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DIVERSION FROM THE CRIMINAL PROCESS: THE 'MENTAL-HEALTH' EXPERIMENT**

*by Edward de Grazia**

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INTRODUCTION

The criminal justice system is failing to apprehend some two-thirds of the persons who commit reported criminal acts.[1] Of those it does apprehend, only one-half proceed to judgment.[2] The great majority of these judgments result not from adversary trials openly held before judges and juries, but from guilty plea bargains negotiated in private with prosecutors.[3] The prosecutor's activity in this regard is not controlled by legal rules, precedents, standards, or procedures; it is "discretionary" and, effectively, non-reviewable by courts.[4] Most of

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1. THE PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 21-25 (1967) [hereinafter cited as REPORT OF PCLEAJ]. "Several times" the number of *reported* crimes are actually committed, for example, in the District of Columbia; *see* THE PRESIDENT'S COMM'N ON CRIME IN THE DISTRICT OF COLUMBIA, REPORT 21 (1966) [hereinafter cited as REPORT OF PCCDC].

2. REPORT OF PCLEAJ 127.

3. *Id.* at 11, 127-28, 133-34. The National Advisory Commission on Criminal Justice Standards and Goals has proposed that by 1978 "negotiations between prosecutors and defendants — either personally or through their attorneys — concerning concessions to be made in return for guilty pleas should be prohibited." NATIONAL ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS AND GOALS, COURTS STANDARD 3.1 (1973) [hereinafter cited as COURTS]. The same Commission has recommended the use of diversion by police, prosecutors and pre-police community agencies, and the organization of formal diversion programs in every local jurisdiction by 1975. NATIONAL ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS AND GOALS, CORRECTIONS 73-97 (1973) [hereinafted cited as CORRECTIONS].

4. REPORT OF PCLEAJ 130-34; *see* A. GOLDSTEIN, THE INSANITY DEFENSE 176 et seq. (1967). On police discretion not to arrest, *see* J. Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low Visibility Decisions In the Administration of Justice*, 69 YALE L. J. 543 (1960). For a sociological analysis of the "general principles according to which policeman routinely use or withhold their power to arrest," *see* Black, *The Social Organization of Arrest*, 23 STAN. L. REV. 1087 (1971). *See also* Yale sociologist Albert J. Reiss' study of transactions between police and citizens as "the microcosm that generates all cases for processing in the criminal justice system," in A. REISS, THE POLICE AND THE PUBLIC (1971); "discretionary enforcement" is described at 129 et. seq.

the people whom the system manages to convict are given little or no help toward avoiding further criminality;[5] instead, the sentencing and corrections structures of the system stigmatize them,[6] and either release them outright or subject them to the frequently "shattering impact" of prison,[7] or of a mental hospital.[8] When it is time for the institutionalized persons to return to their communities, they do so, predictably, in conditions more predacious than before.[9]

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5. *See, e.g.*, REPORT OF PCCDC 543-50; TASK FORCE ON CORRECTIONS, THE PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CORRECTIONS 4-6 (1967).

6. *See* THE PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 5-8 (1967): ("[L]abelling a person criminal may set in motion a chain of events which will increase the probability of his becoming or remaining one. The attachment of criminal status itself may be so prejudicial and irreversible as to ruin the future of a person who previously had successfully made his way in the community, and it may foreclose legitimate opportunities for offenders already suffering from social, vocational and educational disadvantages.") *See* the sociological analysis of the stigmatization of deviants in K. ERIKSON, WAYWARD PURITANS (1966).

7. REPORT OF PCCDC 377.

8. Recently, Chief Judge David L. Bazelon of the United States Court of Appeals for the District of Columbia Circuit notified the psychiatric profession that if its members did not "open up their locked doors" a distrustful public and the adversary process would. The allusion was to institutional doors and the scientific ones which hide away the facts behind the mystique of expertise.

> Psychiatry uses the power of the State to confine people against their will. This necessarily introduces the potential for misuse of that power. It is a court's duty to scrutinize all governmental intrusion of freedom and liberty. The patient's interests in release, in less restrictive confinement, or in adequate treatment cannot be matters solely for medical determination. Bringing these matters into court does not impose an artificial adversary posture between the patient and his keepers—it reflects the adversity which already exists. . . . Those of us whose judicial duty it is to scrutinize governmental intrusions on liberty cannot keep silent.

Address by Chief Judge Bazelon, *Southern California Psychiatric Society*, 1973 Spring Meeting in Los Angeles, Cal., April 21, 1973.

9. REPORT OF PCLEAJ 172-85; REPORT OF PCCDC 377-89. Project interviews of diversion-involved prosecutors revealed their perception of the current prosecutorial-correctional system as a "revolving door" for many offenders. See text *infra* at p. 473. Norval Morris and Gordon Hawkins report: "World-wide experience with all 'total institutions,' prisons and mental hospitals alike, reveals their adverse effects on the later behavior of their inmates," and speak of "experimental development . . . tending toward the eventual elimination of prison in the form we now know it." N. MORRIS & G. HAWKINS, THE HONEST POLITICIAN'S GUIDE TO CRIME CONTROL 124 (1970). *See* B. WOOTTON, CRIME AND THE CRIMINAL LAW 3 (1963) ("Penal treatments could be described as cumulative failures. The more anyone experiences them, the greater the probability that he will require further treatment

It is one thing to admit that elemental structures within the criminal justice system are disserving its correctional goals;[10] it is another to invent, test, and incorporate, in their place, more effective replacement parts.[11] In 1968, the Center For Studies In Crime and Delinquency of the National Institute of Mental Health (NIMH) funded a pilot research project in Washington, D.C. which was designed to test the feasibility of one such innovation—the "diversion" of accused criminals to community mental health treatment programs.[12] Although several other diversion projects have been undertaken and reported on since 1968,[13] none of these involved the structured

still."), *id.* at 4 ("[T]he treatment itself aggravates the disease."), and *id.* at 14 ("[T]he experience of conviction, and still more of imprisonment, is itself only too likely to be criminogenic."). REPORT OF PCCDC suggests that the District's mental hospital may be more effective than the District's prison in "rehabilitating" inmates that get released. See note 44 *infra*. Shah, note 20 *infra* suggests at p. 359 that "many more actually dangerous persons are housed in and released from penal institutions than from mental hospitals."

