation pertained to the entire Diversion sample and held up over a post-program period.

Need for Rigorous Research Design

The charge has been that there have been very few carefully-designed, well-executed, rigorous evaluations of Diversion programs. Too often, comparison groups have been selected without sufficient attention to assuring equivalence to the program samples. In addition, cost effectiveness analyses have not generally been conducted from the framework of determining only real or reallocable costs or benefits to the jurisdictions involved.

In this evaluation, we have conducted what we believe to be the most painstaking, meticulous matching strategy possible to assure sample equivalence, given the impossibility of using a randomly-assigned control group. Given a retrospective matching procedure, there are inherent problems which cannot be completely solved no matter how careful the matching strategy, but we believe our one-to-one matching, complemented by the behavioral problem analysis through the Psychiatric Register, comes as close as possible to minimizing the problems.

The conservative nature of the cost effectiveness analysis employed in this evaluation is discussed below, and was based on the assumption that only those costs which could be actually saved or reallocated would be included in the analyses, thereby helping assure that any calculated benefits could in fact be realized by the local communities involved.

Conclusion: Given that the evaluation was begun almost two years after the program started and had severe time constraints which limited the follow-up period to one year, the authors believe that the methodology employed is sound and enables confidence to be placed in the evaluation findings.

Cost Effectiveness of Program

The charge has been that many apparently impressive cost-benefit results have been inflated because of methodological problems and designs which were not conservative enough. Moreover, serious questions have been raised concerning whether diversion programs, with their relatively small caseloads, could ever hope to be cost effective when compared with the existing system, particularly if higher-risk clients were accepted and defense counsel were part of the decisions about whether or not to enter the program.

In the Monroe County program, we have demonstrated that relatively high-risk clients are being served, and access to defense counsel has been a part of the program from the beginning. Costs of having such counsel have been incorporated into the cost effectiveness analysis. A conservative set of research assumptions was applied to the impact and cost effectiveness analyses. To the extent that minor sampling errors resulted from the matching process, these led to underestimates of program benefits, based on reviews of the subsequent impact measures against each of the matching variables. The recidivism benefits were limited to one year. Despite all of this—all of which should have combined, according to most expectations, to assure that the program could not prove to be cost effective—a 1.3 ratio of benefits to costs resulted. The ratio is lower than many reported in the literature, but the authors believe that in the context of the above, it represents solid, real benefits.

Finally, it is also revealing in this context to note the results of a "mini-analysis" of all program clients from January and March of 1975 compared with all clients from those same two months in 1976. This seemed to indicate clearly in the areas of rearrests, convictions, and jail and probation sentences that the program's impact was greater after a year in operation than in its initial months. For example, the conviction rate on original charges for all cases in the first two months of our program sample was 40%, compared to 17% in the last two months (January-March, 1976). The rearrest rate for the same period was down from 28% to 22%, and convictions on rearrests were down from 20% to 11% of the respective subsamples. Average jail sentence time per sample member was down from 29 to 4 days, and average probation time was down from 15 to 6 weeks. Thus, it appears reasonable to assume that, had we been able to conduct the evaluation exclusively on 1976 clients rather than predominantly 1975 first-year clients, impacts and benefits attributable to the program would have been even more positive.

Conclusion: The Monroe County Pre-Trial Diversion program has proved itself cost effective under extremely conservative research methodologies and circumstances.

FOOTNOTES

1/ See, for example, National Pretrial Intervention Service Center, Legal Issues and Characteristics of Pretrial Intervention Programs, Washington, D.C.: American Bar Association, 1974, p. ii; National Pretrial Intervention Service Center, Pretrial Criminal Justice Intervention Techniques and Action Programs, 2nd ed., Washington, D.C.: American Bar Association, 1975, p.2.

2/ Mullen, Joan, Pre-Trial Services: An Evaluation of Policy Related Research, Cambridge, Mass.: Abt Associates, 1974; Rovner-Pieczenik, Pretrial Intervention Strategies: An Evaluation of Policy-Related Research and Policymaker Perceptions, Washington, D.C.: American Bar Association, 1974.

3/ Mullen, pp. 30, 44.

4/ Rovner-Pieczenik, p. xv.

5/ Ibid.

6/ Mullen, p. 30.

7/ Governor's Commission on Crime Prevention and Control, Pre-Trial Diversion/ Intervention, St. Paul, Minnesota: 1976, pp. 102-104.

8/ Kirby, Michael P., "Recent Research Findings in Pretrial Diversion", Alternatives - A Series, Washington, D.C.: Pretrial Services Resource Center, 1978.

9/ Ibid, p. 29.

10/ Ibid, p. 16.

11/ See, for example, Mullen, pp. 30, 37, 39; Rovner-Pieczenik, pp. xiv-xx; Kirby, pp. 7-10.

12/ Adams, Stuart, Evaluative Research in Corrections: A Practical Guide, Washington, D.C.: Law Enforcement Assistance Administration, 1975, pp. 72-73.

13/ Kirby, pp. 8, 12, 15-16; Adams, pp. 60-73.

14/ Adams, p. 64.

15/ In Monroe County, there are 23 lower courts where arraignment occurs: Rochester City Court, 19 town courts, and three village courts.

16/ Several other variables (residence, employment status, marital status, children, release status, arresting agency, education, and time in community) were also included in the matching process, but these were considered secondary in importance and therefore received less attention when cases were being matched. Nonetheless, even these variables were generally quite similar across the Diversion and comparison samples, although less so than the six main matching variables.

17/ Particularly for the program and comparison Official samples, on which the primary impact and cost effectiveness analyses were based.

18/ The previous adult record as shown in the table does not indicate actual number of arrests or convictions, although within each of the categories listed (other than "none"), some of the individuals in each sample had more than one offense on their record. However, there were no significant differences between samples.

19/ The county's Psychiatric Register contains records back to 1960 for incidents of diagnosis and treatment performed by community mental health centers and nearly all private psychiatrists in the county. It is estimated by Register officials that the Register contains about 96 or 97% of all incidents which have occurred in the county since the Register's inception, and it is therefore considered to be perhaps the most complete record of serious behavioral problems for an entire geographical area existing anywhere in the country.

20/ The principal exception being in estimating the cost of incarceration, where the costs of groceries, laundry, medical supplies, etc. were also included. The opportunity cost of facilities and equipment in terms of their lease value in their next best alternative use was not considered. Facility and equipment costs were considered fixed in the short run and were therefore not considered as potential cost savings.

21/ The method of estimating costs was a simple summation of the personnel costs involved in a specific event (e.g., trial, preliminary hearing). This personnel cost was based on the estimated time spent by each person, multiplied by that person's respective costs per hour.

22/ Cost items not included in many evaluations of Diversion programs.

23/ It should be noted that the evaluators were aided by a research advisory committee, established by the director of the Monroe County Office of Criminal Justice Planning, under whom the evaluation was conducted. The evaluation study director met regularly with this committee to review progress, discuss problems, determine strategies and/or necessary modifications in research approaches, seek help in accessing particular information, and the like. This committee proved to be a useful sounding board for the evaluators and provided some helpful insights into the data collection and analysis process.

24/ The comparison sample was held in custody a total of 636 days for rearrests, the program sample 385 days.

25/ The benefit-to-cost ratio is an investment criterion which shows that a project is a "profitable" investment if the ratio of the present value of benefits to the present value of costs is greater than unity.

26/ The marginal costs and total estimated costs and benefits calculated in the evaluation effort for various events and processes in the criminal justice system are not printed here to save space, but they are available upon request.

27/ Although, as seen earlier, charges have frequently not been dismissed for these NNS cases in the absence of services being provided by the program. Thus, the program is having to reeducate those in the system (judges and D.A. staff) about the intent and importance of the NNS designation.

PRETRIAL RELEASE: AN EVALUATION OF DEFENDANT OUTCOMES AND PROGRAM IMPACT

by

Mary A. Toborg
Martin D. Sorin
Nathan I. Silver

* * * * *

In April 1977, the National Center for State Courts published the National Evaluation Program Phase I Summary Report: Pretrial Release Programs. This study, funded by LEAA, attempted to identify what pretrial program types were in existence as well as what the general state of the art was. This important work laid the groundwork for the Phase II study, awarded to the Lazar Institute, which is now under way. In this paper the authors discuss what the Phase II study will examine as well as the methodology to be employed.

Mary A. Toborg is Associate Director of the Lazar Institute and Principal Investigator for the "Phase II" evaluation of pretrial release. She has conducted a wide range of evaluation studies, including two "Phase I" analyses: of projects which provide employment services to prison releasees and of the Treatment Alternatives to Street Crime (TASC) program, which refers criminally involved drug abusers to treatment. Prior to joining Lazar, Ms. Toborg managed evaluation studies for several Federal agencies, including the Economic Development Administration in the Department of Commerce and the Special Action Office for Drug Abuse Prevention. She holds a Masters degree in Public Administration from Harvard University and a Bachelors degree from the University of Texas at Austin.

Martin D. Sorin, a Senior Associate at the Lazar Institute, is conducting the defendant outcomes analysis for the Phase II study. Dr. Sorin has extensive experience in criminal justice research and evaluation, with special expertise in analyses of courts and judicial behavior. Prior to joining Lazar, he was employed at the Center for Policy Research in New York City, where his duties included managing large-scale data bases and analyzing policy implications of research findings. He holds a Ph.D. and M.A. from New York University and a B.A. from Long Island University.

Nathan I. Silver, a Senior Associate at the Lazar Institute, is analyzing pretrial release "delivery systems". Before joining Lazar, he had engaged in a number of analyses of criminal justice problems and other legal issues while working for such organizations as the Court of Appeals of Georgia, the City of Atlanta's Attorney's office and the U.S. Attorney's office (Atlanta). Mr. Silver is a graduate of the Emory University School of Law and the University of Wisconsin.

INTRODUCTION

Background

As part of its National Evaluation Program, the National Institute of Law Enforcement and Criminal Justice of the Law Enforcement Assistance Administration (LEAA) has commissioned a "Phase II" study of pretrial release. This evaluation, being conducted by The Lazar Institute, is designed to fill major knowledge gaps identified in a "Phase I" study conducted by the National Center for State Courts and published in April 1977. 1/ Among these unresolved issues are the following:

- What impact do pretrial release programs have upon release rates?
- Do programs result in increased "equity" of release (e.g., by leading to the release of more poor defendants than would otherwise occur)?
- What is the extent of criminality among pretrial releasees?
- To what extent do defendants on different types of pretrial release (e.g., own recognizance, money bail, deposit bail) return for scheduled court appearances?
- How do the operations of pretrial release programs affect defendant outcomes (e.g., court appearance rates, pretrial criminality rates)?
- What costs and benefits are associated with pretrial release programs?

These and similar issues will be analyzed during the Phase II evaluation.

In general the evaluation encompasses two broad areas of analysis: the "outcomes" of defendants (e.g., their court appearance rates and pretrial criminality rates) and the pretrial release "delivery system" (e.g., the operations of pretrial release programs and their interactions with important parts of the criminal justice system). This paper also describes several special studies which will supplement the defendant outcomes and delivery system analyses. These special studies include the cost effectiveness of pretrial release programs, analysis of defendant perspectives on the release process and consideration of whether pretrial release programs have had a lasting impact on criminal justice system operations.

The remainder of the introductory section presents selected background information on the Phase II evaluation. This information, which provides the perspective needed for review of the subsequent sections, consists of brief descriptions of the development of pretrial release programs, the scope of the Phase II study and the nature of the analyses to be conducted.

Development of Pretrial Release Programs

For many years there was widespread criticism of America's traditional reliance on money bail as the means of securing pretrial freedom. 2/ Such a system was viewed as inherently unfair to poor persons, who could have difficulty raising bail amounts. Moreover, some individuals who could not make bail were eventually placed on probation after their cases came to trial. This created the anomaly that persons were confined while presumed innocent only to be freed when found guilty.

Despite continuing criticism of the bail system, reforms were adopted only in the 1960's. The first major reform effort was the Manhattan Bail Project, begun in 1961 by the Vera Foundation (now the Vera Institute of Justice). Through pretrial interviews—covering such topics as employment status, length of residence at current address and extent of local family contacts—Vera identified a group of individuals considered good risks for release on own recognizance (ROR), with no requirement of money bail. The project demonstrated that people with strong community ties would appear for trial, even if they did not provide cash bail. For example, of the 3,505 defendants granted ROR at the project's recommendation over a three year period, only 1.6% failed to appear in court. 3/

The Vera experiment was widely acclaimed as a major success, and similar projects were initiated in many other jurisdictions. Indeed, within a decade more than one hundred pretrial release programs were in operation across the country. 4/ In addition to release on recognizance, other types of bail reform were in use, including: 5/

- deposit bail, under which a percentage of the bail amount (usually ten percent) is deposited with the court in order to secure release; and
- supervised release, under which the released individual must agree to comply with certain requirements, such as reporting to a pretrial release program periodically.

At present, pretrial release programs vary along a number of important dimensions as discussed in the Phase I report on this topic. 6/ For example:

- Many programs use a formal "point system", similar to that of the Manhattan Bail Project, to determine eligibility for nonfinancial release, but other programs base release recommendations on more subjective criteria.
- Some programs verify all information provided by defendants while other programs pay minimal attention to verification.

- Some programs try to serve the entire population of arrestees, including those who could have obtained the money needed to make bail, while other programs try to serve only those individuals who could not have been released without the programs' assistance.

- Some programs can recommend a wide variety of release alternatives, including different levels of supervised release as well as ROR, while other programs can consider only a very limited set of release alternatives.

Although the use of nonfinancial release has often been accompanied by the establishment of formal pretrial release programs, many jurisdictions without such programs nevertheless use nonfinancial release. This can occur through judges questioning defendants about their community ties and considering this information when setting the conditions of release. Consequently, some analysts 7/ have questioned whether pretrial release programs are necessary once the value of nonfinancial release has been demonstrated. Proponents of this viewpoint argue, that once judicial attitudes have endorsed nonfinancial release, judges can ascertain the information needed to make a release determination without the assistance of a formal program. Although this information would probably not be verified to the same extent as is done by pretrial release programs, the effect of such verification has been largely untested.

An additional consideration which hinders the assessment of pretrial release programs' effectiveness is the lack of even the most basic data on either program or defendant performance. For example, the National Center for State Courts' survey 8/ of 110 pretrial release programs found very few programs which had any data at all on the rearrests of individuals while on pretrial release. In addition, 25% of the programs which responded to the survey had no data on the number of defendants they had interviewed. An even higher percentage of responding programs had no information on the number of defendants who were recommended for nonfinancial release or the number who were granted such release.

An earlier survey 9/ of approximately 100 pretrial release projects had similar findings. At that time only about half the projects maintained failure-to-appear data on ROR releasees and even fewer maintained comparison data on bail releasees or data on the rearrest rates of defendants they served. In the absence of such basic information, it is difficult to make any definitive statements about the effectiveness of pretrial release programs.

The lack of knowledge concerning the effectiveness of pretrial release programs is particularly serious because of the rapid increase in the number of such programs over the past fifteen years. In addition, there has been a concomitant growth in public concern about the possibility that released defendants may be committing crimes while awaiting trial. Without good data on the pretrial criminality of released defendants, it is difficult to gauge the extent to which this public concern is justified. Obtaining such data is therefore an important aspect of the Phase II evaluation.

Scope of Phase II Study

The Phase II evaluation will analyze pretrial release in a sample of communities located throughout the nation. In these jurisdictions the overall release systems will be studied, rather than merely the activities of pretrial release programs alone. This is an important point, because many defendants may secure release without program assistance (or even despite adverse program recommendations).

Other important features of the study's scope include:

- limiting the analysis to adults, rather than also considering the special problems posed by the release of juveniles;
- analyzing the pretrial outcomes (e.g., failure-to-appear, criminality) only for defendants who are taken into custody by the police and excluding outcomes analysis (though not delivery system analysis) for individuals released through police "citation" or "summons" programs;
- focusing the evaluation on defendants processed through State and Local, rather than Federal, courts:
- analyzing only trial courts and excluding release mechanisms associated with appeals of verdicts; and
- studying only pretrial release programs, rather than including such related programs as those concerned with pretrial intervention or diversion.

The sample of programs to be selected for analysis will reflect appropriate geographic representation, a wide range of types of release (e.g., own recognizance, bail, deposit bail, supervised release), broad eligibility for program participation (especially in terms of criminal charges) and different points of program intervention (e.g., soon after arrest versus following arraignment). It is anticipated that eight to twelve programs will need to be analyzed to meet these conditions.

Other criteria which will affect program selection are:

- whether there are enough program clients and other releasees to warrant analysis;
- whether local criminal justice system processing is quick enough to ensure that cases will reach disposition during the time period of the study; and
- whether locally available records are sufficiently good to permit reasonable analysis.

Nature of Analyses

Three broad types of analyses will be conducted during the evaluation study:

- analysis of the outcomes of pretrial releasees (e.g., rates of criminality and failure-to-appear);
- assessment of the "delivery system" used to make release decisions (e.g., analysis of program operations and of key program interactions with other parts of the criminal justice system); and
- special studies (e.g., cost effectiveness of pretrial release programs, perspectives of released defendants, analysis of communities no longer having programs).

The outcomes analysis will be conducted in two different ways depending on the community. If possible, an experimental approach will be implemented in several communities. This approach would operate as follows:

- Two groups of defendants would be analyzed: a group which is processed by the program (i.e., the "experimental" group) and a group which is not processed by the program (i.e., the "control" group). Any defendant would have an equal chance to be in either group.
- Members of the "program" group would receive normal program processing, while members of the "non-program" group would be processed by the criminal justice system without program involvement.
- After each group has about 400 defendants, the program would return to its normal operating procedures.
- Outcomes of defendants in both groups would be tracked. Such outcomes include whether release was secured, whether court appearance dates were kept, whether pretrial crimes were committed and the final disposition of the case.
- A comparison of the outcomes for the "program" and the non-program" group would indicate the program's impact (since the only difference between the two groups of defendants should presumably be that one was processed by the program and the other was not).

In many ways, the "ideal" situation for conducting such analysis is in a jurisdiction having a pretrial release program which is not able to interview all defendants who might potentially be eligible to receive the program's services (for example, a program may lack the resources to conduct around-the-clock interviewing and thus may effectively exclude some defendants from the program). In such a case, not all the eligible defendants are served by the program; those defendants not served can be considered part of an "overflow" group (i.e., they exceed the program's service capacity). Under these conditions, a "non-program"

group of defendants could be developed, for analytic purposes, by modifying the process for selecting "program" versus "overflow" defendants, so that any defendant has an equal probability of being in either group, while overall client loads remain at the same level.

The need for experimental analysis of pretrial release programs has been widely emphasized. For example, at the end of an extensive study of pretrial services (including both release and diversion), Abt Associates concluded that many important questions concerning program impact remained to be answered and that:

> "Questions such as these require the use of controlled field experiments. Properly executed, this design produces results of virtually unimpeachable validity. The random assignment of a sufficient number of subjects to treatment and non-treatment status provides assurance that the groups under observation are similar in all respects and that any observed differences in outcomes may be attributed to the treatment delivered. Without equivalent groups, any differences that emerge can be attributed to the effects of selection rather than the particular treatment strategy." 10/

Despite the usefulness of experimental analysis, there are some jurisdictions where it cannot be implemented. For example, the statutes for certain areas require that all defendants be processed by pretrial release programs. In addition, other areas may reject an experimental approach because of a variety of local concerns. To ensure appropriate coverage of pretrial release programs, "retrospective" analyses will be conducted in selected jurisdictions. In these cases defendant outcomes will be studied after the fact, based on existing records.

Although retrospective analyses do not permit the development of control groups of the type available in experimental studies, comparison groups can be identified. Outcomes of the members of the comparison group can then be used as a benchmark for assessing a program's impact on the outcomes of defendants it serves. Comparison groups could be selected from such groups as the following:

- persons eligible for a program's services who were missed due to screening errors, lack of service for people arrested on certain days or at certain times, or other reasons; or

- persons released by the court, although they had been rejected by the program because of ineligibility, inability to verify information provided or determination that they were poor risks.

Also, for programs which select clients after the first court appearance and thus serve only those defendants unable to secure release independently, a comparison group could be structured from defendants released by the court at the first appearance.

Thus in all areas studied, outcomes of defendants processed by a pretrial release program will be assessed vis-a-vis the outcomes of defendants not so processed. Detailed information on the specific content of the outcomes analyses

appears in the next chapter, followed by a discussion of the delivery system and special analyses to be conducted.

DEFENDANT OUTCOMES DURING THE PRETRIAL RELEASE PERIOD

The releasee outcomes analysis has four major aspects:

- assessment of failure-to-appear rates;
- analysis of pretrial criminality;
- identification of "high-risk" defendants; and
- analysis of final case dispositions of released versus detained defendants.

Each of these four major outcome areas is discussed below. Besides information on outcomes, the study will consider defendants' demographic and socio-economic characteristics, criminal history, current arrest charge, pretrial release status, and extent of program contact. This will permit analysis of outcome difference for various sub-groups of defendants.

Failure-To-Appear

The extent to which released defendants fail to appear for court proceedings is an important issue to be considered during the evaluation study. Historically, the use of money bail has been legally justified as necessary for ensuring a defendant's appearance in court. Thus, alternatives to traditional money bail, such as release on own recognizance or deposit bail, have usually been assessed at least partly in terms of their impact on the appearance rates of released defendants.

Specific questions to be considered include:

- What are the failure-to-appear (FTA) rates of released defendants?
- How do the FTA rates of defendants released as a result of program intervention compare with those of other releasees?
- Do defendants with higher levels of post-release supervision have lower rates of failure-to-appear?
- Do defendants who receive better notification of court dates have lower FTA rates?
- Is the type of release (e.g., own recognizance, deposit bail, money bail, supervised release) associated with different FTA rates?

- Are defendants with certain demographic characteristics (e.g., young black males) most likely to fail to appear?
- Are defendants with certain socio-economic characteristics (e.g., type of job, salary, length of time employed, extent of community ties) most likely to fail to appear?
- Are defendants charged with certain offenses most likely to fail to appear? 11/
- Are defendants with certain types of criminal records (e.g., long vs. short history of criminality) most likely to fail to appear?
- What is the relative impact of defendant characteristics (demographic, socio-economic, offense charged, criminal history), type of release and amount of post-release supervision on failure-to-appear?
- How do failure-to-appear rates vary with the length of time that defendants are released?
- Are FTA rates lower when penalties are imposed for failure-to-appear (e.g., prosecuting the FTA charge)?

In order to analyze these questions, "failure-to-appear" must be defined. Many different definitions have been used in the past. For example, a 1973 survey found that 51 pretrial release programs were using 37 different methods of calculating failure-to-appear. 12/

Although many specific FTA definitions exist, they usually fall into two broad categories: defendant-based or appearance-based. Both types will be included in the pretrial release study, since each reflect an important aspect of the evaluation. Defendant-based measures, which indicate the number of individuals who present some risk of FTA, are needed for analyses relating defendant characteristics to FTA likelihood. Appearance-based measures reflect the overall "disruption" of the court process and are needed to assess total costs to the criminal justice system from release practices.

A third measure of interest is "willful" FTA, which acknowledges that defendants may simply forget court dates (or leave the court after long waits) and are not "willfully" trying to evade justice. 13/ Although willful FTA usually cannot be calculated with precision from existing records, it can often be estimated. For example, in some jurisdictions bench warrants may not be issued routinely at the time of non-appearance, but only later if the defendant fails to contact the court voluntarily. In such places the number of bench warrants issued may serve as a useful indicator of willful FTA. Another estimate could be derived from analyzing the number of defendants who do not contact the court within a certain time period (e.g., thirty days) following a scheduled court date.

As discussed above, several measures of FTA are needed for adequate analysis of defendant outcomes. In general, for purposes of this study, failure-to-appear will be considered to have occurred when a defendant in a criminal case is not present in court at the date and time for which formal proceedings have been

scheduled. Specific operational definitions of failure-to-appear rates which will be used include the following:

- appearance-based FTA rate (the number of failure to appear divided by the total number of scheduled appearances);
- defendant-based FTA rate (the number of defendants who missed at least one court appearance divided by the total number of defendants studies); and
- estimated "willful" FTA rate (the number of defendants failing to appear who did not contact the court within 30 days of a scheduled court date divided by the total number of defendants studied).

Pretrial Criminality

The extent of criminality by pretrial releasees is a topic of great interest, because assumptions about such criminality underlie much of the controversy about the safety of release. Persons who believe that releasees have high levels of criminality may oppose release and support "preventive detention", while individuals who believe that releasees are not very "dangerous" are more likely to advocate release. At present, little reliable information exists concerning releasees' pretrial criminality. Thus, development and analysis of such data is an important concern of the Phase II study.

As with failure-to-appear, a major problem in assessing criminality is a definitional one. Although arrests are often used as a measure of criminality, there are many limitations to this approach, including:

- More crimes occur than are reflected in arrest data.
- Arrest analyses often focus on one jurisdiction, although an individual may commit crimes in other areas as well.
- Charges are often dismissed or reduced soon after arrest.
- Arrests do not reflect guilt.

Despite these limitations, arrests offer a convenient proxy for criminality and will be used in the present study. In addition, every effort will be made to obtain conviction data for arrests which occur during the pretrial release period. These data are important because they reflect a determination of guilty, but they are often much more difficult to acquire than arrest information alone.

Another definitional problem relating to criminality concerns the nature of the offense charged. Since the severity of criminal activity reflects danger to the community, it is important to analyze specific offenses. However, different jurisdictions may have varying definitions of felonies versus misdemeanors and of individual charges. To achieve comparability across jurisdictions, Lazar will try to apply consistent definitions of offenses to the data available locally.

The offense categorization of the FBI's Uniform Crime Reports (UCR) will be used as the basis for this analysis.

Specific questions which will be considered in the criminality analysis include:

- To what extent are released defendants arrested on new charges during the pretrial release period?
- To what extent are releasees ultimately convicted for crimes allegedly committed during the pretrial release period? What are the lengths and types of sentences imposed for such convictions?
- For what types of crimes are releasees arrested during the pretrial release period? What are the conviction rates for these various types of crimes?
- Do defendants released as a result of program intervention have different arrest or conviction experiences for pretrial crimes than other releasees? Do they engage in different types of crimes?
- Are different types of release associated with different arrest or conviction rates for pretrial crime? With different types of crimes?
- Does the level of defendant supervision during the pretrial release period affect: arrest or conviction rates for pretrial crimes? The types of crimes?
- Are certain defendant characteristics (e.g., demographic, socio-economic, criminal history) associated with lower rates of arrest or conviction for pretrial crimes? With certain types of crimes?
- Is the initial offense (for which release was granted) associated with lower rates of arrest or conviction for pretrial crimes? With particular types of subsequent (pretrial) crimes?
- What is the relative impact of defendant characteristics (demographic, socio-economic, offense charged, criminal history), type of release and amount of post-release supervision on pretrial criminality?
- To what extent is failure-to-appear associated with pretrial criminality (as reflected in arrest and conviction rates)?

The analyses of pretrial criminality must also consider the time span between the initial release and final dispostion, since the risk of arrest increases as time passes. Indeed, past analyses have suggested that pretrial criminality would be greatly reduced if cases were tried within 90 days of arrest. 14/

It is important to note that, while the time to disposition affects both FTA and pretrial criminality, the reverse is also true. A missed court appearance or a new arrest will in itself slow down the processing of the case: a failure to appear causes delay while the defendant is found and returned to court, and rearrest on a new charge may also slow the trial of the original charge. 15/ Thus, it is necessary to analyze both the effects of court delay on failure-to-appear and rearrest and the effect of failure-to-appear and rearrest on court delay. As part of this analysis, the impact (if any) of rearrest or failure-to-appear on the defendant's conditions of release should also be considered: Are the terms of release changed and, if so, in what ways?

Identification of "High-Risk" Defendants

Another important area for analysis concerns the ability to predict, at the time of the release decisions, which individuals are likely to fail to appear in court or to commit crimes during the release period. Although a few past studies have considered this problem, findings have so far been inconclusive. Various factors have been proposed as those associated with release risk (i.e., the likelihood of non-appearance or rearrest). Such factors include: 16/

- sex and age, since males are more likely to commit crimes than females and individuals in their teens and early twenties are more likely to commit crimes than older people;
- race and income, because the social disadvantages experienced by blacks and low-income defendants might make their release risk greater than that of whites and higher income defendants;
- local residence, since this might be associated with lower release risk than for non-residents;
- employment status (employed, full-time student or unemployed) at the time of arrest, because this reflects an important community tie;
- family ties (whether the defendant lives with parents, spouse or other kin and the degree of contact and type of relationship with family members), since this also indicates community ties;
- criminal history, because this may be related in general to future criminality and thus to rearrest while on release and perhaps also to non-appearance;
- type of offense charged in the present prosecution, because those charged with more serious offenses may be more reluctant than others to appear in court and face possible punishment;
- court disposition time, since long court delays may be associated with more failures to appear or rearrests; and
- the form of release.

An analysis of these factors for defendants released in Charlotte, North Carolina, found that only court disposition time, criminal history and the form of release were in fact associated with the risk of nonappearance or rearrest. 17/ Similar studies need to be conducted for other jurisdictions to determine whether these findings appear generally valid.

Ideally, prediction analyses should consider program and criminal justice system characteristics, because these may be easier to change than defendant characteristics, Although the small number of programs to be included in the present study precludes most such analyses, some program and criminal justice system characteristics are client-specific (e.g., level of program service provided, type of defense attorney who handled the case, identity of the presiding judge). If there are enough cases to permit reasonable analysis, the impact of these factors on defendant outcomes will be considered.

In addition, qualitative analyses of local delivery systems may suggest that certain causal factors are at work. Although some impressions cannot be analyzed quantitatively, they can be evaluated for plausibility. In certain cases careful qualitative analyses may form the basis for developing new insights concerning ways to reduce any adverse effects resulting from the release of defendants pending trial.

Whatever the various prediction analyses show, Barry Mahoney has pointed out that critical questions about trade-offs are likely to remain:

> "Assuming that a set of indicators can be developed that will predict the likelihood of pretrial crime with some degree of accuracy, how much (if any) inaccuracy is acceptable as a matter of social policy? As a matter of constitutional law? For example, suppose a set of indicators could isolate a group of ten defendants with similar characteristics and accurately predict that, if all are released, four will commit crimes. Would such a 40% accurate predictive capacity be a justifiable basis for holding all ten defendants in detention? What if the predictions were 80% accurate?" 18/

Thus, the provision of more accurate data will facilitate an informed discussion of the trade-offs involved but will not in itself resolve the determination of the most appropriate release policy.

Final Dispositions of Cases

The type and severity of final dispositions for released defendants will be compared with those of detainees, whenever there are enough defendants of each type to permit reliable analysis. Although several past studies have shown that detained defendants received harsher dispositions, 19/ this could have resulted either from the fact of detention itself (e.g., because detained defendants may have a harder time lining up witnesses or otherwise assisting in their own defense) or because the detained defendants were in fact the ones whose cases merited more stringent treatment (in terms of both detention and final disposition). To assess the likelihood of these possibilities will require analysis of defendant characteristics which might affect dispositions.

Past studies have also suggested that detained defendants may be more likely to plea bargain than released defendants. 20/ This can be analyzed indirectly by examining the extent to which detained and released defendants enter guilty pleas and by comparing the final charges with earlier ones.

Specific questions to be considered in the dispositions analysis are:

- How do the final court dispositions (e.g., type, length) of released defendants compare with those of detainees?

  —Are more detained defendants convicted than released defendants?

  —Do more detained defendants plead guilty than released defendants?

  —Do convicted defendants who were detained receive more sentences of incarceration than convicted defendants who were released pretrial?

  —To what extent are detained defendants placed on probation when they are convicted? Since such defendants later are presumably not considered dangerous to the community, is there any evidence that they might have violated release conditions, so that their detention can be explained on that basis?

- To what extent can disposition differences between detainees and releasees be explained by selected characteristics of the two groups of defendants? (e.g., both severity of offense and criminal history might reasonably be associated with more severe dispositions.)

Another issue of interest concerns the time required for the cases of detained defendants to reach a disposition. This information is needed for cost-effectiveness analysis, because a major "savings" usually attributed to pretrial release programs is the lessened cost of detention. Thus, it is important to estimate the length of time that released defendants might have been detained, had they not been released.

The analysis of dispositions will, when added to the other analyses of defendant outcomes, provide substantial insight about the impacts of pretrial release programs. To understand the specific processes which produced such impacts requires analysis of the operations of pretrial release programs and the interactions of these programs with various parts of the criminal justice system. Such analysis is discussed in the following section.

DELIVERY SYSTEM ANALYSIS AND SPECIAL STUDIES

The Phase II study will include an analysis of the "delivery system", which provides defendants with pretrial release opportunities. This analysis, discussed below, considers both the operations of pretrial release programs and interactions

with important criminal justice system components. Several special studies are also described in this section; these include a cost-effectiveness analysis of programs, assessment of defendant perspectives and consideration of whether programs have made a lasting impact on criminal justice system operations.

Program Operations

Goals and Objectives

The goals and objectives of the program, along with the methods chosen and resources available to realize them, will be ascertained. These goals and objectives will determine the kinds of choices apparent to the program managers and the eventual decisions made by them. Such elements as staff responsibilities, resource allocation and selection of pretrial release approaches depend on program policy.

Goals may vary widely among programs. For example, a program might seek to:

- release as many defendants as possible, limited only by the size of the defendant population;
- release only those defendants who are unable to secure release by other methods, especially by posting money bail;
- release only those defendants that it believes are likely to reappear for trial;
- release only those defendants who are believed not likely to commit new offenses during the pretrial period; or
- provide pretrial releasees with the supervision and counseling that it hopes will serve the ends of the criminal justice system and the needs of the individual defendants.

In addition, the attitude of a program's directors toward its role and position in the criminal justice system may affect release rates and defendant outcomes. A program may be organized as, or consider itself to be:

- an advocate for defendants;
- an impartial agency which collects and provides information for the court; or
- an organization which serves and protects primarily the non-defendant population.

Types of Release

Another indication of the goals of a program is the type and extent of services it provides. Since there are many possible types of release, the Phase II study will include a profile of methods of release that are available

in the jurisdiction and applied by the program. This will include analysis of the program's involvement with:

- own recognizance release;
- cash bail;
- unsecured bond;
- surety release;
- ten percent deposit bond;
- release with stipulated conditions;
- release with supervision; and
- third party custodial programs.

Eligibility Determination

Eligibility for various types of release may be determined by many factors, including:

- State statutes or local ordinances, or both;
- trial court policies, including procedures adopted by the courts or enforced individually by judges;
- State or Federal appellate court decisions;
- prosecutorial attitudes and influence; and
- the policy of the program itself.

There can be variations, even within a single system, in the manner that a defendant is considered for release. The following scheme suggests the possibilities for review of a defendant's qualifications for release:

- Defendant is ineligible for pretrial release. There is no interview, and no information is reported to the court.
- Defendant is ineligible for release, yet is interviewed by the program. If the defendant is ineligible on the basis of the offenses charged, and the charges are later reduced in seriousness, the interview information will be readily available for presentation to the court.
- Defendant is eligible under the court policy and is interviewed by the program. However, the program issues no recommendation, in order to avoid the controversy that may attend an undesirable defendant outcome, and leaves the interpretation of the interview results to the court.

- Defendant is eligible and interviewed. When the information has been verified, recommendation for or against release is made.

- Defendant is eligible, and program is empowered to release the individual without obtaining prior court approval.

- Defendant is released upon arrest, after an issuance of a citation. This requires the posting of a "bond", which is forfeited in the event that the defendant fails to appear at scheduled court proceedings. In this event, the failure to appear constitutes an admission of guilt (no contest) and the forfeiture serves as a fine.

- Defendant is released upon arrest, after issuance of a summons to appear. No bond is required, but the defendant is expected to appear at court proceedings for a determination of guilt and a fixing of punishment if guilt is proven.

As indicated above, a defendant may be deemed eligible for release at several different points in the criminal justice process. For many defendants the involvement of a pretrial release program is an important aspect of the release determination. Eligibility determination for program services can be considered as a two-stage process: "threshold" eligibility conditions must be met to enable a defendant to receive pretrial release attention by a program, but program "considerations" must also be favorable to secure support for release. Thus, a threshold eligibility condition may be viewed as one which is necessary, but usually not sufficient, to ensure a defendant's release.

A threshold eligibility condition may be offense-related, that is, a defendant may be denied pretrial release attention due to having been accused of committing a certain enumerated crime, say a violent felony. In such a case, no background attribute could then qualify the defendant for non-surety bond release.

Threshold eligibility conditions may also be defendant-related, tied to an individual's personal attributes or actual past conduct within the criminal justice system. These conditions include previous failures-to-appear at scheduled court proceedings, arrests or convictions for crimes committed while on pretrial release, and previous convictions for certain serious offenses. Other defendant-related factors involve a determination by the program that certain attributes indicate a likelihood that the defendant will fail to appear for court proceedings or commit pretrial offenses, or both. These factors include such items as residence outside the area served by the program and evidence of drug or alcohol addiction.

As indicated earlier, to survive the threshold eligibility determination does not assure the defendant of pretrial release. For at this point there is a second application of criteria, in the form of program "considerations". No single consideration is capable of screening a defendant out of a program, but it may combine with other factors to have that effect.