10. REPORT OF PCLEAJ 14, 185. *See* SENATE COMM. ON THE JUDICIARY, REPORT ON COMMUNITY SUPERVISION AND SERVICES ACT, S. DOC. No. 93-417, 93d Cong., 1st Sess. (1974) [hereinafter cited as S. REP. No. 93-417]. This report recommended passage of S. 798, 93d Cong., 1st Sess. (1974) [hereinafter cited as S. 798], a bill to authorize diversion to community supervision and services for persons charged with federal offenses:

> The statistics of crime in America are inescapable. Crime has increased, and most crime is committed by recidivists—repeaters who are starting their second, third, or fourth trip through the criminal justice system. These statistics dictate that we seek new and effective ways of dealing with the people who commit crimes.

Id. at 5.

11. See the discussion of research as an "instrument for reform" in REPORT OF PCLEAJ 274-77.

12. PHS Research Grant No. 5 Rol MH 14501. The grant was administered by the Georgetown University School of Medicine, Department of Psychiatry. The project staff consisted of: the author of the present article, who was Clinical Associate Professor of Psychiatry in the School of Medicine and served as the Project's Program and Legal Director; Dr. James Foy, Associate Professor of Psychiatry and Project Medical Director; Mr. Norman Glassman, Administrative Director; Dr. Harris Cohen, Process Research; Dr. Noel Markwell, Recidivism Research; Mr. Stephen Boxley, Coordinator; Mr. Jay Crimmins, Court Liaison; Mr. Lee Blair, Research Assistant; Mr. Michael James, Ms. Jean Hicks, Ms. Onka Dekkers, Social Work Counselors; Dr. Barry Bukatman and Dr. Michael Petite, Supervising Psychiatrists; Dr. Steve Karp, Research Evaluation; Ms. Alice Wakefield, Receptionist; Prof. Alan Dershowitz of the Harvard Law School consulted on the Project's referral process.

13. *See* VERA INSTITUTE OF JUSTICE, THE MANHATTAN COURT EMPLOYMENT PROJECT FINAL REPORT (1972) [hereinafter cited as MCEP REPORT]; THE NATIONAL COMM. FOR CHILDREN AND YOUTH, PROJECT CROSSROADS: FINAL REPORT (1970). These were the "pilot" job-diversion projects, some twenty more of which are reported

diversion of mentally ill accused offenders.[14]

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to have become operational in various cities of the United States; eight of these were funded by the U. S. Department of Labor. *See* Statement of Governor Richard Hughes, Chairman of the ABA Commission on Correctional Facilities and Services, in *Hearings on S. 798 Before the Subcomm. on National Penitentiaries of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. at 382 (1973). The expeiments with drug-diversion programs are yet to be adequately reported on, although federal and state laws authorizing the diversion of addict offenders have been in force for some time. *See* Note, *Addict Diversion: An Alternative Approach For the Criminal Justice System*, 60 GEO. L.J. 667 (1972); Robertson, *Pre-Trial Diversion of Drug Offenders: A Statutory Approach*, 52 B.U. L. REV. 335 (1972).

The validity of recividism research findings of the Crossroads and MCEP Programs recently has been questioned; *see* Note, *Pretrial Diversion from the Criminal Process*, 83 YALE L.J. 827, 846-50 (1974). Those projects reported appreciably lower incidences of re-arrest of diverted defendants as compared with normally processed defendants than did the mental health diversion project which made use of different research methods. *See* pp. 506 et. seq. *infra*.

14. There are legal and social problems presented by a program for the diversion of mentally-ill accused offenders which are not presented, or are more complicated than those presented, by a program for the diversion of under-employed accused offenders. For example, data collected regarding a potential divertee's mental condition is forensically more sensitive than that regarding a potential divertee's employability: questions of confidentiality, testimonial privilege, and possible self-incrimination readily arise in the former situation; moreover, the possible use by courts of information concerning the mental condition of criminal defendants to commit them involuntarily, and for indeterminate periods, to mental hospitals, via insanity "defense" and "incompetency to stand trial" or "sexual psychopath" proceedings, can discourage such defendants and their lawyers from consenting to diversion—in the absence of assurances that such information would not be used in this way. As described *infra* at pages 463 et. seq. it was found feasible to safeguard the rights and interests of potential divertees, in these respects, through arrangements with the prosecutor's office and the reporting of information in descriptive, but non-diagnostic terms. The problem would also be taken care of by a system patterned after that proposed in UNIFORM RULES OF CRIMINAL PROCEDURE, Rule 29d (Tent. Draft No. 2, 1973) or by that proposed in MODEL CODE OF PRE-ARRANGEMENT PROCEDURE § 320 (Tent. Draft No. 5, 1972). The protection afforded by S. 798 in this respect may not be adequate because it is limited to directly "incriminating" data. § 6(6) of S. 798. "Delivering" psychological evaluation and treatment services to diverted accused offenders in the community is more difficult and more costly than providing job training and employment services, but there is no reason why both can not effectively be delivered in parallel or integrated programs of diversion. S. 798 authorizes diversion to "medical, educational, vocational, social, and psychological" community-oriented programs. The diversion of mentally ill criminal defendants to community programs of evaluation and treatment is predictably less costly than the committment of comparable defendants to in-patient wards of mental hospitals for mental examination or custodial treatment. *See* text *infra* at pages 522 et. seq. for the estimate that whereas the evaluation and diversion to a community treatment program of a person suspected of mental illness entails a cost of $311, the cost of committing the person for examination only in a mental hospital is $357 per month of hospital custody. The President's Commission on

Part I of this article depicts the origin of the diversion concept and its relationship to prosecutorial discretion and community corrections, with particular attention to the District of Columbia where the concept first was tested. The account presented in Part II is the first published report of the NIMH-funded *Project* and of the goals, methods, problems, and results of a mental-health diversion program. A subsequent article will focus on problematical aspects of diversion as presented by pending federal legislation[15] and in the standards and procedures for diversion being developed by official study groups. That article also will explore the conditions under which diversion might be distinguished from other processes of social control, and be applied as an alternative strategy of criminal justice.