Residence in the community is an example of a common program consideration. A showing of local residence may increase the defendant's chance to receive a

program's favorable recommendation for release, but it will not assure it. Nor will the lack of residence by itself prevent a program, when other considerations have been met, from issuing a release recommendation.

Besides determining the threshold eligibility conditions and program considerations which have been formally specified, the Phase II study will analyze the ways these various eligibility factors are actually applied by the program. For example, a program might relax the operation of an eligibility condition and recommend for release some defendants who would be screened out under a rigid application of the eligibility rules. On the other hand, a program consideration may be used in practice to exclude defendants from the program's services.

Program considerations concerning eligibility reflect the values and experience, and in some cases the willingness to experiment, of programs' directors. Pretrial release programs must consider whether a defendant, if released, is likely to appear for court proceedings. In addition, programs sometimes also consider, at least implicitly, whether a defendant is likely to commit a crime during the pretrial release period.

A defendant's reliability as a pretrial risk is often believed to be indicated by employment, residence in and ties to the community, personal stability and absence of previous criminal activities. Conclusions about the defendant's reliability are made after the following kinds of information are collected:

- age, race and sex;
- residence (place and length);
- marital status;
- family ties to the area;
- employment history;
- educational background;
- medical and psychiatric history;
- alcohol and drug-related problems;
- previous criminal record; and
- economic responsibilities (e.g., family support, public utility payments).

The phase II study will not only list those factors that are considered by a program but will also discern how they are weighted and used. This is especially important, because many programs begin the defendant evaluations by collecting essentially the same information.

Interview

An important aspect of program operations is to interview defendants and provide appropriate information to the court. To help evaluate the effectiveness of the interviewing arrangement, the study will consider:

- what questions are asked the defendant;
- how much time the average interview requires;
- if the interviewing hours are coordinated with arraignment schedules to prevent a sizable backlog from occurring;
- how much time typically elapses between arrest and interviewing;
- whether the wait before interviewing affects the ability or willingness to answer the interviewer's questions;
- what instructions and training are given to interviewers, including format, questioning, courteousness, etc.; and
- if a defendant has the option of postponing the interview until a more advantageous time.

Verification

Verification procedures are often used to assure the accuracy of the defendant's answers to the interviewer's questions. Many programs attempt to verify obtained information by the time the defendant is brought before a magistrate for a bail determination. Usually, such programs will not make a recommendation for release until the information has been verified.

The sources used for verification will be examined during the Phase II study. These sources include: telephone interviews with references; city directories, street directories, and voters' lists; computerized information systems; and federal, state and local records of the defendant's previous criminal record, if any.

The defendant's previous criminal record is, of all interview information, perhaps the most difficult item to verify. In many cities, the local arresting authority supplies this information to the pretrial release program. But even they are often uninformed about the criminal activity of many defendants. This lack of accurate information sometimes results from the separation of jurisdictional authority. For example, it is often more difficult to learn of a defendant's activity in another state, or even in another county within the same state, than it is to learn of a defendant's previous federal offenses, because of elaborate FBI and U. S. Attorney's Office computer systems. So long as there are incomplete connections among state and local record-keeping systems, the problem of obtaining this information will persist. The Phase II study will assess the ways that local pretrial release programs deal with this problem.

Evaluation of the Defendant

Because of the respect commanded by Vera's pioneering pretrial release program in New York City and the operational ease of many of its procedures, a number of pretrial release programs use a Vera-type "point system" to evaluate a defendant's appropriateness for release. However, modifications in the system are often made to meet the needs of the individual programs. Other programs rely primarily on interviewers' subjective judgments to determine release reliability.

To assess the techniques used for defendant evaluation, the Phase II study will consider such questions as:

- Does the program use a numerical scale?
- Does the program evaluate defendants on the basis of the interviewer's subjective judgment?
- When a number system is used, may an interviewer, on the basis of subjective judgement, recommend release when release is not numerically indicated?
- Does the program attempt to elicit subjective information from the defendant that is then weighed along with the other elements?
- Who has the authority to recommend release, if recommendations are made? Interviewers? Unit leaders? Deputy directors? Program directors?
- What quality control measures are used to make sure that program recommendations (or other information provided to the court) are carefully developed?

Presentation of Information

Pretrial release programs use different techniques for presenting release-related information to the court. Many programs prepare written reports which contain recommendations about release. Such a report is derived from the program's interviewing questionnaire and may even be a copy of it. More frequently, a separate report is prepared with information taken from the interviewing form.

Program representatives sometimes appear in person at bail hearings. They may be assigned the task by the program's directors, or by order of the court. The representative who answers judicial and other inquiries may have actually interviewed the defendant, but it is more likely that one individual has been chosen to represent the program in behalf of all defendants. Monitoring court activities, representing defendants and the program, and maintaining good relations with the courts are among the purposes served by such representation. The main disadvantage of this arrangement is that the representative's appearance may be extraneous because of the availability of a written report and thus constitute an ineffective use of program resources.

The Phase II study will include consideration of the ways that programs present release-related information to the court. In addition, the study will assess the advantages and disadvantages of the various procedures used.

Follow-up Procedures

The term "follow-up procedures" describes the supervisory and notification methods used after a defendant's release to ensure the individual's return for court proceedings. Many persons who are active in the pretrial release field believe that a program's effectiveness is largely attributable to the strength of its follow-up procedures. These procedures may be applied before a defendant's scheduled appearance or after a defendant has failed to appear in court.

There are three common ways to follow the progress of defendants and inform them of upcoming court appearances. One is to send a post card or letter, prepared manually or generated by computer, to the defendant's last known residence to provide information scheduled court dates. Additionally, telephone contact with the defendant is relied upon by many programs, and some assign to each defendant with a sense of participation and responsibility. Last, there is the less frequently used method of having field staff notify defendants of their scheduled appearances; this practice is often limited to persons who have already failed to appear at proceedings.

Programs sometimes have a variety of special procedures which are used when a defendant misses a court date. For example, in some places programs have been given the authority to issue and execute bench warrants, that is, writs for the arrest of defendants who have failed to appear at scheduled court proceedings or have otherwise violated the terms of their release. Other programs apply additional supervisory measures when a defendant fails to appear in court.

The different follow-up methods and their frequency of use vary across programs. These variations, and their apparent impact on defendants' appearances for court dates, will be considered in the Phase II study.

Other Aspects of Program Analysis

The Phase II study will include analysis of other aspects of pretrial release programs, such as:

- the way the program is organized to achieve its goals;
- the administrative hierarchy within which the program is located and its influence on program operations;
- the program's budget, sources of funds and allocation of financial resources to various activities;
- the costs of the program services provided;
- the type of staff who work at the program and how they were selected and trained;

- the nature of the facilities available to the program; and
- the type of research and evaluation activities conducted by the program and the uses to which they are put.

These analyses, coupled with the Phase II study components described earlier, will provide a detailed understanding of program procedures and operations.

Program Interactions with the Criminal Justice System

The Phase II evaluation of pretrial release will include descriptive accounts of the nature of the criminal justice systems and the broader communities in which individual pretrial release programs operate. The study will, by fixing the context, illustrate how these elements affect a program's operation and how the program may itself influence the workings of the criminal justice system and the attitudes of residents in the area.

The Formal Process of Justice

The "formal process" of justice refers to the steps through which the criminal law is enforced against individual defendants. It begins not at the time of arrest but when charges have been lodged against the individual. At this point, the defendant is said to be "booked", and the process attaches to the individual.

The steps outlined below describe the range of possibilities to which the defendant is exposed. The defendant may pass through one, more than one or all of the following stages; in addition, it is possible and often happens that charges may be dismissed, and so done at any time. A judgment may be made by a responsible authority that insufficient evidence is available to convict, the severity of the act is negligible, or the defendant has shown sufficient remorse or rehabilitation to warrant the removal of charges. When this occurs, the defendant is released from criminal liability, although further criminal exposure may occur—usually via grand jury indictment—if the individual has not yet been in criminal "jeopardy".

To the extent that the practices of a system vary from the proposed scheme, there may be, too, variations in the kinds of treatment or attention the defendant receives. Thus, the following steps are descriptive but cannot be considered definitive of the procedures possible in a criminal justice system:

- "arrest"; the apprehension of the individual;
- "booking", the labeling of an individual as a suspect and the creation of a police record. Once booked, a defendant's situation must be resolved by a judicial authority; thus, booking represents a heightening of criminal process involvement;
- "initial appearance", a procedure that allows for the setting of bail or release conditions, and the taking of pleas. Bail commissioners, magistrates, or trial judges may preside at this procedure;

- "preliminary hearing", an optional though often used procedure that enables defense counsel to test the case against the client. If "probable cause" exists to indicate that a crime occurred and, further, appears to have been committed by the defendant, the defendant will remain so charged. If no probable cause exists, charges will be dismissed; and

- "arraignment", the hearing at which a plea of guilty or not guilty is required of the defendant.

It should be remembered that systems have different names to describe similar procedures. What is an "arraignment" in one jurisdiction may be an "initial appearance" in another. Of importance to a pretrial release study is that release may be awarded at nearly any point in this scheme. Also, when release or bail has been denied, there are procedures that exist almost everywhere to assure review of the original detention decision.

The Phase II study will include an analysis of release rates, the number of persons released at each stage in the process, and the way that the process itself affects the operation and equitability of pretrial release programs.

The Criminal Courts

The structure of the criminal court system will be an important determinant of the way that a pretrial release program operates. Release programs must adapt most of their procedures to the practices of the local courts.

Courts may be organized in one of three ways. They may be organized according to the substantive law itself (e.g., separate courts for felonies and misdemeanors), geographical boundaries or political units. Because of the nature of the criminal law, there must be connections among the courts to assure that cases are finally taken to disposition. For example, a reduction of charges may result in a transfer of case authority from one to another court. Thus, the Phase II study must consider the organization of the local courts and the manner in which the pretrial release program interacts with them.

Judicial Officers

The term "judicial officer" refers to any person who is authorized to perform a decision-making function in the service of the courts. This category includes judges but is not limited to them. Judicial officers include all persons who perform the discretionary tasks of justice, that is, those acts that require not only the application but also the interpretation of the criminal law. Judges, magistrates, bail commissioners, and other persons possess this authority.

Unless a program has the independent authority to release certain defendants, its recommendations for release must be approved by judicial officers. Even when a program possesses the authority to release defendants, this authority has been granted by the deference of the court.

The process for selecting judicial officers must be considered, since this process will determine the types of individuals who will make release decisions. Selection will depend on the structure of the system itself, the legal background required for the position, and the extent to which political considerations affect the selection and decision-making processes.

The Phase II study will also assess the judicial officers' relationships with the local pretrial release program and the extent to which judges make use of information developed by the program. Answers to the following series of questions should accurately depict judicial attitudes toward pretrial release programs:

- Does the agency enjoy good relations with the judges in the criminal courts?
- Does the judicial officer generally rely on the recommendations of the pretrial agency?
- Does the judge release as many defendants as are recommended by the program? Fewer? More?
- Does the judge require verification of information before making a release decision?
- In the event that a defendant fails to appear for proceedings, does the judge issue a bench warrant for arrest? Revoke release provisions? Set bail? Add new conditions? How often?
- Does the judicial officer apply extraordinary measures to defendants charged with pretrial criminality?

The Role of the Prosecuting Attorney

Many kinds of decisions are made by a prosecuting attorney, and many of them will affect the defendant's pretrial standing. In those places where pretrial release eligibility depends on the seriousness of the alleged offense, overcharging defendants could prevent many from securing pretrial release. On the other hand, the willingness of the prosecution to charge lesser offenses could allow some defendants to obtain release where otherwise they would be detained until a later probable cause determination led to a reduction of charges.

The prosecuting attorney's policy toward plea bargaining may affect both charging policy and release attitudes. If plea bargaining is used extensively, the prosecuting attorney may oppose the release of many defendants in the belief that plea bargaining will be aided if they are detained.

At the base of this discussion is the fact that prosecutors have broad discretion over the course of the criminal process. How they exercise this authority, and how that affects the pretrial status of defendants, will be subjects for Phase II study.

The Legal Community

The legal community comprises a number of public and private groups and individuals charged with the responsibility of providing assistance to the local criminal defendant population. For those persons of means who are charged with crimes, there are usually private attorneys available to be retained at various rates.

Because the defendant population contains many persons who are indigent or have few resources, much legal representation is subsidized. Many cities and most United States District Courts have public defenders, salaried attorneys who are appointed by the courts to assist the defense of indigent defendants. Where there is an insufficient number of public defenders or none at all, such conventions as the appointment of counsel, pro bono (free of charge) defense work, and bar association registers and assignment schedules provide the needed representation.

One problem that affects this area of law is that attorneys who work as public defenders or appointed counsel may have little financial interest in the resolution of individual cases. Additionally, there may be certain built-in limitations that prejudice the defendant's cause: for example, when continued good relations with the court and local prosecutors are needed for additional court appointments, a lawyer may be less supportive of the client's case than if other circumstances surrounded the defense.

The vigilance of the practicing bar can affect, too, the work of the pretrial release program. If the bar is generally capable and determined in its defense of criminal defendants, it may demand that the program develop information helpful to its clients' cases. The bar in this way can try to influence pretrial release programs. Also, because the practicing bar is usually viewed to be among the more conservative of community elements, its support of the pretrial release program's work and advances in the field may be important for public acceptance.

The relationship of public defenders and the private bar to the pretrial release system will be explored in the Phase II study. A profile will be prepared of the role of the criminal law community as it affects pretrial release functions.

The Police

Police officers are granted considerable authority to investigate complaints and make arrests where the evidence warrants such action. How this authority is used affects the intake of defendants into the system. The priority that is given to answering certain kinds of complaints (e.g., family arguments that are likely to escalate into violence) will be reflected in the booking records. The attention of police officers to certain areas of a community will be mirrored by the characteristics of persons eventually detained. Also, the extent of police activity in tracking persons released pending trial may affect both fugitive rates and pretrial criminality rates.

In some jurisdictions the police commonly release many individuals, particularly those charged with relatively minor offenses, through citation or summons

programs. Such police activities may substantially reduce the number of defendants who are screened by a pretrial release program.

Although the activities of the police may affect pretrial release programs in a variety of ways, these impacts may be measurable only inferentially. For example, conclusions regarding the overcharging of offenses, by either the number or seriousness of allegations, may be derived from an examination of the number of dismissals or reductions of charges on the basis of probable cause. Records of police bookings and dispositions at initial appearances, preliminary hearings, and arraignments could also be studied to supply essential information. Yet, even here, because of the role of prosecutors and the functioning of the judicial process, an already overloaded mechanism, it is difficult to isolate police behavior as the cause of these occurrences.

Interviews with judges, prosecutors, defense attorneys and persons active in pretrial release programs will provide some of the desired information. Discussions with the police themselves should provide their perspective on their attitudes toward their role and the performance of law enforcement functions which affect the pretrial release system.

Surety Bond Practices

The surety bond, commonly known as the bail bond, was until the middle 1960's the traditional method for obtaining pretrial release. The association of financial loss with the defendant's obligation to make court appearances was and still is believed by many to provide a needed incentive for voluntary personal return. Under the surety arrangement, a bondsman or bonding company promises the court that the defendant will appear at later court dates. If the defendant fails to do so, the bonding agency attempts the location and return to custody of the individual. From this service the bonding agent receives a usually non-refundable percentage of the bond amount, the defendant secures pretrial liberty, and to the court goes the benefit of a pretrial release program at no cost to the court itself.

That is how the surety system is supposed to work. The major impediment to its effective operation is that the defendant has oddly little financial stake in the outcome. The defendant's payment to the bondsman is the same, whether or not court appearance dates are met.

What financial motivation the bondsman has in the matter is often vitiated by court practices. An unsuccessful surety is responsible for the face amount of the bond in the event of a defendant's non-appearance. However, courts do not always require the surety to pay the bond amount.

Doubtfulness about the bonding agent's effectiveness and the fairness of a system of pretrial release that helps only those who can afford the bondsman's fee led to the Manhattan Bail Project of the early 1960's, the forerunner of all own recognizance release programs. Today, the surety bond continues as a major form of pretrial release, despite pressure for reform of the system. Although some states have outlawed the issuance of surety bonds, bondsmen on other states are well-organized and vocal advocates for the continuance of the surety bond practice.

The Phase II evaluation will describe bonding activity in each jurisdiction studied. Included will be analyses of the extent to which bail bonds are issued, typical bond amounts for various offenses, whether bonds are forfeited and collected when defendants fail to appear for court dates and the nature of the local bonding community (e.g., size, amount of influence).

Jail and Prison Facilities

The Phase II evaluation will provide a profile of jail and prison facilities that serve the defendant and convicted criminal populations in the areas studied. Jails are ordinarily the places of confinement for persons sentenced to short periods of incarceration (e.g., less than a year) and for individuals awaiting trial who have not obtained pretrial release. Prisons house persons who have been convicted and sentenced to relatively long periods of incarceration.

The confinement situation may have a considerable impact on the operation of a pretrial release program. If the local jail is overcrowded, more defendants may be released pending trial than the jurisdiction would otherwise allow. Even if the local jail is not overcrowded, other conditions (e.g., lack of proper sanitation, hygiene or medical care) may encourage liberal release policies. Thus, assessment of local jail and prison facilities is an important part of the analysis of the pretrial release delivery system within a jurisdiction. When combined with the analyses of other key criminal justice system interactions with the pretrial release program and the assessment of the operations of the program itself, this will provide a detailed understanding of the pretrial release system in each area studied.

Special Studies

Several special studies will complement the analyses of pretrial release delivery systems and defendant outcomes. These include a cost-effectiveness assessment of programs, a small-scale study of releasee perspectives and a brief analysis of communities no longer having pretrial release programs.

Cost-Effectiveness Assessment

It is important to compare the costs of a pretrial release program with the benefits which derive from its operation. Despite the importance of such analysis, Barry Mahoney reports that "there have not been any really sound cost-benefit analyses of pretrial release programs". [21] He notes that several cost-benefit studies of individual pretrial release programs have been conducted and that these have generally concluded that the programs were cost-effective. However, these studies contained serious methodological flaws, including:

- assuming that the persons released by the program would otherwise have remained in jail;
- assuming that the period of time from arrest to disposition would have been the same had the defendant not secured release; and

- failing to distinguish between fixed and variable jail costs in computing the per day savings from jail population reduction.

Besides such conceptual problems, difficulties frequently arise in developing quantitative estimates of program benefits and costs. Often extremely crude estimating techniques must be used to assess such costs as those resulting from crimes committed by released defendants. In addition, certain program benefits may defy quantification altogether. For example, a criminal justice system may provide greater equity of release decisions for its citizens as a result of a pretrial release program's operations. This may be considered a benefit in its own right, without regard to any savings in detention costs or other measured benefits stemming from the increased equity. In such cases, the benefits can be identified and described, but an economic value cannot easily be associated with them.

An additional problem which the cost-benefit analysis must face is that both costs and benefits may be different, depending upon the perspective from which they are viewed. For example, benefits to releasees will be different from benefits to the government agency sponsoring the program. Additionally, various levels of government may perceive benefits and costs differently. A city government, for example, may have little interest in savings which accrue to county court systems.

Such differences in perspective can be illustrated by considering program costs. Besides the program budget, costs to the jurisdiction include:

- added welfare payments to the family and other expenses, if the defendant is not released;
- costs of attempting to apprehend released defendants who would otherwise be in detention; and
- costs that result from crimes committed by released defendants who would otherwise be in detention.

Costs to <u>defendants</u> include:

- lost income, if they are not released; and
- the costs of obtaining release through a bail bondsman, if release through a program is not possible.

Thus, the perspective for measuring both program costs and benefits must be specified before the analysis can begin.

As the above discussion illustrates, it is difficult to develop precise estimates of program benefits and costs. Nevertheless, due to the importance of the topic, the Phase II study will include a cost-effectiveness assessment of program impact. This assessment will necessarily rely on a variety of estimating techniques which are less than perfect. In spite of this limitation, the cost-effectiveness assessment should provide useful insights concerning the extent to which program costs are offset by identifiable benefits.

Release Perspectives Analysis

The perspective of defendants is an important one to consider for a number of reasons. For example, Feeley and McNaughton have observed that failure-to-appear may be more associated with "how well defendants understand court procedure, how much respect they have for the court and the police, how well aware they are of scheduled court appearances, and what penalties they believe they face if they fail to appear", than with the defendant's background characteristics or severity of charge. 22/ These aspects of defendants' understanding of the court process will be explored during selected interviews with released defendants.

It is anticipated that a small number of personal interviews will be conducted with released defendants in a few of the communities studied. These interviews, seeking subjective impressions of defendants, will supplement the information acquired in the other parts of the Phase II study. The interviews will:

- obtain the releasee's perspective on the release process;
- solicit the releasee's views about the pretrial release program; and
- provide a means of verifying data collected from existing records about the defendant.

Additionally, efforts will be made to obtain information about any criminal activities in which the defendant may have engaged during the pretrial release period, whether or not the releasee was arrested for them.

Communities Now Without Programs

Some analysts have speculated that the major impact of pretrial release programs may be to bring about changes in judicial attitudes regarding nonfinancial release. 23/ Once such changes have been achieved, there may be little need for the program: judges might ask the relevant questions of defendants during the release proceedings and continue to release as many defendants without requiring money bail as they had done when the program existed. On the other hand, some analysts believe the presence of a formal program is essential for achieving high rates of nonfinancial release.

One way to address this issue is to consider the types of changes which occured in release practices after a program ceased to operate in a jurisdiction. Brief telephone interviews with knowledgeable local individuals in these areas should permit an assessment of the nature of such changes. If possible, the former program director will be contacted, as well as judges who had been on the bench over a period spanning both the program's existence and its demise.

Interviewed individuals will also be asked whether data are readily available in the jurisdiction on such matters as release rates by type of release during the period of program operation and afterward. If available, such data will be analyzed to assess possible program impact.

CONCLUDING REMARKS

As discussed in the preceding sections of this paper, the Phase II evaluation is designed to address many of the unresolved questions identified in earlier assessments (including a Phase I study) of the state of knowledge regarding pretrial release. These questions include:

- What is the extent of criminality among pretrial releasees?
- What are the failure-to-appear rates of releasees?
- Are different types of release (e.g., own recognizance, money bail, deposit bail, supervised release) associated with different rates of criminality or failure-to-appear?
- Do certain defendant characteristics (e.g., age, race, sex, current charge, prior criminal record, community ties) seem to affect rates of pretrial criminality or failure-to-appear?
- How are release decisions made in various jurisdictions?
- What is the nature of the interrelationships between pretrial release programs and other parts of the criminal justice system?
- What are the costs and benefits of alternative types of pretrial release?

These questions will be considered through a variety of analyses focused primarily on assessing defendant outcomes and understanding pretrial release delivery systems in a sample of communities located throughout the nation. The results of the Phase II evaluation should facilitate an informed judgment about the impact of pretrial release programs on defendant outcomes, community safety and criminal justice system practices. Such evaluation can, in turn, help ensure the future development of appropriate release policies for accused defendants.

FOOTNOTES

1/ Thomas, Wayne H. Jr., et. al., National Evaluation Program Phase I Summary Report: Pretrial Release Programs, Washington, D.C.: Law Enforcement Assistance Administration, April 1977.

2/ See, for example, Pound, Roscoe and Frankfurter, Felix, eds., Criminal Justice in Cleveland: Reports of the Cleveland Foundation Survey of the Administration of Justice in Cleveland, Ohio, Cleveland, Ohio: The Cleveland Foundation, 1922, or Beeley, Arthur L., The Bail System in Chicago, Chicago, Illinois: Chicago Press, 1927, reprinted in 1966.

3/ Mullen, Joan, Pre-Trial Services: An Evaluation of Policy Related Research, Cambridge, Massachusetts: Abt Associates, Inc., 1974, p. 11

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5/ Mullen, op. cit., p. 15.

6/ Thomas, op. cit., pp. 18-27, passim.

7/ Ibid, p. 35.

8/ Ibid, p. 84.

9/ Goldman, op. cit.

10/ Mullen, op. cit., p.5.

11/ Past studies have indicated that FTA rates are likely to vary considerably, depending on the offense charged. Also, in some jurisdictions bond forfeiture may be treated as a fine, especially for minor offenses. See Mahoney, Barry, "Evaluating Pretrial Release Programs", paper prepared for the 1976 Annual Meeting of the American Political Science Association, Chicago, Illinois, September 1976, p. 35, and Clarke, Stevens H., et. al., "Bail Risk: A Multivariate Analysis", The Journal of Legal Studies, Volume V(2), June 1976, p. 350.

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13/ Feeley, Malcolm, and McNaughton, John, The Pretrial Process in the Sixth Circuit: A Quantitative and Legal Analysis, New Haven, Connecticut: Yale University, 1974, mimeographed, p. 39.

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15/ Clarke, ibid, p. 349.

16/ Ibid, pp. 347-349.

17/ Ibid, pp. 372-374.

18/ Mahoney, op. cit., p. 45.

19/ See, for example, Rankin, Anne, "The Effect of Pretrial Detention", New York University Law Review, Vol. 39 (1964), pp. 641-655.

20/ See, for example, Wice, Paul B., Freedom for Sale: A National Study of Pretrial Release, Lexington, Massachusetts: D.C. Heath and Co., 1974.

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22/ Feeley and McNaughton, op. cit., p. 37.

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A GROUP TREATMENT MODALITY FOR YOUTHFUL FIRST OFFENDERS IN A PRETRIAL DIVERSION PROGRAM

by

Robert M. Casse, Jr.
Greg Sisk

* * * * *

Diversion programs and systems are constantly looking for service delivery alternatives in their locale that might aid the client in their charge. While employment and/or school opportunities are often the primary focus, programs are by no means limiting themselves to just these options.

In the East Baton Rouge Pretrial Intervention Program an innovation was implemented three years ago that became an integral part of the program. Clients under the age of 26 participated in group discussions conducted once a week by a psychologist who co-authored this article. The process involved developed over the past three years so that what is presented is not a paper alternative, but rather one that has been on-going.

Although the authors do not discuss the cost involved in running such a program in their article, diversion program administrators should know that it needn't be an expensive proposition. Quite often dedicated professionals such as the authors are available for assistance, particularly if the diversion program has any contact with a college or university.

Robert M. Casse, Jr. is currently an Associate Professor at Louisiana State University. Dr. Casse received his doctorate from the University of Southern Mississippi, having received his M.A. degree from Louisiana State University. Dr. Casse personally conducted the groups described in this article while under contract to the Diversion program. Dr. Casse was aided in the preparation of this article by Greg Sisk. Mr. Sisk received his M.A. from Louisiana State University and is presently completing work toward his doctorate.

INTRODUCTION

The following article provides a unique diversion model employed at the local level by combining individual counseling, education, training, employment, and group treatment. Group treatment or education, which is the focus of this presentation, utilizes a multi-modal approach which draws upon learning theory, gestalt, transactional analysis, stigma, behaviorism and psychotherapy. The multi-modal aspect of group treatment clearly indicates that no single psycho/educational approach is applicable to the wide diversion of personalities, environments, antecedants or crimes which are present in each group. It has taken the senior author three (3) years to determine the parameters for this time limited/task focused modality and it is hoped that the procedures described herein will be helpful to others as they integrate group treatments into their diversionary programs.

Arrest data and court statistics have indicated that "most cases in the criminal courts consist of what are essentially violations of moral norms and instances of annoying behavior, rather than of a dangerous crime" (President's Commission, 1967).

The concern over the tremendous burden placed on courts and the injustices associated with the inability of the courts to handle the volume of cases, compounded by evidence that criminal processing often does more harm than good (Rubin, 1970), has resulted in a focus on diversion of certain groups of offenders before court processing. In terms of time-cost savings, deferred prosecution of selected cases contributes to a more effective allocation of the limited resources available to the criminal justice system, thereby permitting a concentration of resources upon the more serious criminal cases which may present a real threat to public safety.

The East Baton Rouge Parish District Attorney's Office initiated a diversionary Pretrial Intervention (P.T.I.) Program in 1975. 1/ The program is designed to offer an alternative to criminal prosecution to youthful first offenders (between the ages of 17-25) arrested for non-violent crimes. Provided an individual meets these criteria and the arresting officer and victim concur, the District Attorney's Office notifies the accused of their eligibility for the program. The individual may then choose to stand trial for the crime with which he is charged, or he may elect to participate in the P.T.I. program; whereupon the charges filed against him are not processed. While in the three (3) month program, the participant is required to attend school, receive vocational training, or work at a suitable job. Each participant is assigned a counselor he must meet with weekly to assist him toward these goals. In addition, participants are required to attend a weekly group meeting. Participants understand that termination from the program will result if they are re-arrested, fail to maintain employment, do not attend meetings, or drop out of educational/vocational classes. Termination from the program means the individual must stand trial for his original offense. Upon successful completion of the program, the pending charge is "dead-filed", although the District Attorney retains

the right to refile the charge for a period of two (2) years. This may occur if the participant is re-arrested and convicted of a criminal offense prior to the expiration of the two (2) year period. If no conviction occurs during this two (2) year period, all records of the case are expunged. By participating in the P.T.I. Program, the individual avoids the possibility of receiving a conviction on his record, receives rehabilitative counseling and assistance in finding employment or continuing his education, and avoids exposure to hardened criminals.

The purpose of this paper is to describe a successful group treatment modality for use with youthful offenders in a diversionary program. This group treatment approach is not group psychotherapy in terms of the traditional medical model of a practitioner administering a prescribed therapy to ill persons. Rather, participants are viewed as normal, rational individuals who have made poor decisions. Consequently, the groups are oriented toward examining the antecedents and consequences of the decision-making process in order to develop better decision-making skills.

CHARACTERISTICS

The approach can best be described as time-limited, task-focused, and multimodal simply because it is structured around a twelve (12) week interval to attain the major goal of reducing recidivism through the utilization of a variety of behavioral and educational techniques.

The time-limited component means that the group meets for one and one-half hours and the number of sessions is limited to a twelve (12) week interval. This twelve (12) week interval may be expanded or contracted pursuant to the number of participants. Because of the structure of the sessions, eight (8) participants is ideal. One (1) week should be subtracted for each group with less than eight (8) participants and one (1) week should be added for each group with over eight. Within these time constraints, which is not unlike a twelve (12) week training or reinforcement schedule, participant responses are continuously and selectively shaped through various tasks to approximate the goal of reducing recidivism.

In this treatment modality, the task focused aspect of reducing recidivism is attempted by incremental learning in five (5) component tasks:

(1) The initial session

(2) The individualized group interview sessions

(3) The feedback session

(4) The synthesis session

(5) The simulation session

These components are arranged to progressively develop more effective decision making skills in each participant.

Due to the utilization of various theoretical orientations in the approach, the authors have referred to it as multi-modal. Although the structure of each

component task remains unaltered from group to group, the dynamics of each component and the multi-modal treatment and techniques employed are directly contingent on the uniqueness of each group or individual. The essential treatment mode taken in each component task will be more fully developed in subsequent descriptions.

INITIAL SESSION

In the first session, as in all sessions, the therapist models behavior he desires in the participants: openness, trust, confidentiality, and a relaxed, non-threatening manner. This is particularly important to later group functioning since it has been shown to foster an effective working atmosphere (Van Zelst, 1952). Participants understand that the purpose of the group is to assist them in making better decisions, but that they are free to choose their own behavior. For example, they are assured that they can freely choose to leave the group at any time. Establishing a ground rule of confidentiality also gains acceptance of the group purpose (Back, 1951). Participants understand that anything said in the room stays in the room and that anyone observed breaking this rule will be expelled from the program. For the same reason, no notes or recordings of the session in progress are allowed. Frequently, a participant will confront (test) the therapist (by refusing to cooperate with requests, or by asking to search the room for records, etc.) to test the validity of his statements. In such cases, it is best to accept such challenges in the interests of further establishing group cohesiveness, trust and openness.

Following this brief introduction to the program, participants are then asked to introduce themselves (name, age, marital status, etc.), omitting a description of the offense with which they are charged. During this "get acquainted" period, the therapist reinforces with praise any verbalizations that contribute to group cohesiveness. Subsequently, participants are requested to write each person's name and to project what they feel each person was charged with. Besides reinforcing recognition of group members, this exercise serves as an illustrative example of the dynamics of labeling theory (Becker, 1963). The inability of group members to correctly judge others demonstrates the fallacy of any stigma labels they may have assigned to themselves. This exercise appears to effectively destigmatize each participant.

Once more positive attitudes toward the self have been cultivated with the former exercise, the therapist proceeds to mitigate against negative transference towards the criminal justice system and himself. This is accomplished by allowing each participant to give a brief description of his arrest in which he releases any unresolved emotion he may have regarding the incident. The benefits derived from catharsis are well documented (Freud, 1950; Megargee, 1966) and serve a two-fold purpose in the process described. First, the ventilation of negative feelings lessens the individual's anxiety, hostility and distrust, rather than permitting it to be displaced to the P.T.I. program or the therapist. Second, the onerous aspects of arrest (fingerprints, pictures, jail, and etc.), when discussed serve as vicarious learning for those in the group that did not have these experiences.

To foster a more positive transference relationship to the criminal justice system and the P.T.I. program in particular, the therapist explains to the group that they have nothing to fear from the criminal justice system since it is the same system that affords them a chance to keep their records clean (through the P.T.I. program).

At the conclusion of the first session the therapist gives a brief explanation of future sessions to the group and invites any questions from participants. Also, by the end of the first session the therapist should be able to assess: 1) the participant with the most ego-strength to be a candidate for the first individualized group interview session the following week; and 2) the presence of any extreme psychopathology in a participant. Generally, the groups can function well with mild to moderate degrees of neuroses and sociopathy, but the presence of severe neurotics or psychotics seriously interferes with group progress. Such members would hamper the progress of other participants and would most likely not benefit from the group since it is not designed entirely as a psychotherapeutic tool. Also, considering the nature of the group structure, other members would soon detect the abnormality and would probably confront the individual with his behavior directly (which could initiate serious repercussions in that person). When the therapist does detect such behavior in an individual, he/she is referred to other agencies for help.

INDIVIDUALIZED GROUP INTERVIEW SESSIONS

Before describing the structure of these individualized sessions, it is important to note the flexibility in technique offered in a multi-modal treatment approach. Such a method permits the therapist to select the most appropriate, effective, and expedient techniques among several theoretical orientations. A new or multi-modal approach emerges which is more adaptable than any of its components -- "the strength of one system balances the weakness of another" (Ponzo, 1976). Since poor decision making and/or faulty learning is the basis for most of the arrests, the present approach draws heavily from learning, cognitive, and gestalt theories.

First, participants are invited to give a brief overview of their incident in their own words and at their own speed and length. The therapist then solicits reactions/questions from the group in the form of a "brainstorming" period. All members are reinforced to ask at least one question. Dynamically, the brief overview allows the participant to project his perception of what occurred and permits the therapist (and later on, the group) to identify defenses used, image projected, rationalizations, etc.). The brainstorming period provides group members the opportunity to give their initial impressions based on their own experiences, biases, and prejudices, which can later be checked out for accuracy; thereby teaching objectivity in the perception of a new situation. In the first sessions the initial group impression is usually inaccurate, although later individualized group sessions reflect a more concise focus in the brainstorming.

Second, the participant is requested to mentally walk through the incident and present a detailed review of it from its true beginning, i.e., not the shoplifting in the store but how he/she got to the store in the first place. Sometimes role-playing is used to facilitate a thorough picture of the incident. During the detailed review the therapist detects the motiviations and antecedents which precipitated the participant's alleged act. Even though participants maintain that they didn't know why the act was committed, following group discussion and appropriate reality testing (Glaser) they realize that it was not so impulsive. The participant is encouraged to see the sequence of events that led up to the event. The other group members are asked why the participant engaged in the act and are encouraged to ask questions to check their initial impressions. During this brainstorming period, the group usually focuses on incident specifics and the content aspects of the act.

Third, the therapist processes the detailed review with the entire group to determine antecedents. The group is again asked to brainstorm to determine whether the participant engaged in or was aware of similar acts by significant others. For example, in many cases a participant's criminal behavior is related to vicarious learning, or modeling the behavior of a significant other (Bandura, 1963). Usually, the person has internalized certain perceptions of what he should try to become, i.e., an ego-ideal (Freud, 1950), which also figures into the incident. The participant may engage in criminal activity to satisfy his ego-ideal or to avoid ridicule from his peers. Also, it is not uncommon for a participant to commit criminal acts because of a "self-fulfilling prophecy" (Jones and Panitch, 1970). At any rate the therapist interprets these antecedents and encourages the group to recognize any patterns in the participant's behavior. Dynamically, determining the antecedents to a participant's act provides a vivid demonstration of the ways modeling, reward, and reinforcement influence behavior.

Fourth, the antecedents to the incident and the participant's past behavior are interfaced. The therapist asks the group to verbalize any relationships they see, providing them the opportunity for tangential learning. Also, it appears that such interfacing is more acceptable to a participant when related by group members rather than an authority figure.

Fifth, the participant is requested to review his initial reaction of the incident and in light of the preceding discussion, present the Gestalt of his behavior — the "why and how" (Wertheimer, 1945) in his own words. It is assumed that a clear public affirmation reinforces what the participant has learned. Through role-playing, possible alternative decisions in similar situations are discussed. The therapist follows through on the process by checking transferable probabilities, e.g., a participant may affirm to never steal again but continue to find receiving stolen property acceptable. To close the session the therapist elicits any other relevant observations.