Within a short three years following completion of pilot experimental projects, diversion obtained endorsements from the American Legal Establishment—including the American Bar Association, American Correctional Association, National Council on Crime and Delinquency, National Conference of Commissioners on Uniform State Laws, American Law Institute, National District Attorneys Association, President's Task Force on Prisoner Rehabilitation, United States Chamber of Commerce, National Advisory Commission on Criminal Justice Standards and Goals, United States Department of Justice, and the United States Senate—as an instrument designed to bring about important changes in the system of criminal justice.[16] The newest of "official" study groups, the National Advisory Commission

Crime in the District of Columbia found that all but a few court-ordered mental examinations of criminal defendants in the District were performed on the basis of commitments to hospital custody for from 30 to 90 days. REPORT OF PCCDC 531. A recent report from the Forsenic Psychiatry Clinic of the New York City Criminal Court suggests that 70 per cent of cases raising issues of mental competency to stand trial ("the major access route in the criminal process to psychiatric intervention," A. MATTHEWS, MENTAL DISABILITY AND THE CRIMINAL LAW 90 (1970)) may be evaluated without hospitalization. Goldstein, *The Fitness Factory*, 130 AM. J. PSYCHIATRY 10 (1973).

15. *See infra* note 183. The structure presented in S. 798, "An Act to reduce recividism by providing community-centered programs of supervision and services for persons charged with offenses against the United States and for other purposes," contemplates diversion to a "program of community supervision and services" including, but not limited to, "medical, educational, vocational, social, and psychological services, corrective and preventive guidance, training, counseling, provision for residence in a half-way house or other suitable place, and other rehabilitative services designed to protect the public and benefit the individual."

16. The views of most of these groups are to be found in *Hearings on S. 3309 Before the Subcomm. on National Penitentiaries of the Senate Comm. on the Judiciary*, 92d Cong., 2d Sess. (1972) [hereinafter cited as *1972 Hearings*], and in

on Criminal Justice Standards and Goals, has recommended implementation of a "formally organized program of diversion" in "each local jurisdiction"[17] by 1975, and the U.S. Congress is preparing to authorize diversion programs for every federal district court.[18] But whether actual or nominal changes will take place, and whether the changes which do take place will serve the ostensible goals, or some others, are issues still to be answered as the experimental structures of "diversion" are recast into court machinery for community-centered "supervision" and "servicing" of accused offenders.

I

Diversion and the Exercise of Prosecutorial Discretion

The Conception of 'Diversion'

The concept of diversion from the criminal process surfaced officially in the *1967 Report of the President's Commission on Law Enforcement and Administration of Justice* ("National Commission").[19]

Hearings on S. 798 93d Cong., 1st Sess. (1973) [hereinafter cited as *1973 Hearings*]. More recently, opposition to the legislation in the form passed by the Senate was expressed by Prof. Daniel J. Freed of the Yale Law School and by Raymond T. Nimmer, a research attorney with the American Bar Foundation, in *Hearings on H.R. 9007 and S. 798 Before the Subcomm. on Courts, Civil Liberties and Administration of Justice of the House Comm. on the Judiciary*, 93d Cong., 2d Sess. (1974) [hereinafter cited as *1974 Hearings*].

17. Corrections, *supra* note 3 Standard 3.1.

18. *See* note 10 *supra*.

19. Report of PCLEAJ 81-89, 133-34. There are conceptions of diversion which differ from that presented here; sometimes it is said to be the same as police and prosecutorial discretion.

> Stripped of title and formal trappings, diversion has been practiced in the criminal justice system for years. Law enforcement officers and prosecuting attorneys always have the discretion not to pursue trial and conviction when they see a better way to achieve the purposes of the criminal law. Diversion gives added statutory recognition to the concept of prosecutorial discretion in such cases . . . [D]iversion legislation would give the criminal justice system necessary authorization to provide supervision and professional services to diverted individuals who are in need of them.

S. Rep. No. 93-417, *supra* note 10, at 5. This approach, which is looser than that actually incorporated in S. 798, tends to confuse structured with unstructured diversion. The National Advisory Commission on Criminal Justice Standards and Goals defines diversion differently in the differing contexts of its Reports on Courts, Corrections and Police; *see* Courts, *supra* note 3, at 27. The ABA Commission on Correctional Facilities and Services prefers the term "intervention" to "diversion." ABA Monograph, note 23 *infra*. The National Attorneys Association prefers the appellation "deferred prosecution;" *see* Statement of Robert F. Leonard

It was brought into the deliberations of the Commission and its Task Forces on Courts and Corrections by Professor (now Dean) Abraham S. Goldstein of the Yale Law School, and Dr. Saleem Shah of the National Institute of Mental Health, whose respective memoranda—"a proposal for a pre-trial conference" and "the mentally disorded offender"—provided groundwork for the Task-Force discussions[20] and the Commission's ultimate recommendations in the area. In his contemporaneously published work, *The Insanity Defense*, Professor Goldstein projected diversion as a "competing process" to traditional criminal and civil procedures for dealing with the problems of mentally ill offenders, and one which he foresaw evolving by a regularization of police and prosecutor discretionary practices with respect to certain kinds of problematical offenders; as such, it seemed likely to entail hospitalizations of accused persons suspected to be mentally ill.[21]

Within the Commission, elements of "voluntariness," "consensual disposition," and "community resources" were stressed by Goldstein and Shah, and consensus was reached that diversion was best conceptualized, structured, and tested in forms which permitted offenders (and not only mentally ill ones) to be channeled into flexible community programs and have their charges dismissed. Diversion would not be designed to offer alternate routes to locked wards and cells, or to closed mental or penitential institutions.[22] Rather, it would locate

in *1972 Hearings* at 403. The U.S. Senate appears to have adopted the term "diversion." *See* S. 798 §§ 4, 5, 6(b), 7(c).

20. The memoranda are mentioned, and their contents transcribed in Shah, *The Mentally Disordered Offender: A Consideration of Some Aspects of the Criminal-Judicial-Correctional Process*, in READINGS IN LAW AND PSYCHIATRY 347, 349 (R. Allen, E. Ferster, and J. Rubin eds., 1968); Dr. Shah's article is an outstanding contribution to the literature dealing with the problems of the mentally ill offender in the American systems of criminal and psychiatric justice. *See also*, Shah, *Crime and Mental Illness: Some Problems in Defining And Labeling Deviant Behavior*, 53 MENT. HYG. 21 (1969). On the further development of the concept and design of the "pre-trial conference" as a mode for consensually screening-out, diverting, and negotiating guilty plea dispositions in criminal cases, *see* MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE, § 320 (Tent. Draft No. 5, 1972).

21. A. GOLDSTEIN, THE INSANITY DEFENSE 189-90 (1967). Dr. Shah and Professor Goldstein recognized that "hospitalization" was not synonymous with "treatment" and that arranged without regard to the confined persons wishes it amounted to a "sanction." Shat, note 20 *supra*, at 353.