The foregoing process is then applied in each individual case — with the group members assuming a greater role in determining antecedents, consequences and finally determining the gestalt.

GROUP CLOSURE

Group Feedback

Each participant is asked to write the names of all other group members and whether they feel that person will be arrested again in the near future. They are given all the time they need to complete the task. Each participant then gives and receives feedback from the rest of the group. This provides participants the opportunity to check out their perception of themselves with the way others see them. This is helpful because it suggests to each member areas to work on in becoming a more responsible individual. Sometimes new information arises that can be probed to further help participants understand their behavior. Also, this exercise provides a thorough review of material discussed in the individualized sessions and thus reinforces learning which has occurred.

Besides the above mentioned benefits of the exercise, there are several additional reinforcing aspects. First, it demonstrates to each member that others are concerned and are trying to understand and help them. This empathy is reinforcing to group members who sometimes still feel stigmatized and abandoned for their offense. If others' comments are positive, not only is this reinforcing to participants, but also it sets up an expectancy for them — they know that at least someone expects them to do better in the future than they have done in the past. For those individuals that receive negative feedback, measures must be taken to present the establishment of a self-fulfilling prophecy (Jones & Panitch, 1970). This is done by confronting them with it. When confronted, the member must publicly affirm to others that he will not be "busted" again. It is believed that such public affirmation will stay with the person and require a longer period to extinguish.

Synthesis Session

The therapist requests the group to take a pencil and paper and answer the following questions, presented sequentially;

1) What was the purpose of the groups?

2) Was this purpose achieved?

3) What have you learned from the groups?

4) What changes if any, would you make if you were group leader?

Dynamically, this exercise allows each participant, in his own words, to recapitulate the purpose of the groups. It reinforces whatever learning has occurred. Further reinforcement of the program goals occurs when each participant reads his/her answers and the other group members process them. Hearing others' comments provides vicarious reinforcement to each member; each participant hears what the program has done for others and can use this information to reinforce what he has learned.

Simulation Session

To integrate what has been discussed in previous sessions and to demonstrate the gestalt of decision-making, an exercise from Simon, "The Two Phase Fall-Out Shelter" is used for the last session. From a description of eleven people, each participant must choose individually six (6) who will live. Then, as a group, the participants must decide together on the six (6) who will live. The therapist plays no active role during the group discussion but he must mentally note all the dynamics of the group consensus. Particularly, he should note the peer influences and subtle manipulations that figure into the group consensus. Generally, the most dominant individual in the group will arrange for the group consensus to agree with his own personal list.

Following the group consensus, the therapist asks the participants what their individual choices were. Participants usually state that the group consensus was freely chosen and they were not manipulated in their decision. The therapist points out how a dominant personality, or personalities, influenced the entire group's decision. Although members are frequently reluctant to admit being influenced, they are rebuffed when the therapist notes all of the dominant participant's subtle arguments, persuasions, tactics, etc. Many times the dominant person is also unaware of his/her influencing techniques. In sum, this final exercise provides a striking illustration of the complexities involved in decision-making.

CONCLUSION

Probably one of the most vital contributions of the P.T.I. program to society is the severance of the multiplier effect of criminal behavior. It has been blatantly pointed out in each group how a member, once being "taught" to steal by someone they admire (the ego ideal), will in turn then begin to teach new "recruits". As stated previously the subtleties of modeling are revealed in detail to the participants. In most cases, particularly with shoplifting, the participant is enamored with the articles the ego ideal has acquired. The ego ideal might then give some article to the participant. Usually the next step is when the participant accompanies the ego ideal to the designated place, observes the ease with which the ego ideal obtains the desired article and then either on the initial or subsequent excursions is encouraged (reinforced) to replicate the ego ideal's behavior. Once the participant successfully obtains the desired article without being apprehended, the success of obtaining the object becomes the reinforcement for further stealing. Moreover, with each subsequent success both anxiety and guilt are diminished. The multiplier effect becomes apparent when the participant then becomes elevated to the positions of ego ideal for some other person who is attracted by the possessions of the participant and the ease with which they were acquired.

Although the P.T.I. program has reduced recidivism as its main objective, breaking the link in the multiplier effect has become equally important. As many participants have verbalized, "I was not fully aware that I was teaching others to steal, nor how I myself had been taught." Most gratifying of all for the therapist is when the participants realize that, had it not been for the P.T.I. program, they would more than likely have resumed the same behavior once being released by the court.

The authors wish to thank Ossie Brown, District Attorney for the 19th Judicial District for implementing and supporting the program

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EDITOR'S NOTE: Although the above service delivery model for diversion was discontinued in December 1977 due to funding cutbacks, the program did enjoy local support. In District Attorney Brown's analysis, "We would point out that the percentage of recidivism in this group [those terminated unsuccessfully] *is greater than those terminated satisfactorily. This significant difference reflects the*

success of the [Pretrial Intervention] Program. Of the 27 rearrested after being satisfactorily terminated from the program, thirteen were arrested less than six months from the date of termination and fourteen were arrested six months or more after termination. From the results of this information a policy was adopted commencing January 1, 1977, to attempt to identify participants who may be considered high risks. When one is so identified, special treatment will be provided in an attempt hopefully to reduce recidivism in this group."

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IS PRETRIAL PERFORMANCE AFFECTED BY SUPERVISION?

by

J. Daniel Welsh

* * * * *

As Professor Freed mentions in the Introduction to this Journal, a problem that some release programs have to contend with is "condition overkill". While it is generally assumed that some conditions of release do help to insure the return of defendants to court, burdening a defendant with conditions that are rehabilitative in nature is improper.

In the following paper the author examines the affect that different levels of supervision have on defendant outcomes. The findings and conclusions should prove useful to release program administrators in developing methods of supervision.

J. Daniel Welsh has been employed at the D.C. Bail Agency since 1974 serving as researcher. Mr. Welsh has served on the Research Committee of NAPSA and has been a member of that organization for four years. Prior to his present position, Mr. Welsh was a private consultant in the criminal justice field, particularly in the area of drug abuse. Mr. Welsh was the principal author of The Pretrial Offender in the District of Columbia: A Report on the Characteristics of 1975 Defendants published by the D.C. Bail Agency and the Office of Criminal Justice Planning on Analysis in D.C.

We are particularly thankful that Mr. Welsh, under the most limited time constraints, was able to produce this article for the Journal.

The relationship between supervision and pretrial performance has received little attention. While many programs and jurisdictions are advocating and using alternatives to financial release, there is a need to measure the capacity of release programs to supervise pretrial defendants when these alternatives are employed. For years there has existed a presumption that supervision makes a difference in the behavior of pretrial releasees. However, seldom are empirical findings provided to buttress this assertion. Rather than supervision, the decision of the program to choose low-risk clients by means of a conservative "point scale" may be producing these low rates. This article attempts to fill this void in the literature.

An experiment using random assignment procedures was conducted in Washington by the District of Columbia Bail Agency to determine whether increased levels of supervision improve pretrial performance. There were three levels of supervision examined: passive supervision consisting of defendant-initiated contact, moderate supervision where the Agency took an actual role on contacting the defendant; and intensive supervision which included outside contact with the defendant in the community. The impact of supervision is examined using the following outcome measures: court appearance, rearrest during the pretrial period, and compliance with court-ordered conditions of release.

There is some literature which addresses the impact of supervision and motivation on pretrial release clients. A study in Monroe County, New York in 1972 examined the impact of client outcomes. 1/ Pretrial Release Agency clients were divided into two groups. One group received no supervision, while the other group maintained contact with the program (essentially by telephone). The Agency clients receiving minimal supervision had a slightly higher appearance rate. A study in Des Moines, Iowa, examined the impact of a supervised release unit on high risk defendants. 2/ The supervised release clients were of higher risk. Thus, even though there was no difference in rearrest rates or failure-to-appear rates, it could be argued that there was a possibility of impact because of differing risk levels. A study of the Philadelphia Supervised Release Program also using a comparison group strategy, found that agency clients had lower violation rates than defendants in any of the comparison groups. 3/ Finally, a study in New York City used an experimental design to determine the impact of notification on agency clients. 4/ Defendants were randomly assigned to "notified" and "not-notified" groups. Notified clients were sent letters indicating time and place of their court date and they were required to check in after arraignment and prior to court dates. The failure-to-appear rates were considerable lower for those in the notified group. However, notification had less impact as the pretrial period lengthened.

These studies show that notification has a strong impact on failure-to-appear (New York City); that low level supervision may not have a great effect on failure-to-appear (Monroe County); and that supervised release may influence defendant behavior (Philadelphia and Des Moines). This study will provide methodologically defensible information on the impact of "increased" supervision.

THE PROGRAM

D.C. Bail Agency

During the past fifteen years, the District of Columbia has become one of the leading jurisdictions in implementing bail reform. The courts have shifted from the practice of total dependence on the traditional bailbond system to a policy of presumptive release on recognizance. Acceptance of this approach was made possible by legislation; judicial interpretation; cooperation and coordination among system actors; and successful performance by the local pretrial release program—the D.C. Bail Agency.

In 1975, the year of this study, seventy percent of the pretrial population processed in this jurisdiction was initially released on one of the many varied forms of non-financial release available, and in some manner was supervised by the Bail Agency during the pretrial period. 5/ The Agency is supervising between 3,000 and 3,500 cases at any one time.

Routinely, the Agency notifies defendants of upcoming court dates and monitors compliance of court-ordered conditions of release. The Agency coordinates its activities with custody organizations and treatment facilities. At the same time the Agency must provide telephone service twenty-four hours a day, seven days a week to handle the large number of contacts with releasees. If supervision efforts fail the Agency notifies the appropriate court officials of violations discovered. Finally, if the defendant fails to appeal the Agency makes an attempt to determine where the defendant is and tries to persuande him/her to surrender voluntarily to the court before arrest. At the time of this study the program was awarded a grant that provided a car to assist in this effort.

METHODOLOGY

This section discusses the following methodological concerns: research design considerations; variables used to measure pretrial behavior (failure-to-appear, rearrest, etc.); equivalence of the three randomly assigned groups; and statistical techniques.

An experimental research design provides the methodological focus for this study. It provides the most reliable information for studying program impact on client outcomes. This design involves the random assignment of defendants to an experimental group and a control group. Random selection (also called equal probability assignment) ensure that the experimental group and control group are similar in characteristics. Any difference in client outcomes are solely due to the program's effect. 6/

The experimental design is employed in this study for a number of reasons:

- A controlled experiment is the most certain way to demonstrate the impact of a program. There are numerous reviews of the literature which question the validity of research in pretrial release and diversion because of design considerations. There can be no challenge to a properly implemented experiment.

- Under some circumstances random assignment can be done with less cost and disruption than other design types.

- One conclusive evaluation using an experimental design can be far less costly than many inconclusive studies using weaker designs.

Although these are very persuasive arguments for the use of experimental design, it is seldom employed in criminal justice research. 7/ Among the arguments against the technique are political and ethical problems in random assignment, familiarity with the technique, and the "supposed" cost of implementation. Yet, it was easy to implement an experimental design in this study. Among the reasons were the following:

- Clients were not denied release from jail because of the experiment. Rather, clients were provided services and assigned to different supervision groups after they had obtained release.

- The administrator of the D.C. Bail Agency is attuned to the value of research in making policy decisions.

- The experiment was implemented with relatively little effort compared to a study providing simple statistical description. Writing the final report was the most time-consuming aspect of the project.

- The program had the necessary resources so that the time period required to complete results would not be an impediment to the project.

Two experimental groups and one control group were employed in this study. Each received a different level of supervision. They included the following:

- Group 1—Passive Supervision: Because of legal and programatic requirements "normal" services could not be withheld from this group. The services include notification of court dates, phone contact with the defendants and attempts to get clients to return if they failed to appear.

- Group 2—Moderate Supervision: In addition to the normal level of supervision, clients in this group were contacted every two weeks either by telephone or letter (if the defendant had no phone). The purpose of these contacts was to remind the defendants of future court dates, to warn them of the responsibilities pertaining to conditions set by the court, and to determine whether there were any problems that might affect the defendants' pretrial performances. Two counselors maintained running-logs of all contacts with and about each defendant while the case was pending in court.

- Group 3—Intensive supervision: This group received the same type of supervision as the clients in Group 1 and 2. The clients in this group were visited at their residence or place of employment on a monthly basis by the Bail Agency's Street Investigation Unit. During the visit this unit did nothing more than reinforce the conditions of release and the upcoming court date. The Unit also alerted the client's counselor of unusual activity or behavior which might require further contact.

We have every confidence that the random assignment procedure used to choose the defendants in each group produced groups that are thoroughly similar in characteristics. Therefore, any differences in outcome can be solely attributed to the differences in the levels of supervision. One way to demonstrate this is to compare background information on the equivalence of the three groups. This information is presented in Table 1. The table, which presents background and criminal justice characteristics, shows few differences between the three groups. On the basis of these conclusions it can be argued that the three groups are equivalent. Among the findings of this table are:

- There are no differences in demographic variables, community ties and socioeconomic variables.

- Of the criminal justice system variables, only "charged with crime of violence" exhibited any differences among the three groups. It was not clear why this difference appeared since random assignment had been employed. However, this difference did not appear to affect the results of supervision impact on client outcomes.

- Variables important for the analysis of failure-to-appear rates, such as exposure time and number of court dates, did not differ in the three groups.

Client performance is examined from three perspectives: Failure-to-appear (court appearance), rearrest during the pretrial period and, compliance with court-ordered conditions (such as cooperation with drug treatment, reporting conditions, etc.). Each of these variables is defined below, their importance is discussed, and measurements are selected.

Failure-to-appear is probably the most important variable in defining the quality of a defendants pretrial behavior. For example, the National Association of Pretrial Services Agencies (NAPSA) "Standards and Goals for Pretrial Release" argue that "the primary purpose of bail is to assure the appearance of the defendant at trial. It is essential that pretrial release agencies orient their—criteria for recommendations, notifications systems, defendant supervision—toward this goal." 8/

Methodological concerns are especially important in defining failure-to-appear. It makes a great deal of differnece in the nature of the failure-to-appear measurement. For example, failure-to-appear can be defined as any missed court appearance or a deliberately missed appearance. Depending upon which is chosen, the rates will differ dramatically. This may be one of the major reasons why there can be no national failure-to-appear rate, nor is it possible to compare rates in different jurisdictions. Programs in different jurisdictions use various

Table 1

COMPARISON OF GROUP CHARACTERISTICS BY SELECTED VARIABLES

	Group I Passive Supervision	Group II Moderate Supervision	Group III Intensive Supervision
Demographic:			
Age (Mean)	27	27	26
Black/White	94/6	93/7	94/6
Male Population	88	91	88
Community Ties:			
Area Residence (5 years or more)	93	96	88
Present Address (1 year or more)	71	76	74
Living with family	65	67	61
Socio-Economic:			
Less than 12th Grade Education	61	64	64
Unemployed at Arrest	42	39	48
System Related:			
Number with prior record of convictions	42	39	34
Number under sentence (on probation or parole)	15	19	17
Number with cases pending at beginning of study	16	12	12
Number charged with crimes of violence	80	71	62
Number originally recommended for release by Agency	91	88	85
Number of Court appearances on original charge	435	405	450
Average number of days from arrest to disposition	183	187	174
Average number of days on realese in the community	157	149	148

definitions of the term and varying court characteristics mean that failure-to appear must be measured in different ways in different jurisdictions. Variations in procedures, rules, and bail practices may significantly influence the failure-to-appear rate. Equally important, the prosecutor's approach can drastically influence the flow of cases through a system based on the availability and use of diversion, plea bargaining, and the role of discovery. 9/

Failure-to-appear is narrowly defined in this study. Only persons who missed a court date where a warrant is issued for arrest at the close of daily business are classified as having missed an appearance. Persons who were late for court or missed the first calling of a case but who appeared later in the day are excluded. The issued warrant must be outstanding on the following day before a defendant is considered to have failed-to-appear.

Clearly, the use of warrants to define failure-to-appear will produce a figure which is lower than found in many jurisdictions. By the same token to some degree it will eliminate from consideration those defendants who did not deliberately miss their court date. Failure-to-appear is defined as three different measures in this study. They include:

- Failure-to-appear—Appearance Based: Since each defendant often makes more than one court appearance during the life of the case, a measure was selected to take this into account. Thus, the total number of appearances and the total number of failure-to-appear were computed. The average number of appearances was slightly more than four per defendant for each group examined.

- Failure-to-appear—Defendant based: Many programs provide defendant-based measures of failure-to-appear. Thus, no matter how many court appearances a defendant misses, it is still counted as one defendant who missed at least one court appearance.

- Failure-to-appear—Willful: It is difficult to use "willful" for "deliberate" failures. The courts nor the Agency keep information on these failures. Further, it is difficult to measure or define defendant motivation. Therefore, a surrogate was chosen to measure willful failure as those cases in which the prosecutor chose to charge the defendant with the crime of bail jumping. Though this is not the perfect definition of "willful" such a definition selects some of the more egregious cases.

Rearrest rate is an important measure of defendant pretrial performance. Clearly, pretrial crime while on bail inflames the community through sensational events reported in newspapers. Research has shown that judges consider the dangerousness of the defendant, in terms of risk of pretrial crime, in making bail decisions. 10/

There are a number of methodological problems in defining rearrest rates. The National Center for State Courts argues that the problems with measuring the extent of pretrial crime committed by releasees are even more severe than the problem of measuring failure-to-appear rates. 11/ Some of these problems relate

to the fact that not all crimes are reported; only a small percentage of crimes leads to arrest; crimes may take place across jurisdictions; record-keeping of county, city and police departments may not be coordinated; defendants may use aliases, etc. Probably one of the greatest problems with this rearrest measurement is the time frame used (exposure time). For the purpose of this study, pretrial crime is defined as a rearrest while on bond for the study period where the prosecutor chose to file charges with the court. Persons arrested who had charges against them dropped at the initial hearing were not counted as a rearrest. Rearrest, in this study is measured in the following ways:

- Rearrest—Defendant-Based: As with failure-to-appear, a defendant-based measure of rearrest is employed. Since rearrest is not related to number of court appearances, an appearance-based measure is unnecessary.

- Rearrest—Exposure time: Exposure time is one of the more important determinants of the extent of pretrial crime. A North Carolina Study by Clarke, et al showed that: "court disposition time...must be considered the variable of most importance" in predicting rearrest. 12/ This measure of rearrest was defined as the number of arrests per 100 man-days of pretrial freedom.

Compliance with release was the third outcome variable employed. Compliance with court ordered conditions (for example, receiving drug treatment) is required if release agencies are to have any impact on either failure-to-appear or pretrial crime. The NAPSA Standards and Goals argue that "the pretrial release agency should monitor compliance with all conditions of release....In cases of serious violations, the Agency should submit a report in writing to the court."13/

However, compliance is not as important as failure-to-appear or rearrest for it does not involve behavior clearly affecting the court. In this study compliance covered the entire pretrial period. Non-compliance was possible even if a violation was not submitted to the court. Initial non-compliance, even if rectified at a later time by the defendant, is considered in the count. Non-compliance was defined from two perspectives:

- Non-compliance—Defendant-based: If at any time during the pretrial period, the defendant failed to comply with any of the four conditions listed below, then the defendant was counted as a failure.

- Non-compliance—Specific type: The particular types of non-compliance were calculated. These included maintaining contact with the Bail Agency, cooperating with a third-party custody program, taking court ordered drug treatment, and not threatening a complaining witness.

An index of rearrest and failure-to-appear was the fourth outcome variable employed. The index was used because a measure was needed which combined these two important measures of pretrial failure. The index was defendant-based and identified those clients who either were rearrested or failed to appear for their court date.

The selection of defendants for the study was done between July and August of 1975. Data on the outcomes, such as rearrest and failure-to-appear, was gathered in the Summer of 1977. Information on outcomes was not gathered until all of the cases were disposed of. Group members were selected by a random process, until each group had one hundred members. All felony cases released non-financially were included in the groups during the selection period. A true random sample using a "goldfish bowl" method of selection was employed. The data was primarily obtained from the Bail Agency's record system although police and court records were used to supplement missing information.

Every attempt has been made to write for the nonmethodologist. Thus, statistical techniques and descriptive statements have been written as clearly and simply as possible. For example:

- Data are presented in percentage form for each of supervision types.
- Only essential data are put into the tables so that even the nonquantitatively oriented will want to consult them.
- Unless otherwise indicated the number of cases for each group is 100, with a total of 300 cases in the entire study.
- The reader is urged to compare the percentages of the three groups. Note expecially that Group 1 (Passive Supervision) and Group 2 (Moderate Supervision) have results very different from Group 3 (Intensive Supervision).
- For those interested in more advanced statistical techniques, T-tests were computed for variables such as failure-to-appear and rearrest. 14/

FINDINGS

Failure-to-Appear

Comparison of failure-to-appear rates among the three groups show variations according to the level of supervision received. As supervision is intensified the rate of failure to appear decreases. Group members receiving the highest level of supervision have the lowest failure rate at 1.55 percent. By contrast, the failure-to-appear rate is over 4 percent for members of the other groups receiving less intense supervision. (Moderate Group 4.20 percent and 4.59 percent for group members with Passive supervision.) 15/

Based on the number of people who failed to appear, the ranking among groups changes. More persons actually failed to appear who have moderate supervision (Group 2) than those passively supervised. The effect of applying higher levels of supervision has been to reduce the incidence of multiple failures to appear for the same court case. That is, 5 persons failed to appear two or more times in Group 1, and 4 persons did likewise in Group 2, while no members of the group receiving intensive supervision failed to appear more than once during the experiment.

Table 2

PRETRIAL PERFORMANCE BASED ON APPEARANCE AT COURT

	Level of Supervision		
	Passive	Moderate	Intensive
Failure-to Appear Rate	4.59%	4.20%	1.55%
Percentage of Group Failing to Appear	10%	13%	7%
"Willful" Failure to Appear Rate	3.22%	2.47%	0.44%

Rearrest

Examination of rearrest information discloses that increasing the level of supervision has no effect on reducing the incidence of new arrests during the pretrial period. Table 3 shows that the total number of new arrest cases for each group are similar, ranging from a low of 34 for those persons intensively supervised to a high of 37 for those in the moderate supervision group. While the intensive supervision group has the fewest number of rearrest cases, suprisingly it has more persons rearrested during the experiment than the other groups.

The similarity of pretrial performance of the three groups is more clearly seen when examining rearrest based on the exposure time, in this instance 100 man-days. 16/ The "rearrest-exposure time" rate averages 19 new arrest cases for each of the three groups.

While increased contact did not reduce the incidence of rearrest as expected, an unanticipated association between rearrest and classification of original charge was found. Persons originally charged with offenses of robbery, burglary, auto theft, forgery, and larceny have significantly higher rearrest rates than persons charged with other types of offenses. Thirty-six percent of the defendants charged with these crimes were rearrested as compared to 14 percent for persons charged with other types of crime. 17/

Table 3

COMPARISON OF REARREST INFORMATION ACCORDING TO LEVEL OF SUPERVISION

	Level of Supervision		
	Passive	Moderate	Intensive
Total Number of Rearrest Cases	36	37	34
Number of Persons Charged with New Offenses	25	26	28
Rearrest Exposure Rate (Based on 100 man-days)	19.6	19.8	19.5

Compliance with release conditions

Based on the levels of supervision initiated by the program, persons provided with higher levels of supervision complied with conditions of release more often than those receiving passive supervision. No violations of court ordered conditions were discovered for over 70 percent of the persons having the most intensive level of supervision. In contrast, the rate of overall compliance drops to 52 percent for defendants passively supervised. Persons receiving moderate supervision fall between the two extremes.

Compliance with individual conditions of release also vary according to the level of supervision provided. As expected defendants receiving increased supervision maintained contact with the program more often, throughout the pretrial period, than those receiving passive supervision. Surprisingly, the number of violations reported by third party custody and narcotics treatment organizations were significantly reduced by increased Agency contact even though the amount of contact between Agency staff and these organizations did not increase appreciably for experimental group members. No difference is found among groups when examining if releasees threatened or intimidated a complaining witness.

Table 4

COMPARISON OF COMPLIANCE WITH CONDITIONS OF RELEASE ACCORDING TO THE LEVEL OF SUPERVISION

	Level of Supervision		
	Passive	Moderate	Intensive
Overall Percentage Complying with Conditions of Release	52%	62%	71%
Percentage Failing to Comply with "Reporting" Condition	54%(74)	44%(82)	30%(79)
Percentage Failing to Comply with Third Party Custody	19%(42)	11%(46)	12%(51)
Percentage Failing to Comply with Drug Treatment	47%(17)	9%(22)	11%(19)
Percentage Failing to Stay Away From a Complaining Witness	2%(50)	- (46)	2%(41)

Index of Rearrest and Failure to Appear

The previous discussion focused on the effect of varying levels of supervision by independently examing information on non-appearance, rearrest, and compliance with conditions of release. To more clearly present the overall effect of supervision, an index that combines information on both rearrest and failure-to-appear was constructed. 18/ Overall, 69 percent of the total population supervised appeared for all court dates and were not rearrested during the pretrial period. Of the remaining defendants, 21 percent were rearrested at least once, five percent failed to appear for at least one court date, and five percent both failed to appear and were charged with new crimes.

If the effect of defendants missing more than one court date or being rearrested two or more times is ignored, little difference between groups is found based on these two variables. The net effect of increased contact in this study has been to reduce the incidence of multiple failures to appear by some individuals.

Table 5

INDEX OF REARREST AND FAILURE-TO-APPEAR
ACCORDING TO LEVEL OF SUPERVISION
(Defendant-Based)

	Level of Supervision			
	Passive	Moderate	Intensive	TOTAL
Percentage Appearing for All Court Dates and having No Rearrests	69%	68%	70%	69%
Percentage Failing to Appear at Least Once	6%	6%	2%	5%
Percentage Rearrested at Least Once During Study	21%	19%	23%	21%
Percentage Rearrested and Failing to Appear	4%	7%	5%	5%

Of the total population succeeding (no rearrest or failure-to-appear), 70 percent complied with conditions of release during the pretrial period. By comparison, 60 percent of the group rearrested and/or failing to appear did not comply with conditions of release. Since the level of supervision effected compliance its usefulness becomes apparent. Condition compliance information can be used as an indicator of possible failure-to-appear or rearrest during the pretrial period.

CONCLUSION

The purpose of this experiment at the D.C. Bail Agency has been to investigate the effect of supervision with "high risk" defendants released non-financially by the court. The use of a "classical" experimental design made this one of the more methodologically defensible studies in the release field. Our supposition was that more intensive supervision would increase the likelihood of court appearance; would reduce the level of rearrest during the pretrial period; and would improve defendants' compliance with court-ordered conditions of release. Among the findings were the following:

- Increased levels of supervision improve the appearance rate of conditionally releasees charged with felony offenses.
- Increased levels of supervision not only reduced the overall number of missed appearances, to some degree it also reduced the incidence of individuals missing multiple appearances for the same case.

- Increased pretrial supervision also improved compliance with conditions of release set by the court.

- The types of increased supervision used by the Agency (additional Agency initiated phone contact and visits in the community) substantially improved condition compliance over those persons receiving the Agency's passive level of supervision.

- The supervision provided by the Agency, no matter the level of intensity, had no affect on reducing the level of recidivism during the pretrial period.

The importance of this study needs to be judged in terms of the following comments:

- The impact of supervision on failure-to-appear confirms prior studies on supervision in Des Moines and Philadelphia and a study of notification in New York City.

- The lack of impact of supervision on pretrial crime runs counter to earlier methodologically weaker studies in Des Moines and Philadelphia. 19/

- Though methodologically strong, this study discussed "increasing" levels of supervision. Thus, all clients in the study had some form of supervision and notification. This study examines the impact of increasing the minimal level of supervision.

The findings from this study directly contradict one of the most common rhetorical claims about pretrial supervision, at least with respect to rearrest. The program's inability to decrease the rearrest rate with increasing levels of supervision presents a difficult dilemma. There are a number of possible solutions to decreasing the rearrest rate.

First, other approaches may work and should be tried. For example, the "high risk" population drawn for this experiment selected persons charged with felony offenses irregardless of the particular type of charge. Findings show that 80 percent of the persons rearrested were initially charged with crimes involving robbery, burglary, autho theft, forgery, and larceny. Future efforts should consider developing individualized supervision plans, that target more specifically on offense data. Aside from charge, other areas that might be considered include: whether the defendant was originally recommended for release by the program; defendant drug use; age and unemployment characteristics, etc. Any one area may go beyond the program's capability to provide specialized services. However, the more discriminating a supervision model becomes, the greater the chance of focusing resources where they will do the most good.

Second, much of the empirical research on release practices has focused on the release decision itself. "Point scales" which are more accurate predicators of both failure-to-appear and pretrial crime need to be developed. Release program recommendation schemes that focus primarily on defendant characteristics such as strength and stability of community ties may be ignoring factors which may

be more potent predicators of pretrial behavior.

Third, the implementation of an intensive supervision model using home visit may not be possible because of cost considerations. Release agencies often on low budgets require systems which maximize the client load of each supervision counselor. Clearly, intensive supervision for all but the highest risk defendant may not be cost effective.

Fourth, the high rearrest rate suggests the recommendation and use of preventive detention as a viable alternative to release if no alternative supervision approaches can be found. The goal of maximizing release at the point of endangering the safety of the community must be weighed. The proponents of pretrial detention may be correct if the rearrest rates found in this study represent to some degree the magnitude of crime during the pretrial period. If the estimation of human costs becomes more important than it has been in the past, the the philosophy of equal justice must also be balanced in terms of safety to the community.

A complex, very difficult, trade-off of goals is associated with the operation of a pretrial release program. There are too many blanks in knowledge and too many choices of program goals to permit a concluding recommendation on the role of supervision at the pretrial level. The benefits to the defendant are fairly clear. The costs to the system and to the public are much less so. Release programs most of all, must re-evaluate their mission and goal structure on the compatibility of achieving the variety and diversity of goals espoused in the pretrial services field.

FOOTNOTES

1/ Evaluation of Monroe County Pretrial Release, Inc., Rochester, New York: Stochastic Systems Research Corporation, 1972.

2/ Venezia, Peter S. Pretrial Release with Supportive Services for High Risk Defendants; Three Year Evaluation of the Polk County Department of Court Services Community Corrections Project, Davis, California: National Council on Crime and Delinquency, 1973.

3/ Miller, Herbert S., et al., Second Year Report: Evaluation of Conditional Release Program, Philadelphia, Pa., Washington, D.C.: Institute for Criminal Law and Procedure, Georgetown University, 1975.

4/ Gerwitz, Miriam, Brooklyn PTSA Notification Experiment. (Unpublished).

5/ Welsh, J. Daniel and Viets, Deborah, The Pretrial Offender in the District of Columbia: A Report on the Characteristics and Processing 1975 Defendants Washington, D.C.: D.C. Bail Agency, Office of Criminal Justice Plans and Analysis, 1976.

6/ In this study Bail Agency clients assigned to passive supervision are defined as the control group. Clients assigned to moderate or intensive supervision constitute the experimental (treatment) groups.

7/ Even though experimental designs are seldom employed, there are studies which demonstrate the value of this approach. Examples in pretrial release include the original Vera Study of release on recognizance in New York City and their more recent Notification study. The Vera study of the Court Employment Project, currently in progress, is an example in the diversion study field.

8/ Performance Standards and Goals for Pretrial Release, Washington, D.C.: National Association of Pretrial Services Agencies, May, 1977 p. 44.

9/ For a discussion of prosecutorial policy and its impact see Pretrial Screening Projects: Phase I Report, Washington, D.C.: Law Enforcement Assistance Administration, National Institute of Law Enforcement and Criminal Justice (Series A, No.2.) 1976.

10/ The NAPSA "Standards and Goals" also speak to the question of this issue: "While the relationship between anticipated criminal activity and the pretrial release decision is a controversal area, in a very practical sense, pretrial agencies must address the possibility of dangerousness since their existence and the continued growth of nonfinancial release as a replacement for the traditional surety bond system depend on judicial and public support."

11/ Mahoney, Barry, An Evaluation of Policy Related Research on the Effectiveness of Pretrial Release Programs, Denver, Colorado: National Center for State Courts. p. 58.

12/ Clarke, Stevens, H. et al, The Effectiveness of Bail Systems: Analysis of Failure-to-Appear in Court and Rearrest While on Bail, Chapel Hill, North Caroline: University of North Carolina, Institute of Government, 1976

13/ NAPSA "Standards and Goals".

14/ The T-test is designed to compare results between two groups. Since the study uses three groups, the test is applied to all the possible combinations of groups to determine the levels of supervision. The T-test is only appropriate for interval levels of measurement for variables such as failure-to-appear and rearrest. Data for the compliance outcomes is not in this format but rather is ordinal or discreet. Thus, only percentage differences are available for this latter data. Suffice to say, qualitative analysis of percentages is the primary analytical tool. A statistically significant relationship is defined at .05 level of significance.

15/ Using these rates, the difference between Intensive Supervision and Passive Supervision is confirmed statistically with a t value of 1.71 with 109 degrees of freedom. A similar difference is found when the Moderate Group is compared with the Intensive level with t=1.66 with p=.05. No statistical difference is found, in terms of the failure rates when the Passive group is compared with the Moderate Group.

16/ For a more detailed discussion of the computation of failure rates based on exposure time see Galvin, John, et al, Instead of Jail: Pre- and Post-Trial Alternatives to Jail Incarceration, Volume 2, October 1977, pp. 78-81 & 97-98.

17/ Charge categories with particularly low rearrest rates include assault, sexual assault, fraud, homicide, and charges involving stolen property. Overall, 80 percent of the persons rearrested during the pretrial period were originally charged with crimes that fell into one of these five categories.

18/ Information in this discussion is defendant-based, as such, it does not account for the overall effect of persons missing more than one court appearance or persons having two or more rearrest cases.

19/ For a discussion of the methodological problems encountered with these studies see Mullen, Joan, Pretrial Services: An Evaluation of Policy Related Research, p. 96, Miller, Herbert S., et al., Second Year Report: Evaluation of Conditional Release.

CITIZEN DISPUTE RESOLUTION: A BLUE CHIP INVESTMENT IN COMMUNITY GROWTH

by

Paul Wahrhaftig

* * * * *

Following World War II the United States entered a period of tremendous growth and movement. People began to move, technology galloped and the population exploded. Between cities and rural areas "suburbia" was discovered. With the many benefits that this period gave there were, and still are, corresponding losses. One of these has been a dwindling in the numbers of communities. This refers to communities in the broadest sense: neighborhoods where families, merchants, law enforcement officials and the judiciary knew each other and settled disputes quickly. As these communities have faded away, impersonal substitutes have replaced the actors once well known. Nowhere is this more evident than in the justice system now existing in large metropolitan areas. Out of necessity (some would argue convenience), justice has had to become more impersonal as it deals with more conflicts while retaining the adversasy system so ingrained in the judicial system of the United States.

Some are beginning to challenge this impersonal development. Disputes should be given back to the community whenever possible, they would argue, allowing the community to solve its problems in the best way the community perceives. One method for accomplishing a reversal of this situation is presented in this article. Dispute resolution at the community level can work, the author argues, but it must be encouraged. Carefully examine the author's definition of dispute as property—property that should belong to the community rather than the formalized judicial system. Anyone with more than a passing interest in pretrial in its most catholic sense will find this an interesting example of an alternative that should be encouraged.

Mr. Paul Wahrhaftig has been an active force in the American Friends Service Committee, Middle Atlantic Region since 1969. From that time until 1977 he worked in the Pennsylvania Pretrial Justice Program (serving as Director from 1973 to 1977) which operated under AFSC. As of last year Mr. Wahrhaftig has served as the Program

Secretary (Director) of the Grassroots Citizen Dispute Resolution Clearinghouse of the AFSC, providing a resource to citizen groups around the country interested in establishing dispute resolution programs.

EVOLUTION OF THIS PAPER

The concepts in this paper started developing around 1973 when the American Friends Service Committee's Pennsylvania Pretrial Justice Program first started examining what is now referred to as Citizen Dispute Resolution (CDR). Briefly, an anthropologist member of the program committee suggested attention should be paid to informal processes ("moots") which he had observed being used in Ghana to settle interpersonal disputes outside of the formalized court system. A similar informal mediated process might be used by neighborhood groups in this country to help community members solve conflicts within the neighborhoods. Thus, it was suggested, neighbors and friends in conflict would settle their differences in an informal mediated process focusing on the future—"how can we live together in peace", rather than battle over guilt finding in court. The idea was tested on community organizers, ex-prisoners, public officials and others and was received with enthusiasm. The Pennsylvania Pretrial Justice Program then served as an informal clearinghouse for developing, analyzing and promoting the concept of CDR. CDR was discussed in workshops and in the pages of the program's various publications.

Interest in developing alternative, non-coercive, citizen-based forums for the resolution of individual disputes grows out of an awareness of the shortcomings of the formal court system in coping with "people" disputes. The traditional court system is an inappropriate mechanism for resolving many disputes between people—particularly those who know each other. A significant number of disputes in criminal court involve people with on-going relationships [over 30% in Pittsburgh (Goldman) and 56% of felony cases in New York City involving interpersonal violence (Vera, 19)]. Courts, focusing on blame finding, on narrow specific incidents, and complex procedures, seem designed to increase rather than decrease the intensity of the dispute.