22. The National Commission did not exclude the possibility that diversion might "involve institutionalization or prolonged or intrusive supervision of the offender in the community," but asked for *court* review of any such "alternative non-criminal disposition." REPORT OF PCLEAJ 134. The Commission's *model*

structured ways to deliver needed mental health treatment and other services to willing defendants, in their communities, without the stigmatizations or invasions of prisoners' and patients' rights which have proved characteristic of the normal criminal and psychiatric justice processes. It was recommended that diversion be invoked "early" in the criminal process,[23] i.e. at the pre-trial stage, before the traditional system's apparatus had been committed to prosecuting and stigmatizing the accused.[24] This also would prevent the law enforcement bureaucracies—judges, prosecutors, defense counsel, police

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institution "would resemble as much as possible a normal residential setting." *Id.* at 173. S. 798 § 2 also conceives of diversion to community programs of supervision and services as "alternatives to institutionalization." Shah relied on the availability of defense counsel to prevent defendants being "voluntarily" diverted to inappropriate or coercive situations. Shah, note 20 *supra*, at 350-53. The National Commission seems to have despaired of recourse to controvery-ridden definitions and procedures of insanity and competency to stand trial for answers to the questions of how to identify and treat mentally ill offenders. REPORT OF PCLEAJ 133-34. For another despairing voice, *see* J. Goldstein, *The Brawner Rule—Why? Or No More Nonsense On Non Sense In The Criminal Law, Please!* 1973 WASH. U.L.Q. 126. And *see* Chief Judge Bazelon's re-evaluation of the problems involved, in United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972) and his Address of April 21, 1973, *supra* note 8.

23. REPORT OF PCLEAJ 133-36. S. 798 § 3(1) defines a person "eligible" for diversion as one "who is charged with an offense against the United States,"but this definition may not be intended to exclude pre-charge prosecutorial (as distinguished from police) diversion. *The Section-By-Section Analysis*, SEN. REP. No. 93-417, *supra* note 10, at 17-19, suggests the legislation was designed to have consideration of diversion *begin* following arrest and before the defendant's first opportunity to be judicially advised of the charge(s) against him. *Accord*, UNIFORM RULES OF CRIMINAL PROCEDURE, Rules 15, 29-30 (Tent. Draft No. 2, 1973). This structure conforms to the method used by the mental health diversion Project as described *infra* at page 478. *Query:* is there risk here of depriving a person considered for diversion of his rights to a "speedy appraisal of the charge against him," where the formulation of the diversion plan and any necessary evaluations of the defendant's situation require more time? A defendant's agreement to enter a diversion plan expected to occupy up to one year's time will tend to prejudice his right to speedy trial unless, for example, the right is waived as a condition to seeking diversion and dismissal of the prosecution. On these and other legal aspects of diversion, *see* R. Leonard, Prosecuting Attorney, Genesee County, and J. Wright, Director, Citizens Probation Authority, Flint, Mich., *Deferred Prosecution and Criminal Justice: A Case Study of the Genesee County Citizens Probation Authority*, in *1973 Hearings*, *supra* note 16, at 442-506. ABA National Pretrial Intervention Service Center, Washington, D.C., Monograph on Legal Issues and Characteristics of Pretrial Intervention Programs (April, 1974).

24. Sir James Stephen has suggested that "the sentence of the law is to the moral sentiment of the public in relation to any offense what a seal is to hot wax." 2. J. STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 81 (1883). *See* the authorities cited note 6 *supra*. *Compare* Kafka, *In the Penal Colony*, in THE PENAL COLONY: STORIES AND SHORT PIECES 191 (1948). Shah and Goldstein argued that

and witnesses from wasting their time and the public's money.[25]

The Commission proposed that diversion not be limited to persons charged with crime who also were suspected of mental or emotional illness. All persons exhibiting "clear medical, mental, *or social* problems" (emphasis added) which could be "better dealt with outside the criminal process than within it" should have the benefit of diversion to "the kind of correctional program that appears to be most appropriate for a particular offender."[26] The target group would be composed of "the many offenders who clearly need some kind of treatment or supervision, but for whom the full force of criminal sanctions was excessive." This extension of the projected scope of the diversion instrument beyond medical and psychological problems was supported by references to "common prosecutorial practice" with respect to first offenders and certain types of minor offenders, including those whose offenses arose from drinking or mental problems.[27] In fact, the first pilot projects of diversion undertaken in response to the Commission's recommendations included two which declined to service the mental problems of the eligible offender population, but which

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diverting early avoids the deadening tendencies of the criminal process whereby "the choices decrease, the statutory and other constraints increase, and the relative inflexibility of labeling and dispositional alternatives also increases." They also alluded to the "screening-out of those persons who it is felt should not be subjected to the ponderous machinery of the criminal law." Shah, note 20 *supra* at 349. During the course of Congressional study of the diversion technique, a representative of the U.S. Department of Justice urged that diversion opportunities be offered only to persons who plead guilty or are otherwise convicted, with an erasure of the conviction record promised for successful completion of the diversion program. *1973 Hearings, supra* note 16 at 380. S. 798 appears to preclude the possibility that diversion to a needed social program in the community could be conditioned upon a *formal* admission of guilt, by defining persons "eligible" for diversion as persons under a federal "charge." Most study groups are in accord that diversion should be structured to take place before trial or plea. There is a telling Constitutional objection to requiring an accused person to admit guilt and thereby *waive* his privilege against self-incrimination and rights to confrontation of witnesses, jury trials, etc., as a condition for admission to a rehabilitation diversion program—since such waivers must be voluntary and not induced by improper pressure, coercion or promise of immunity. *See* ABA Monograph *supra* note 23 at 44-52.

25. REPORT OF PCLEAJ 134. *Cf.* MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE, Introductory Memorandum at xiii (Tent. Draft No. 5, 1972).

26. REPORT OF PCLEAJ 133-34. Shah and Goldstein had suggested that it might be more "appropriate" to deal with "certain categories of norm-violating individuals" through "various other social agencies," and pointed to recent court decisions as marking the direction diversion might take to keep "the vagrant, the kleptomaniac shoplifter, certain sex offenders, and others . . . entirely outside the criminal process." Shah note 20 *supra* at 349-50.

27. *Id.*

undertook to service the social problems of "under-employment" which afflicted them;[28] a "second round" of demonstration programs of diversion has followed suit.[29] While it rarely has been suggested that more than a small proportion of criminal offenders suffer from mental problems, the belief is widely shared that most criminals are handicapped by employment and other social disadvantages.[30] As a device to deliver community psychiatric services to the relatively small number of offenders likely to need them, diversion would make a salutary contribution; as a tool for the distribution of needed social services to the offender population in the community, diversion would bid to alter the criminal justice system's whole prosecutorial-correctional stance.[31]

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28. These are the two projects cited note 13 *supra*. The types of mental illnesses presented by our Project's clients are indicated *infra* at page 460.

29. *See* note 13 *supra*.

30. *See* REPORT OF PCLEAJ 160; *see also* REPORT OF PCCDC 120, where it is stated that "eighty five per cent of the adult sample" of convicted persons "had not completed high school;" the majority were products of broken homes, with less than half (forty three per cent) raised by one or both natural parents. Half of the Negro offenders, and forty one percent of the white offenders, were unemployed when arrested." Of the adult offenders, "sixty percent had no history of regular employment at the time of arrest." *Id.* at 127. *Compare* the remarks of Whitney North Seymour, Jr., U.S. Attorney for the Southern District of New York in *1972 Hearings, supra* note 16, at 33: "it is a stark reality that breakdowns in education, housing, employment opportunity, home services and guidance, and community environment, ultimately end up on the courthouse steps. The prosecutor is given the responsibility for dealing with society's failures." Shah however, estimated that "between fifteen and twenty percent of all criminal offenders have such a significant degree of behavior deviation they they could be diagnosed psychiatrically and are in need of psychiatric treatment." Note 20 *supra* at 348.

31. Consider the range of accused offender "problems" which would be embraced within the scope of services envisioned by S. 798, quoted *supra* note 15, which legislation would place no limitations on the types of accused offenders who would be eligible to be diverted to community programs, and would eschew "diversion" into institutions. *See* S. 798 §§ 2 and 3. Compare the estimate contained in SEN. REP. No. 93-417, *supra* note 10, at 9, "[P]retrial diversion will be a useful tool for only a small number of criminal defendants, perhaps 1 out of 20" which would amount to 2,000 of the 44,000 criminal cases filed annually in the federal court system. The Manhattan Court Employment Project (MCEP) claims to be diverting 2500 defendants in a year. FIRST ANNUAL REPORT (Fiscal Year 1974). The U.S. Attorney for the Southern District of New York testified:

> The most hopeful new idea that has flowered in recent years is the concept of avoiding both the criminal court system and the correctional system by diverting the offender immediately into supervised activity in the community where he has a chance to learn to get along on his own, using his natural talents and meeting his own responsibilities.

THE RELATIONSHIP OF DIVERSION TO 'PROSECUTORIAL DISCRETION'

The modern public prosecutor can be compared with the old justice of the peace in his combination of investigative, prosecutorial, and judicial functions, and in the amplitude of 'discretion' lodged in him by law and legal tradition.[32] In this country, as early as 1931, The Wickersham Commission on Law Observance and Enforcement noticed how "the conditions of administering criminal justice in the urban industrial centers of today, [have] made the prosecuting attorney in substance, although not in legal theory, a magistrate determining in such way and on such grounds as he sees fit, who shall be tried in court and who not." The prosecutor's power was "absolute" as he was "not even required to give a reason for his dismissal." He could dispose of criminal cases "without trial and without review on grounds nowhere recorded and quite unascertainable." His powers of nolle prosequi, and to accept a plea of guilty to a lesser offense, rendered him "the real arbiter of what laws shall be enforced and against whom. . . ." It was deemed an "anomoly" that "the powers and discretion of the judge with respect to the small percentage of prosecutions which ever come before him should be so thoroughly hedged about with restrictions, while this power and discretion of the prosecuting attorney with respect to disposition of the great majority of initiated prosecutions should remain so absolute."[33]

The situation throughout the United States did not differ appre-

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1972 Hearings, supra note 16, at 29-30. A critical examination of the MCEP diversion operations is found in F. E. Zimring, "The Court Employment Project" and "Measuring the Impact of Pretrial Diversion from the Criminal Justice System" (1974) (unpublished manuscripts, Center For Studies In Criminal Justice, Univ. of Chicago Law School.)

32. *See* 1 NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON PROSECUTION, Report No. 4, at 6-30 (1931) (the "Wickersham Commission") [hereinafter cited as REPORT ON PROSECUTION]; F. MAITLAND, JUSTICE AND POLICE 79-93 (1885). MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 330.8 (Tent. Draft No. 5, 1972) provides that the prosecutor shall "hold" the preliminary hearing which the Code would establish for misdemeanor cases.

33. REPORT ON PROSECUTION, *supra* note 32. According to the Commission the first American colony to establish the office of public prosecutor was Connecticut which in 1704 enacted a statute providing in part that: "Henceforth there shall be in every countie a sober, discreet and religious person appointed by the county courts, to be attorney for the Queen to prosecute and implead in the lawe all criminals and to doe all other things necessary or convenient as an attorney to suppress vice and immoralitie." *Id.* at 7. As the Commission observed this authorization combined "what is substantially a magisterial function" with "a function of general criminal detection and investigation." *Id.* at 16.

ciably thirty-six years later, when the National Commission made its survey and report. This Commission singled out the prosecutorial function in the pre-trial stage as the recommended point of entry for the diversion instrument precisely because of the amplitude of the dispositional power still to be found there, capable, in its judgment, of being applied in the servicing of the medical, mental and social problems of selected offenders. The Wickersham Commission had depicted the prosecutor as "the pivot on which the administration of criminal justice . . . turns;"[34] the National Commission saw how this pivot might be used to transform the traditional prosecutorial and correctional functions. Rather than curtail the prosecutor's powers to "no-paper," nolle prosse, dismiss, and plea-bargain, the Commission urged that these powers be made visible, be regularized and be restructured to divert from the criminal process into community programs all persons "for whom the full force of criminal sanctions seemed excessive" but who "might benefit by some type of *non-custodial* community treatment or supervision."[35] As conceived by the National Commission, diversion required both the existence of community resources capable of being mobilized to service the problems of divertible offenders, and prosecutors willing and able to use their discretionary powers to divert selected accused offenders to those community resources.[36] It would also be essential to develop visible standards and procedures to govern diversion in order to minimize involuntariness, inequality, arbitrariness, and abuse.[37] Left

34. *Id.* at 11.

35. REPORT OF PCLEAJ at 133-35.

36. "Of course, implementation of this recommendation [for early identification and diversion] is heavily dependent on the availability to the prosecutor, defense counsel and the courts of adequate factual information on offenders and of appropriate facilities and programs in the community for the diagnosis and management of offenders who are diverted." *Id.* at 134.