> "The above description (of the court system) has all the elements of a zero sum game. At the end of the day there must be an ultimate winner or loser and at each stage of the game, a point won by one party is a point lost by the other.
>
> Two important consequences flow from this. First, the criminal trial guarantees that 50% of the parties go away disappointed with the result. Second, the process leads to further alienation and polarization between the parties." (Hogarth, 57)

Second, there are a whole range of conflicts and disputes which never reach the court system. Law Enforcement Assistance Administration-sponsored victim surveys indicate that less than half of actual crime is reported to the authorities. The most common reason given for failure to report is that no good will come of it anyway. Many other disputes, civil and criminal, are never brought to

court or any other conflict resolution forum. One anthropologist has referred to this phenomenon as "avoidance" or "lumping it". (Felstiner) Courts, in summary, have ceased serving as adequate forums for the resolution of "people" disputes.

> "Historically, courts in the United States were a forum for settling grievances. They served this function until about the middle of the 19th century, when demands upon the court gradually changed their function from dispute settling organizations to organizations that facilitated economic transactions. At the same time, lawyers found that business clients were more lucrative resources of income than ordinary citizens. The courts of the people gradually responded to the demands of a mass society and a mass economy." (Nader, Singer, 2)

Even though the court-justice system processes are inadequate for resolving "people" disputes, they have been viewed until recently as the only legitimate forum for that purpose. For example, in Pittsburgh, Pennsylvania in 1973, city police saw their only alternatives upon taking custody of a youth, as returning the child to the home or taking it to court. To take the child to a community agency was seen as "exceeding not only the legal powers of the police, but lying outside the boundaries of traditionally accepted 'standard procedure' as well". (Gentile, 18)

DISPUTES AS PROPERTY

If conflicts are seen as analagous to pieces of property—valuable property—the root problem is best illustrated. Conflicts and disputes are a way people grow. However, disputes today have become the property of "professionals" rather than the people. The victim of a crime knows this when s/he discovers after filing a criminal complaint that s/he becomes a non-person—a spectator at best. Both parties observe police, judges, lawyers, probation officers and other professionals arguing, disputing and finally reaching some sort of decision over "their" dispute. Often the victim never finds out what decision was made. What chance is there for the offender, victim or community to grow?

For example, the Harlem Small Claims Court, one of the best in the country, prides itself in keeping a record of defendants. Thus, a business that is frequently sued by its customers, and particularly one that fails to pay judgments, is listed in the record and is liable to be assessed punitive damages in future cases. However, the people in that business' neighborhood have no ready access to small claims court files. By taking over ownership of the dispute and the records involved, the professionals have removed the community's chance to both learn from its individual disputes and see patterns of behavior developing over which collective action could be taken to improve the situation.

WHAT IS CITIZEN DISPUTE RESOLUTION?

An approach that is being experimented with to both respond to the inability of conventional courts to adequately resolve many "people" disputes and to return

ownership of disputes to the people is an informal process that we call Citizen Dispute Resolution. Basically it involves a process by which disputes are settled in the neighborhood and by neighborhood people. For example, a person who feels he has been harassed by his neighbor could tell his complaint directly to the clerk at the neighborhood CDR center. Alternatively, he could take it to the police or justice of the peace who would advise the complainant to try to settle it out of court at the CDR center first. The process is voluntary. The complainant may opt for going to court if he feels it is in his best interest, and similarly the respondent may refuse to cooperate. If all parties agree to settle informally, then the case is heard before a mediator. The mediator has no power over the parties other than to recommend solutions and help the parties see points at which it is in their mutual interest as well as the interest of the community for a settlement to be made. This process is made easier since the hearing does not focus on blame finding but on the future. It does not matter who hit whom first, but, "how can we arrange our conduct so that all of us can live together in this neighborhood in peace?". The prime sanction for regulating the future behavior is recognition by both parties of their mutual interests in living in peace. Of course there are some informal elements of coercion: if the agreement breaks down, the complainant could file his original complaint with the courts; peer pressures may also be involved. The format may vary significantly from neighborhood to neighborhood. Mediation or arbitration may be used. Neutral mediators or people who know both parties intimately might be used, but the basic informal, voluntary, reconciliation-focused orientation remains constant.

The "Community" nature of the dispute resolution process is fundamental. First, how is the term "community" used? Consider a community to be a small unit of people who share some common interests and who have on-going face to face relationships. A community often is a neighborhood, but it may be a public housing unit or a factory work force. Those organizing community-based programs tend to focus upon communities which today are powerless. To put it another way, they are concerned with communities whose interests are not served by the institutions with which they come in contact. Poor, minority, and blue collar communities are acted upon by the court system but not served by it. On the civil side, the courts' preoccupation with business disputes precludes hearing peoples' disputes. On the criminal side, the criminal justice system is seen as regulating behaviors threatening to the established order while ignoring so called white-collar crime which has an even greater impact on the daily lives of these communities. (Struggle for Justice, Chapter 7)

Advocates of CDR programs being truly community based, that is designed, implemented and controlled with the full involvement of community people, feel this approach is needed for many reasons. Among the arguments, two stand out. To have one's case heard before one's peers, rather than a socially distant judge from another section of the city and of different class makes a big difference. The neighborhood mediator is more likely to know the social context of the dispute, the community values and the language involved. Thus, a resolution applicable to that context is more likely to result.

Furthermore, if not only the mediators and staff are "community people", but the program is organized by and run by the community, then the "dispute as property" analogy becomes relevant. The disputants will have retained control over their dispute-property, for they are intimately involved in the decision making process. In addition, the community has taken control over the dispute-property. There is room for community growth in learning how to overcome generalized problems. For example, suppose a repeated number of disputes arise between customers

and the local dry cleaning company over damage to clothes. The community group can learn from these individualized disputes and evolve strategies to cope with the general problem. Solutions might range from a boycott of the cleaners until practices are changed, to neighborhood consumer education efforts designed to inform people about what kinds of materials cannot be cleaned safely.

BENEFITS OF CITIZEN DISPUTE RESOLUTION

Possibly the most important and least recognized benefit of CDR is that it provides a testing ground for those working towards the abolition of prisons and the creation of supportive community institutions based on the values of reconciliation rather than punishment. It was for this reason that a workshop organized in May 1977 by the Prison Research Education Action Project (PREAP) outlined CDR as a priority area upon which to focus attention. (The Working Conference on Alternative Models for Justice in May 1977 was sponsored by PREAP. Their book Instead of Prisons contains a section analyzing citizen dispute resolution models from a prison abolitionist perspective on page 114ff.)

CDR also leads to better resolution of individual disputes. The informal proceedings, the reduced social distance between the parties and the hearing officer, the location of the program in the community, and the design to meet community needs provides an environment in which livable resolutions to real problems may be reached. While few truly community based programs have been in the field long enough to compile statistics, the record with independent private agency sponsored, but not community based, programs shows a high degree of satisfaction with these informal models. For instance 73.2% of participants responding to the Orlando, Florida Citizen Dispute Settlement Program gave researchers a favorable rating of their satisfaction with the program (Conner & Surette, p.18).

This form of direct personal justice appears to meet peoples' needs not only because they feel closer to the hearing officer, but because it is open. They can see, understand and participate in the proceedings. At the same time, from their perspective, the economic costs are much lower. Evening and weekend hearings save lost pay. Absence of lawyers saves fees while the economy of the proceedings means that court fees are minimized.

Communities retain control of their valuable property—disputes—and can learn and grow from those experiences. The Community Board Program in San Francisco makes strenuous efforts to maximize community involvement in the process. By involving as many people as possible in running the program, mediating disputes, being an audience at hearings, and participating in public meetings it is expected that the neighborhood will learn more about the nature of the problems which lead to conflict. Further, through trying to solve specific problems, they will be able to assess the effectiveness of available social services. Through their experience of working together they will be in a position to press for more effective delivery of those services to their community. (This information was obtained from site visit interviews with Community Board Staff.)

The community will have a chance to have its say as to which disputes are its "property" and which belong to the professionals. Just as the business community and organized labor have traditionally determined which conflicts in which they are involved will be handled out of court through arbitration agreements, so organized communities will have a voice in deciding which cases they feel could

better be resolved within the neighborhoods. Serious criminal matters involving complainants and respondents from the same neighborhood may involve important policy questions when one decides whether or not to process them informally. However, under a community controlled CDR program, the involved parties and citizen group as well as the professionals will have a say in making that decision.

Citizen Dispute Centers provide a means by which disputes not now serviced by the professional system will have a legitimate forum—without extending the control of the court system. Many people have been jaded by the development of pretrial diversion programs which promised to remove defendants from the conventional court system. Informal court-dominated processes were set up. The result has been no reduction in cases going through court and more people brought under court supervision through quasi-probation. Fears of court intrusion into more lives are dissipated however by Citizen projects which keep the matter entirely in the community with no records or reports going to a judge and no coercive powers being retained.

PROGRAMS UNDERWAY

In the last few years various experimental model dispute resolution programs have been set up. Most of them use informal dispute resolution techniques, but very few are built upon the community based principles outlined in this paper. Thus, programs are run out of the prosecuting attorneys' offices (Night Prosecutor model in Ohio), courts (New Jersey Municipal Courts), and bar associations (Orange and Dade Counties, Florida). Some are run by independent large agencies. The American Arbitration Association has dispute settlement programs in many cities. The Institute on Mediation and Conflict Resolution runs a program in Manhattan and in conjunction with Vera Institute in Brooklyn, and the YMCA sponsors one in suburban Suffolk County, New York. The YMCA sponsored model, in particular, could provide a format adaptable to community organizing. Truly community based programs are very rare and for the most part are only now emerging. The Community Assistance Program in Chester, Pennsylvania ran one of the first from 1973-77. (Wahrhaftig, 31) However, it was never formalized and eventually ran out of money. The Community Board Program in San Francisco began organizing in the Summer of 1977, adopting a procedure designed to involve as many people as possible in the development of the program. (Wahrhaftig, 47) This author's experience at the American Friends Service Committee's Grassroots Citizen Dispute Resolution Clearinghouse in the Fall and Winter of 77-78 is that each week's mail brings in new inquiries from citizen groups interested in exploring the potential of community based dispute resolution organizing.

"OFFICIAL" ACCEPTANCE OF INFORMAL DISPUTE RESOLUTION

Unlike the situation four years ago, the theory has now become accepted, that many disputes are ill served or not served at all by the court system. When we see that the American Bar Association propounded that concept at its 1976 Roscoe Pound Conference and its recent National Conference on Minor Dispute Resolution and when position papers on the subject are circulated by the Justice Department, it is clear that the general concept of substituting informal mediation procedures for formal court processes has been accepted.

> "The Neighborhood Justice Center program will establish three pilot, experimental Neighborhood Justice Centers. The center should be an office in the community to which people can go with a wide variety of problems. The Center will offer to provide mediation or, where that fails, arbitration, through a panel of members of the community trained in mediation and arbitration for those disputes in which both parties are willing to participate." (Justice 1, 2)

The acceptance of alternative forms of dispute resolution by these pillars of the established judicial system is heartening, but it is also threatening. Whose property will dispute processing be? Will it be done by establishment dominated and designed justice centers located in neighborhoods, or by community groups who are learning how to handle and resolve conflicts within their neighborhoods? Reformers have seen their promising ideas adopted by the criminal justice system only to be used as smoke screens to preserve the status quo. Thus, for instance, "community treatment" was originally conceived of as a means by which ordinary neighborhood people could take more responsibility for working with "offenders". Instead it has become rhetoric used by departments of corrections to place more economical mini-prisons in urban neighborhoods. Prison systems can now bring even more people under their control than before "community treatment" became popular. Is this the future for citizen dispute resolution? Is it to become a means by which court run mediation centers will reach more people, placing them under a new form of court supervision? Or will it become a means by which neighbors resolve their own disputes on their own?

The record indicates that a government and lawyer dominated thrust, however well-intentioned, is not likely either to have much effect on resolving disputes between individuals or in effectively promoting any significant community growth in problem solving. For example, it is not without accident that the American Bar Association entitled its conference "Minor Dispute Resolution". These disputes are "minor" primarily because they do not generate significant lawyers fees.

"People" disputes are unimportant to lawyers and the courts. The number one priority for them is to unclog the system of "people" complaints at the intake level. Other benefits of informal dispute resolution, such as providing an effective forum for disputes, do not have the immediate economic pay-off for lawyers and the courts. Hence they become secondary priorities. Empowering communities to handle many of their own grievances, usually without ever consulting an attorney, is an idea which if carried beyond unattractive, uneconomical "junk" cases, stands as a potential threat to lawyers.

> "Currently, there is little incentive for lawyers to create new legal institutions to facilitate the resolution of disputes outside the courtrooms. The coinciding forces of economic scarcity and the dramatic increase in the number of lawyers work against the organized bar's encouragement of new methods of dispute avoidance or resolution that will make people less dependent on formal, lengthy judicial procedures—hence on lawyers. The fact that there are many lawyers in the legislature (75% in California) limits the likelihood of outside pressure to this end. Another barrier...lies in the structures and content of legal education. Law schools rarely teach the essential skills of negotiation and mediation; rather, their concentration on dissection of appellate cases emphasizes the escalation of disputes rather than

> their prevention and early settlement. The dearth of inter-disciplinary study makes it difficult for lawyers to percieve alternative ways of dealing with different types of existing disputes. At the same time, the social distance between the legal profession and the mass of middle-income Americans has increased so that most professions are virtually uninformed about the range of consequences of the legal problems that plague average citizens." (Nader, Singer 12)

Nader's and Singer's comments are particularly pertinent when one turns to the section of the Justice Department's position paper noting which dispute-properties will be allowed to be handled by dispute resolution centers and which will remain under the direct proprietorship of the legal professionals.

> "Mediation generally will be limited to matters relating to consumer, housing, family and neighborhood problems. These limitations are necessary, first to ensure that the centers do not attempt to mediate matters that are of such public consequences or have so much money or property at stake that a more formal resolution process is appropriate." (Justice, 5)

As long as CDR processes are voluntary and the parties have the option of using the traditional courts if they feel it appropriate, whose interests are served by refusing informal proceedings as an available option when the dispute involves "much money or property": the parties' or the lawyers'?

True Citizen-based dispute resolution, in contrast to informal processes dominated by the established professionals, offers the best hope of providing a workable system for handling "people" disputes.

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THE KANSAS CITY NEIGHBORHOOD JUSTICE CENTER: AN ALTERNATIVE FOR DISPUTES RESOLUTION

by

Vivian Arps
Maurice Macey
Michael L. Thompson

* * * * *

While the preceding article discussed plans for the development of an informal community based dispute resolution mechanism, there are three model programs established by LEAA to do the same in a more formalized structural manner. These Neighborhood Justice Centers will, in the words of Attorney General Griffin Bell "...the Centers will provide an avenue to justice for many persons now shut out of the legal system. They also will help relieve overburdened courts. This is a major step in our efforts to help provide new or improved forums where citizens can obtain redress for any legitimate grievance."

One of the locations chosen as a test site for this project was Kansas City, Missouri. The authors of this article describe what these Neighborhood Justice Centers are and hope to achieve. They are eminently qualified to discuss the Centers as all three have been involved in the formative stages and two are presently serving in Administrative positions on the Center staff.

Ms. Vivian Arps, a Summa Cum Laude graduate of Park College, received her Masters degree in the Social Sciences in 1977. She has worked in the courts of Kansas City since 1975 as a social worker.

Mr. Maurice Macey, the Director of the Neighborhood Justice Center, served as Executive Director of the Kansas City Dispute Resolution Center immediately prior to his present position. Mr. Macey besides having been awarded the degree of Master of Social Work (M.S.W.) has attended Law School at the University of Denver.

Mr. Michael L. Thompson presently serves as the Neighborhood Justice Center Coordinator in Kansas City. Mr. Thompson attended the University of Missouri where he received his Bachelor of Arts degree in 1970 and his Masters in Public Administration in 1976.

Besides the extensive educational background the three authors bring to this article, their experience, particularly the Director, Mr. Macey, ensures that this article offers the reader a complete description of the Neighborhood Justice Center idea as well as practical views of what the Center may be able to accomplish.

This paper is designed to describe the development of the Kansas City Neighborhood Justice Center which begins serving Kansas Citians in March of 1978. While the paper is in the main descriptive, there is a section devoted to analysis of the Kansas City project and of the neighborhood justice center concept itself. In brief, the paper will include a review of the history, design, approach, and analysis of the Kansas City project. Prior to the descriptive material, we have inserted two sections on the neighborhood justice center concept as Kansas City perceives it. This hopefully will create a better understanding of the entire project.

Initially, the concern of this discussion centers upon the concepts inherent in the creation of the neighborhood justice centers—the need for an alternative process to supplement the present legal system in handling disputes of a close interpersonal nature. Accordingly, this discussion focuses upon an understanding of conflict and the associated process of mediation/arbitration as the means of alleviating the disputes that are the anathema of our present legal system.

Even though conflict can be disastrous to interpersonal relations and despite its general negative connotation, the position espoused here is that conflict is not necessarily dysfunctional. This leads to the contention that conflict is a basic form of socialization which is inherent and essential to the formation of all groups including the basic family group. With respect to developing relationships among members of a group, conflict is a means of maintaining the group relationships; it gives each party the opportunity to drain off hostile feelings, thus enabling the relationship to endure. 1/ While conflict relies upon a relationship between parties, the closer the degree of the relationship, the more likely the conflict is to intensify because it involves "converging and diverging motivations", "love-hate" relationships, which define a primary relationship where there is a greater probability of developing hostile feelings than in a secondary relationship. The hostility in part is caused by the parties' tremendous affective investment which heightens the potential range of love or hate. However, due to social pressures and/or fear of disintegrating the relationship, parties tend to suppress conflicts until it culminates in an explosive outburst. 2/ Thus when conflict occurs, the parties inject previous unaddressed grievances which cause the conflict to heighten. This minimizes the opportunity for successful resolution of the situation unless the appropriate safety valve mechanism is used. If this occurs, conflict acts as a binding mechanism which revitalizes existing norms and establishes the means for creating new norms which structure the relationship in a positive manner. 3/ Thus the development of appropriate safety valve mechanisms legitimizes conflict, allowing the parties to gain positive benefits as an outcome. With this in mind, we turn to an understanding of the development of an alternative to the formal legal system.

The second aspect of this discussion hinges upon understanding the need to create an alternative to the present legal system which includes an explanation of

the demise of the informal methods of handling disputes. Previously, interpersonal conflicts were handled by the beat cop, city fathers, or the parish priest, but today these individuals either do not exist per se, or they do not have the legitimacy to render a decision acceptable to the parties in conflict—a consequence of the rapid changes occurring in an industrial society where bureaucratic procedures dominate the informal procedures of yesteryear. Accordingly, the formal means to dispense justice have moved in the same direction—law now encompasses public bureaucracy and its rules. Similarly, because of the power and prevalence of private bureaucracies, the legal system now recognizes the "legal worth" of these organizational rules, such that the rules are considered as legitimate as those of public bureaucracies. Consequently, the legal system accepts the basic private organizational methods of dispensing justice—industrial justice. This concept relies upon the process of grievance mediation arbitration as a means of resolving group and interpersonal conflicts other than entering the formal adjudication process. Moreover, a separate aspect of "industrial justice" emphasizes problem-solving positive law that is responsive to the social circumstances of the environment. This allows the law to develop in an unsystemmatic responsive manner, but fosters the establishment of justice as the ultimate end. 4/ In relating the preceding process, it should be obvious that industrial justice is the safety valve mechanism necessary to handle disputes in the industrial world. 5/ Is it not then appropriate that neighborhood justice centers make use of the basic tenets of industrial justice to provide justice an alternative means of dispensing justice to disputants of a close interpersonal nature? Moreover, the similarities do not end with the preceding—the relationship of labor to management is analagous to that of many disputants. Additionally, we expect that the concept of neighborhood justice will develop a legitimacy as readily as industrial justice has. Hopefully, this material establishes a setting for describing the Kansas City project.

In 1977 the Department of Justice—Law Enforcement Assistance Administration asked for responses to a Request for Proposals relating to neighborhood justice centers, and the City of Kansas City, Missouri responded. The Kansas City response detailed the creation of a neighborhood justice center which would deal with comparatively minor civil problems, quasi-criminal problems, and certain criminal problems using non-adversary means—basically the third person intervention techniques of conciliation, mediation, and arbitration. 6/ The intent of these techniques being to problem solve the conflicts that occur interpersonally and across institutions. The proposed benefits of such a program include:

- Creation of an institution where non-adversarial interventions are used to develop justice.
- Development of a system where the poor and minorities can become involved in providing justice.
- Development of a system where minorities and the poor will have access to the justice system and hence have trust in it.
- Reduction of the case load of the Kansas City and Jackson County courts.
- Treatment of disputes in a problem-solving manner such that they do not become explosive.

- To provide speedy settlement of disputes.
- Reduction of the processing costs for citizens and governmental institutions.
- To provide resolutions which make use of existing social service agencies to deal with the psycho-social problems encountered.
- Development of a system where guilt and/or innocence is not the predominant outcome and settlement instead is the main objective. 7/

Consequently, the philosophy of the Kansas City program is geared to providing a program which will resolve interpersonal and inter-institutional conflicts such that the process is legitimized in the community.

To implement the preceding benefits the city planners developed a list of specific objectives. These included:

- The establishment of an agreement with the City and County prosecutors which would allow disputants to volunteer for resolution of conflicts through the Neighborhood Justice Center in lieu of court processing.
- The development of a reciprocal referral mechanism with social service agencies to insure service provision for Neighborhood Justice Center disputants.
- The encouragement of business leaders to participate in the program as a disputant, as a mediator, and/or as an advisory board member.
- The development of agreements with neighborhood and community organizations operating within the subsite relating to the organizations' dissemination of information to their constituents on the center's operation.
- The resolution of community and neighborhood disputes.
- The resolution of interpersonal disputes referred by the Kansas City Police Department, by the prosecutor's office, by the courts, and by community social services agencies.

By way of completing these objectives, the city planners perceived that all potential avenues for referrals would be accessible and that the program's success would be contingent upon the mediator's and arbitrator's ability to resolve disputes.

In implementing the Kansas City project, the administrators selected a subsite to test the project. This target subsite is a contiguous area which contains a population of approximately 50,00 people. This targeted area was selected according to federal criteria. Essentially, the neighborhood was to include a good mix of socio-economic characteristics such that the results of the project

could be extrapolated for similar neighborhoods across the country. Also, the Kansas City subsite was chosen to meet the additional federal criteria of being easily accessible to public transportation and having a high incidence of social service agencies within its boundaries. 9/

In approaching the creation of the Kansas City center, the planners focused upon placing the organization within the confines of the City governmental structure. Specifically, the program was placed under the auspices of the Community Services Department. To advise the staff the City developed an advisory board of fifteen members consisting of five City officials, five subsite community leaders, and five social service (referral) agency officials. The reason for the board was to provide input to the center staff regarding the needs of the community, especially the institutions that would supply the center with cases. 10/

To administer the program, the City employed a staff of five: the Center Director, Center Coordinator, an Administrative Assistant, Intake Caseworker, and a Clerk Stenographer. Basically these administrators have five duties: 1) to maintain a record of activities; 2) to maintain the process of the Neighborhood Justice Center from mediation through arbitration; 3) to facilitate referrals to the Neighborhood Justice Center from all actors of the community; 4) to train and oversee the hearing staff so they can provide an equitable system of justice; and 5) to develop public relations regarding the center. Theoretically, the administrative staff has the responsibility of maintaining the project, but any member may be called upon to mediate or arbitrate cases under emergency circumstances. 11/ In this event the staff must be prepared to actually implement the appropriate process.

To hear the majority of cases, a group of 25 to 35 individuals were selected according to the following criteria: education, conflict expertise, community knowledge, and geographic proximity to the target subsite. To increase their skills in mediation/arbitration, this group is required to attend a forty to fifty hour workshop which gives them the opportunity to experience the appropriate role. The training for these sessions has been contracted jointly to the American Arbitration Association and the Institute for Mediation of Conflict Resolution. 12/ Hopefully, this training will provide the City with an adequate supply of qualified interventionists who can assist in developing an appropriate solution to the situation.

The process of handling cases is best described by a four part procedure: referrals (intake), case processing, case hearing, and follow-up. The initial aspect of case handling (referral) occurs when the client appears at the center from one of four sources: walk-ins or self initiated referrals, police referrals, prosecutor and court referrals, or community agency referrals. In any of these cases, the staff has initially to ascertain whether the dispute can be resolved without implementing the formal dispute process. If the dispute can be resolved at intake, the staff member available will perform the desired action. If the case cannot be immediately resolved, the staff initiates case processing procedures. To begin the process, both parties to the dispute are required to complete a voluntary submission agreement to participate in the mediation/arbitration process. After the complainant and respondent have completed these forms, a hearing time is scheduled. At this juncture the staff is prepared to assign the case to a mediator/arbitrator, and they begin to monitor the hearing process to insure that both parties receive equitable treatment. 13/

In the event that one or both respondents have failed to appear, the process is changed. Normally, the case is rescheduled after disputants are contacted to ascertain the reasons for non-appearance and if the parties are still amenable to the hearing. However, in the case of a police referral, the case is remanded to the police department for processing under the General Ordinance Summons procedure where court sanction may occur.

When both disputants have appeared at the hearing, the hearing staff determines the mode of intervention: conciliation, mediation, and/or arbitration. 14/ Generally the path that is followed begins with mediation and ends with arbitration; however the Kansas City model has allowed the intervenor some latitude depending upon the circumstances surrounding the case. The criteria considered includes the intervenor's expertise and the closeness of the relationship between the disputants. As a rule, arbitration is considered a last resort in resolving cases, and it is used with the utmost caution. While the determination of the exact strategy of intervention is crucial, it must be reiterated that the basic purpose of the center is to resolve problems. This forces us to insure that the formal procedures will be sufficiently flexible to maximize the chances of resolving the case. 15/ Moreover, the project staff and hearing staff are cautioned to avoid bureaucratizing the neighborhood justice process, as this condition seems to destroy the philosophy the Neighborhood Justice Center wishes to promote: the creation of trust and commitment on the part of the clients so they may receive an equitable resolution to their conflict.

To supplement the actual intervention process, the Kansas City center has plans for a follow-up mechanism. This procedure was designed to obtain information about the quality of service received by Neighborhood Justice Center clients from participating service agencies, and to ascertain the degree of compliance observed by disputants. In dealing with the former situation, the City advocated that the center staff should note patterns of inadequate action by social service agencies, and that the center should reconsider the use of these agencies should they continually provide unsatisfactory services. It is stipulated that this data be reduced to writing to document the appropriate action. With regard to non-compliance of the agreement by disputants, the City has developed a number of courses of action. These include:

- Reopening the case.
- Dropping the case.
- Notifying the source of the original referral.
- Referring the case to the appropriate institution. 16/

Consequently, the Kansas City center has been given the opportunity to deal with disputants who do not live up to project agreement.

The final aspect of the Kansas City plan that has to be reviewed is the internal monitoring process by which the staff will collect data for national evaluation and local feedback. Data collected includes items such as the referral source, the case flow, and case characteristics. The specific data collected will be determined by interaction with the independent national evaluators, and will be developed to give the federal government a sense of the effect of the Kansas City model. 17/ Hopefully, the internal monitoring process will facili-

tate alteration of the program to meet the City's demand.

In analyzing the advantages of Kansas City's Neighborhood Justice Center, it is our estimation that the Kansas City Neighborhood Justice Center has a number of built-in advantages which will lead to its program being effective. Initially, Kansas City appears to have overcome the intergovernmental problems of dealing with the Police Department, the prosecuting attorney's office, the courts, and community agencies by seeking these institutions' assistance in planning the project, that is, these organizations own a part of this project, and in advance, the institutions have made specific commitments to insure that the project will receive the appropriate type and number of referrals. In brief, the Kansas City Neighborhood Justice Center's developmental base was similar to organizational development concepts of intervention and planned change; the Kansas City organizers considered the positive and negative attributes of a neighborhood justice center and prepared a model which would account for both forces.

Supplementing this built-in commitment on the part of the community is the previous actions of a similar mediation/arbitration program, the Kansas City Dispute Resolution Center, which was successful during its brief ten month duration. The Kansas City Police Department, which sponsored the project with a Ford Foundation Grant, has been willing to share the process and procedures which were successful in their program. This relationship is strengthened by the personal rapport developed in the previous program (the current project director, Maurice Macey, was the director of the previous program and has worked with many of the community leaders). As a result, he has an interpersonal relationship built with these individuals such that a sense of trust and openness is heightened.

Another set of advantages in the long term is that the Kansas City Neighborhood Justice Center is part of the City's institutional structure, and if the program serves the community as well as anticipated, the project's chances of being legitimized are high. Once the project develops a sense of legitimatization, the Kansas City Neighborhood Justice Center will be at a point where institutionalization of the project will depend upon the project's costs versus its benefits as opposed to the court system's cost benefits per case. Consequently, in terms of organizational development, the Kansas City Neighborhood Justice Center seems to be at a stage where survival is contingent upon implementation of the process which, while tenuous, has occurred in many areas including Kansas City, New York, and Miami.

An advantage similar to the preceding ones is that the Kansas City project is not relying upon one institution to provide all or the majority of referrals. Instead the Kansas City project has agreements with a number of institutions which creates a better probability of obtaining enough cases to develop a valid sampling for evaluation of the program. Also, the sufficient numbers allow the evaluators to determine which referrals have the probability of success.

Moreover, because of the projection that each institution will provide a certain number of clients, Kansas City will be able to check the referral sources to ascertain if these institutions are living up to their agreement. The Neighborhood Justice Center can isolate problem areas and prepare a strategy to deal with that institution.

With respect to the staffing of the project, the Neighborhood Justice Center has a possible benefit in that the staff does not include a lawyer. While many

may construe this as a negative attribute, it is our belief that a lawyer could contaminate the mediation/arbitration process (either consciously or subconsciously in the areas of content and process) to the extent that the program would be distorted to be quasi-adversarial or adversarial in nature. Complimenting this condition is the presence of staff members who have had positive experiences with conflict resolution, and who understand the role of arbitrator/mediator as a legitimate process. Finally, the Kansas City project has available a number of former mediator/arbitrators from the previous programs, and these individuals have indicated a desire to hear future cases.

While the Kansas City staff believes that their design has considerable advantages, they are aware that the model has possible problems. Basically, the major objection to the Kansas City model seems to be the use of arbitration as a mode of treatment. The obvious problem is that arbitration can be construed as a form of adjudication quite similar to a judge, which portends of the adversarial system. Compounding this issue is the small length of time (comparatively speaking to labor arbitrators) spent in training individuals in the field of arbitration. Moreover, in labor relations arbitration cases there is an increased emphasis being placed upon arbitrators remaining within the confines of the submission agreement because arbitrators have increasingly usurped authority to resolve issues outside of the fixed agreement.

Obviously, to provide justice, the arbitrators in the Neighborhood Justice Center may need to alter the submission agreements, but they must be sure that they tread lightly in doing so. Essentially, they must insure that all parties understand the changes made. The negative consequences of this type of action may be to obviate the legitimacy of the entire Neighborhood Justice Center process. To limit this activity, Kansas City's procedure is similar to other centers that use the arbitration procedure. The intervenor understands that arbitration is a final means of treatment and that all other modes of problem solving should be exhausted before undertaking this procedure. In a similar vein, there is some concern that intervenors will mix the processes; these interventionists may confuse mediation with arbitration and vice-versa. While this may not appear to be a serious problem, there are a couple of outcomes which may prove unwise for developing a sense of equitable justice. These include the intervenor in mediation being heavy-handed and forcing a settlement before the clients have the opportunity to resolve the problem themselves. Similarly, during arbitration, the intervenor may make a compromise settlement which does not solve the disputant's perception of the problem nor meet the strict definition of arbitration. Again this milieu is not unique to Kansas City, and the Kansas City staff hopes to hold this to a minimum by role playing these situations in the training program.

Another problem area for the Kansas City program and all others occur when the disputants are not on an equal power base. Labor relations research has indicated that personal power may distort the mediation/arbitration process. The distortion created in mediation includes the continued subjection of one party to another regardless of the cost. In effect this could readily occur in those cases where the disputants are closely associated interpersonally (our basic cases). If the mediation award allows for the continued subordinacy of one party, it may well create an escalating emotional situation which will become apparent in an intense non-structured interaction—a phenomena which is not desired. Equally devastating is an award which attempts to equalize the power without dealing with the affective aspect of the parties' situation. The potential consequences include the party with a lesser power base not being able to attain the

unrealistic conditions ascribed to in the award. This allows the superior party to maintain his/her position and power base without altering the aggrieved situation, and this too could lead to an escalation of their emotions. The response to either of these conditions as established under the Kansas City design is for the intervenor to refer the case to a social service agency during the course of the award. While theoretically this would deal with the power disparity, our staff is not sure that limited counseling would affect the parties, and realistically this situation calls for the use of an extensive crisis intervention unit which may not always be available.

Another set of related disadvantages that has been voiced regarding the neighborhood justice center concept is the means of obtaining clients and of ultimately dealing with clients who do not adhere to the agreements. The major objection that is voiced is that clients do not voluntarily select the program, and that they are coerced into participation, at least in the situation where a police officer, a judge, or prosecuting attorney facilitates the referral process. Ultimately our staff concurs that coercion does exist, not only in these cases but in other referrals as well. Our postulation relies upon the thought that community referrals, walk-ins, and peer referrals depend upon a power context which is somewhat more subtle—some party wishes to end the conflict and through some sort of persuasion, the disputants decide to participate. Consequently our staff believes that the difference is one of degree, and we believe that distinguishing between coercion of these types is difficult at best. With respect to the coercive means of handling parties who break agreements, Kansas City has the following alternatives: reopening the case; dropping the case; referring the case to an appropriate agency; or returning the case to the original reference point. In any event, the Kansas City design will deal with non-compliance in potentially a positive manner, but does this reaction parallel the action of the courts? In discussing this problem, we concluded that all efforts to force compliance are coercive but there is also a coercion in allowing a party to violate the agreement. Moreover, in playing off the two views, it became apparent that compliance is institutionally important to the Kansas City Neighborhood Justice Center in that the program would lose its legitimacy if the agreements are not upheld, especially if one party has kept their portion of the agreement. Accordingly, the Neighborhood Justice Center must maintain the sanctity of the agreement such that an innocent party is not injured (non-physical) by the other's action or inaction. (Promissory Estoppel)

The last problem we perceive concerns the relationship between the Kansas City Neighborhood Justice Center and the Kansas City Bar Association. Because Kansas City's program is not oriented toward the Bar or lawyers individually, there is the possibility that the legal community could perceive the Neighborhood Justice Center as a threat to their livelihood. As a consequence there is the possibility that the Bar could create problems for the Neighborhood Justice Center staff given the possible monetary repercussions. Procedures that the Bar may take include lodging a cease and desist order for all hearing and administrative staff relating to the unlawful practice of law, or subpoenaing the staff and its records in civil or criminal cases which may result from our intervention. Kansas City's response toward the legal community is perhaps the weakest link in the project, for while we have met with the legal institutions including individual lawyers, we have not directed our attention to the Bar. Consequently the Bar may not understand our intent, and given the overcrowded conditions of the legal community in Kansas City, it can be construed as anti-lawyer. Hopefully, the Kansas City staff can address this issue via their public relations kickoff, or by ask-

ing the legal institutions who work with the Neighborhood Justice Center to act as a liaison with this institution.

As a result of our analysis, we were able to denote that our perceived advantages in developing this program were in the basic design areas. However, it seemed that our possible disadvantages were part of the implementation process. It is interesting to note that this phenomena corresponds to Aaron Wildasky's premise in his book, Implementation, that government seems to plan well but that implementation is not given the same concern. Hopefully, we in Kansas City can alter this set of circumstances.

In summing up the outcome of this paper, an overriding advantage of these types of programs becomes apparent: neighborhood justice programs will legitimize conflict as a natural course of events, but they will also structure the parameters of conflict such that it will not escalate into an increasing volatile civil or criminal action. In essence, these types of centers, and the Kansas City center in particular, can open interpersonal relationships to a point where the conflict becomes a means to the end of developing a healthy relationship. As such, the neighborhood justice center concept may best achieve the objective of delivering justice through the vehicles of clarification, ownership, and understanding.

FOOTNOTES

1/ Coser, Lewis, The Functions of Social Conflict, (New York; The Free Press, 1956), pp. 31-38.

2/ IBID., pp. 59-71.

3/ IBID., pp. 121-139.

4/ Selznick, Philip, Law, Society, and Industrial Justice, (Berkeley, California: Russell Stage Foundation, 1969), pp. 243-276.

5/ Coser, The Functions of Social Conflict, pp. 41-48.

6/ United States, Department of Justice, Law Enforcement Assistance Association, Neighborhood Justice Centers Schedule and Recommended Design, 13 June 1977, pp. 1-4.

7/ City of Kansas City, Missouri, Department of Community Services, Neighborhood Justice Center Application of Kansas City, Missouri 14 September 1977, p. 3

8/ IBID., p. 3.

9/ IBID., pp. 5-7.

10/ IBID., p. 8.

11/ IBID., pp. 9-11.

12/ Stulberg, Joseph B., Letter Detailing Kansas City Neighborhood Justice Center Training.

13/ City of Kansas City, Neighborhood Justice Center Application of Kansas City, Missouri 14 September 1977, p. 14-19.

14/ IBID., p. 19.

15/ IBID., pp. 20-21.

16/ IBID., p. 24.

17/ IBID., p. 26.

END