37. *Id.* at 134-35. The articulation of standards and visible policies and procedures to govern the exercise of prosecutorial discretion with respect to diversion, as well as to screening out and plea negotiation decisions is frequently mentioned as a desirable or necessary development. *See, e.g.*, MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE, Introductory Memorandum at xiv (Tent. Draft No. 5, 1972); COURTS, *supra* note 3, at Standard 2.2, *Procedure for Diversion Programs. Compare* the insistence of the representatives of the U.S. Department of Justice who testified in connection with S. 3309 and S. 798, *supra* note 16, that the discretion of the U.S. Attorney to divert or not, and to terminate diversion and reinstitute prosecution or not, be "complete" and that "all decisions regarding an individual's participation in a pre-trial diversion program rest solely within the discretion of the U.S. Attorney." SEN. REP. No. 93-417, *supra* note 10, at 15. It is also noteworthy that

open were key[38] questions as, for example: how would persons "for whom the full force of criminal sanctions seemed excessive" be identified for diversion?[39] who would identify them and what relationship

S. 798 as passed by the Senate allowed complete discretion to reside in the prosecutor, and laid down no requirement that standards or procedures be spelled out. The reported experiences of the pilot diversion projects do not make clear how far the process by which nominally eligible defendants are screened and selected for the diversion opportunity may be objectified and translated into discriminating criteria of selection or actual eligibility. Would "fairness" and "evenhandedness" be assured by separating the diversion-selection function from the prosecution function and vesting the power to divert in an independent/autonomous agency or in a new court-community official (such as the "administrative head," of diversion programs contemplated by S. 798) that would directly divert the defendant or recommend his diversion to a judicial officer, who would "release" the defendants to the agreed-upon community program unless persuaded that such release for diversion would create undue risk of danger to the person or property of the complainant, victim, or other third parties? This process would place the prosecutor in the potential position of being adversary to the diversion authority, but would remove the former from the position of being both investigator/prosecutor and "judge" of the decision whether or not, to divert the accused. A move in this direction by the Subcommittee on National Penitentiaries of the Senate Committee on Judiciary as reflected in S. 3309 §§ 5-7, *supra* note 16, was frustrated by arguments that this was "an invasion of the proper separation of functions and powers" between the executive and judicial branches, and "would take away the Government's powers to determine who is brought to trial for alleged criminal conduct regardless of the crime, the evidence, or of the public interest." *1972 Hearings, supra* note 16, at 139. *See also id.* at 41. Bail reform appears to have made use both of objectified criteria and the insertion of an autonomous recommending authority into the process governing pre-trial release as a means of increasing available information and dispersing the actual power of prosecutors.

38. Some of these issues central to diversion were answered in practice in the procedures developed to govern the diversion of accused offenders to community mental health programs, described *infra* at pages 478 et. seq.

39. This issue regarding the criteria for diversion and the process of selecting divertible defendants is complex. Frequently, informal criteria involving estimates of the defendant's "problem-recognition" or "motivation," (*see infra* at pp. 489 et seq., 492 et. seq.) or of "a change in the participant's attitudes and life style," MCEP REPORT, *supra* note 13, at 52, or of a "willingness to accept responsibility for his previous unlawful behavior," R. Leonard and J. Wright, supra note 23, in *1973 Hearings, supra* note 16, at 443, or even of his unlikeliness "to be arrested and convicted again," *id.* at 473, develop alongside the formal ones relating to rehabilitation program "need" [e.g., "underemployed" and "treatable pathology"], crime category, prior criminal record, residence, age, etc. Sometimes the suspicion is expressed that diversion programs may be diverting mainly defendants whose charges would be dropped absent the diversion opportunity. *See* Note, *Pretrial Diversion from the Criminal Process*, 83 YALE L.J. 827, 846-48 (1974). Of course even were this shown to be the case, diversion advocates still would be able to claim the advantage of delivering social service opportunities to criminal defendants who may or may not be guilty. Against this proposition would be weighed the fact that such treatment "opportunities" would not entirely be clear of coercive elements, bearing in

would the identifiers have to the prosecutors and the courts? how would the accused persons be re-routed (diverted) to community programs? how would their performances be monitored and their rights safeguarded in the process? how would the public 'safety' be protected? how could such questions be answered experimentally and in practice so as to obviate inequality, abuse, and coercion?[40]

In the District of Columbia, where the pilot mental-health diversion project was carried out from 1968 to 1971, another crime study group —the President's Commission on Crime in The District of Columbia— had contemporaneously investigated and reported on some of the same problems, as these were encountered in the nation's capital. With respect to the treatment of mentally ill offenders,[41] the D.C. Commission found that notwithstanding the availability of the insanity defense (and incompetency to stand trial procedures) "many people with 'mental problems' are convicted and sent to correctional institutions," rather than to the mental hospital.[42] One possible reason is that, for persons comparably charged, the average confinement in the District's mental hospital as a consequence of the commitments which attend "successful" insanity pleas is greater than the

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mind the "threats" of prosecution which rejections of the opportunities would leave hanging. *See* note 122 *infra*.

40. On the issue of inequality, *see* Marshall v. United States, 94 S. Ct. 700 (1974), where the Supreme Court held that a federal statute which *excluded from eligibility* for rehabilitative drug addiction treatment, in lieu of penal incarceration, convicted narcotics offenders with a record of two or more prior felony convictions "does not constitute a denial of due process or equal protection." The circuits had been in conflict on the question. The issue of abuse is most directly related to the absence of explict standards and procedure and to the distribution of power concerning the decision to divert among prosecutor, judge, and diversion authority. *See* note 37 *supra*. According to the probably predominant critical view, the trouble consists in the "virtually undefined and unreviewable exercise of discretion by police and prosecutor not to proceed further in accordance with criteria so subjective as to afford no assurance that the rule of law is being applied equally to all." A. Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149, 1166 (1960). *Compare* Reiss, *supra* note 4.

41. *See* ARENS, INSANITY DEFENSE (1974).

42. REPORT OF PCCDC 559. A study by the Stanford Research Institute revealed "that 1.7 percent of adult felons convicted in the District of Columbia in fiscal 1965 had been in mental institutions, 2.7 percent had had psychiatric treatment, 1.4 percent had 'serious mental illness' and 12.5 percent had 'other' mental problems." *Id.* Compare the implications of the reported fact that 14 percent of felony cases commenced in calendar year 1965 were committed to the District's mental hospital for 60 days worth of mental observation. *Id.* at 264. *Compare* Shah, note 30 *supra*.

average confinement in the District's penitentiary.[43] Another reason may be presumed to concern the inadequacy of psychiatric treatment facilities in the hospital's buildings and wards.[44] These (not atypical) factors would seem sufficient to discourage mentally ill offenders, and their lawyers, from seeking the mental hospital.

With respect to prosecutorial discretion, the D.C. Commission agreed with the Wickersham Commission's views concerning the pivotal role of the prosecutor: for the District, he was described as "the final arbiter in a wide range of criminal matters," with probably "more control over individual liberty and public safety than any other public official."[45] His powers are not limited only to no-paper, nolle prosse, and dismissal of cases without trial, but also include negotiating pleas to lesser offenses, deciding guilt and innocence, limiting the sentencing discretion of the judge, and determining the time within which correctional authorities might deal with accused criminals.[46] In the pre-trial stages of most cases, he "wields almost undisputed sway;"[47] his decision not to prosecute is "as dispositive as a jury verdict." The Commission expressed concern that the prosecutor's exercise of discretion be rendered "to the greatest extent possible . . . even-handed and fair."[48] His office was where most

43. This was found to be true "in every crime category with the very important exception of homicide and the less important exceptions of forgery, 'other felonies,' and possibly narcotics." *Id.* at 549.

44. The Commission concluded: "These persons either did not raise the insanity defense or the defense was rejected by the judge or jury." *Id.* at 559. It should be noted, however, that from the standpoint of rehabilitation, or its prediction, the District's hospital (Saint Elizabeth's Hospital, part of the U.S. Department of Health, Education and Welfare) compared favorably with the District's prison: "[T]reatment at Saint Elizabeth's Hospital is at least as effective a means of rehabilitation as imprisonment after conviction." *Id.* at 559. The re-arrest rate for conditionally and unconditionally released patients found not guilty by reason of insanity was 37 percent, preponderantly for felonies; the comparable prison release re-arrest rate was estimated at "about 50 percent." *Id.* at 558-59. The U.S. Attorney for the Southern District of New York stated: "FBI statistics show that 75 percent of those who are released from Federal correctional institutions are re-arrested for another offense within 4 years . . . 57 percent of those who are placed on probation at the end of the adjudication process also show up in the arrest columns again." *1972 Hearings*, *supra* note 16, at 29.

45. REPORT OF PCCDC 326.

46. *Id.* at 230, 326; *accord*, REPORT OF PCLEAJ 134-35.

47. REPORT OF PCCDC 230.

48. *Id.* at 331.

arrested persons, their victims, families, and neighbors would "find the quality of justice."[49]

The National Commission had observed that some offenders "who could and should be convicted are released simply because of an overload of work or inadequate investigation in the prosecutor's office."[50] It added that, because of inadequate information and inadequate alternatives, "more often than not prosecutors exercise their discretion under circumstances and in ways that make unwise decisions all too likely."[51] Structured diversion suggested a way in which these prosecutor problems could be alleviated or removed.[52] The D.C. Commission discovered that in 1965 more than 1700 felony cases[53] and 3000 serious misdemeanor cases[54] were nol-prossed or dismissed by District prosecutors, with perfunctory judicial participation. An estimated 1,428 additional misdemeanor and felony cases were "no-papered" by prosecutors, without referral to judges.[55] While some of the reasons for dropping these cases were deemed "meritorious," in the sense that legitimate rationalizations could be assigned to the prosecutors' actions, others were not; in many cases the distinctions were not obvious.[56] Thus, whereas the D.C. Commission considered 'non meritorious' such factors as excessive caseloads, court congestion, and delays,[57] its attitude toward prosecutor dismissals motivated by the "expertise of defense counsel" or "the likelihood of

49. *Id.* at 331. *See generally*, DAVIS, DISCRETIONARY JUSTICE (1969).

50. REPORT OF PCLEAJ 133.

51. *Id.* The Wickersham Commission found "political" considerations entering into the problem of improper exercises by prosecuting attorneys of their discretion to dismiss cases and to accept pleas to lesser and fewer offenses. REPORT ON PROSECUTION, *supra* note 32, at 11-12. A. W. Alshuler speaks of the desirability of curtailing prosecutor discretion through "preordained rules which can limit the importance of subjective judgments, promote equality, control corruption, and provide a basis for planning. . . ." in *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 71 (1968).

52. REPORT OF PCLEAJ 133-34. *See* note 19, *supra*, for an indication that the "authorizing" and "structuring" of prosecutorial discretionary exercises were main motivations of the Senate Judiciary Committee, which proposed federal systems of diversion. "Structured" diversion here means a regularization, a reduction to "rules," of the discretion not to prosecute and intends a process that has "program" results in terms of the delivery of community services to the diverted persons.

53. REPORT OF PCCDC at 239-40.

54. *Id.* at 274.

55. *Id.* at 233.

56. *Id.* at 234-35, 255, 277-79, 281-83, 331-33, 350-51.

57. *Id.* at 252, 281.

appellate review"[58] was less clear. One often-cited reason was the need to utilize scarce resources on more important or more promising cases;[59] the most frequently adduced factor in dropping charges was the failure of complaining parties to press charges or appear.[60]

The power to nol prosse is related to the power to plea bargain[61] which is related to the powers to sentence, treat, and/or punish, all of which thus can be affected by diversion.[62] District prosecutors in 1965 exercised their discretionary powers to accept guilty pleas in lieu of putting offenders through trials in some 700 felony cases[63] and 3000 misdemeanor cases.[64] One-third of such dispositions involved prosecutor acceptances of pleas to lesser offenses or fewer charges.[65] Here, too, non-meritorious factors of the same type were heavily involved.[66] The D.C. Commission saw *plea bargaining* as a legitimate response to "the desire of the accused to acknowledge his guilt,"[67] and as a proper subject for "negotiation in which the accused seeks a lighter sentence and the prosecutor sees merit in not trying the case;"[68] but it also found prosecutors frequently accepting pleas to lesser or fewer offenses because of court congestion and manpower shortages.[69] Pleas are also bargained for in consideration of secret arrangements involving exchanges of leniency for information and testimony against other offenders.[70] In addition to preventing a breakdown in the criminal courts method of "assembly-line justice,"[71] other

58. *Id.* at 252.
59. *Id.* at 252-53.
60. *Id.* at 234, 239.
61. The National Advisory Commission on Criminal Justice Standards and Goals has recommended abolition of plea-bargaining by 1978: "The Commission does not stop short. It totally condemns plea bargaining as an institution and recommends that within 5 years no such bargaining take place." COURTS, *supra* note 3, at 46. Will *diversion*, a process strongly recommended by the Commission, and one which involves the negotiation or arbitration of charge outcomes and rehabilitation plans, replace plea-bargaining? The Commission has urged that diversion be operative in local jurisdictions by 1975. *See supra* note 3.
62. *See* REPORT OF PCLEAJ 133-36. REPORT OF PCCDC 253, 282.
63. REPORT OF PCCDC 241.
64. *Id.* at 275.
65. *Id.*
66. *Id.* at 240-44, 281-83.
67. *Id.* at 240.
68. *Id.*
69. *Id.* at 252-53.
70. REPORT OF PCLEAJ 135.
71. REPORT OF PCLEAJ 130. *Cf.* REPORT OF PCCDC 280.

arguments for plea bargaining include the relief afforded both sides from the risks and uncertainties of trials,[72] the importing of "a degree of certainty and flexibility" into the "rigid, yet frequently erratic" system of criminal justice,[73] the "mitigation" of the "harshness" sometimes caused by mandatory sentencing provision,[74] and the arranging of a punishment that "more accurately reflects the specific circumstances of the case than would otherwise be possible under inadequate penal codes."[75] From one-fourth to one-half of all the persons convicted by pleas and trials of felony and serious misdemeanor offenses, in the District in 1965, were, by the use of suspended sentences, released to their communities without treatment or punishment.[76]

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72. REPORT OF PCCDC 234; REPORT OF PCLEAJ 135.
73. *Id.*
74. *Id.*
75. *Id.*
76. Only some of these were "supervised." May release to the community on probation or with probationary supervision, be equated with *treatment* in the community by diversion? Since S. 798 authorizes a program of community supervision and services, and envisions the possibility that court probation offices might be involved in the administration of diversion programs, there is continuing risk of confusing probation with diversion. This, in turn, relates to the issues of whether diversion will involve transfers of social responsibility over accused persons from law-enforcement to problem-servicing agencies, and whether probation offices will modify their traditional role from that of exerting restraints upon and of exercising surveillance over, the life-styles of offenders and suspected offenders, to that of shepherding more constructive behavioral integrations, on their parts, with the communities involved. *See* REPORT OF PCLEAJ 81-88, and TASK FORCE ON CORRECTIONS, *supra* note 3, at 6-16, 22-26, 38-44. The Advisory Commission on Criminal Justice Standards and Goals distinguishes between two patterns of diversion programs: "In one, the defendant is diverted into a program run by agencies of the system. In the other, the accused is channeled into a program outside the criminal justice system." COURTS, *supra* note 3, at 27. However, the distinction is never accorded legal or social significance. Is it not predictable that accused offenders will be affected differently depending upon whether their involvements in community programs are overseen by members of the communities which offer to re-integrate them, or are supervised by agents of the courts which sought to prosecute them? Similar questions need to be asked concerning the potential role, in diversion systems, of traditional correctional authorities. S. 798 would permit probational and/or correctional authorities to be appointed the diversion agency function. Consider in the context of what constitutes "treatment," the sometimes cited notion that the experience alone of a suspected person's *arrest* may be therapeutic, or at least afford the opportune "moment when he should be started on a new road." Testimony of Whitney North Seymour Jr., U.S. Attorney for the Southern District of New York, *1972 Hearings*, *supra* note 16, at 30. The Advisory Commission has incorporated into its indicators for diversion the possibility that "[t]he arrest has already served as a desired deterrent." CORRECTIONS, *supra* note 3, Standard 3.1.

The D.C. Commission was largely concerned, at the pre-trial stage and with respect to the prosecutorial function, with identifying and rectifying the problems which prevented meritorious cases being fairly prosecuted and won.[77] It made recommendations for the relief of crowded dockets and manpower shortages,[78] and insisted that the U.S. Attorney in charge "must provide some general policy guidelines to his staff to limit the influence of the personal predilections of individual assistants."[79] The model was a prosecutor's office which successfully prosecuted "meritorious" cases in an "evenhanded" way. But such traditional law enforcement concerns do not alone insure that the physical or mental or social problems of offenders, as these relate to their criminal behavior, will be looked at and serviced, or that prosecutorial action with respect to individual offenders will work to discourage further criminality, or to enhance the "public safety."[80] What stands out is that in the District, as in other urban communities, annually, thousands of offenders who have felony and misdemeanor charges brought against them by victims, complainants and police, succeed in getting those charges dropped by prosecutors, for "non-meritorious" reasons. Thousands more get their cases dropped for "meritorious" reasons which are not, however, related to their "actual" guilt or innocence. And, additional thousands of persons who do get convicted, meritoriously or otherwise, also get released to their communities without rehabilitative treatment or vindictive punishment. The question which the diversion construct poses in such situations is: would not the criminal court structure and the system of prosecutorial discretion be put to better use if applied to screen cases and proffer available social services, including psychiatric treatment programs, in the community, to accused offenders needing and wanting them?[81] As alternatives to prosecution?[82] Before drop-

77. REPORT OF PCCDC 235, 331-32.
78. *Id.* at 269, 287.
79. *Id.* at 332-33.
80. *Id.* at 326.
81. Of 141 cases referred to the Project, 118 were accepted for community mental health diversion. Of these, 79 were placed in programs with which they continued to be involved after dismissals of their criminal charges.
82. The approach is arguably in the service of "the behavioral position" on the administration of criminal justice, as described by Prof. Herbert Packer in H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION, 12-16 (1968); *see* B. WOOTTON, CRIME AND THE CRIMINAL LAW (1963).

ping or reducing charges?[83] or suspending sentence or granting probation[84] or imprisoning[85] or hospitalizing[86] anyone upon whom the institutional experience might have a "shattering impact"? Especially if diversion can be carried out with an economy equal or greater than that of the normal prosecutorial-correctional system.[87] Although the D.C. Commission did not expressly recommend, as the National Commission did, that the prosecutor's discretionary powers be used, through diversion, to service offenders' mental health and other social problems, it did recommend reevaluation of the "labelling of many kinds of problem behavior as criminal, with the resultant need to process offenders through the courts and prisons." It also questioned the validity of "incarceration without treatment," urged the "development of new corrective programs, both in the institutions and in the community," and recognized as "urgent" the "need for more effective vocational training programs for adult offenders."[88] It also noted, without disapproval, that in the District "[m]any cases are not prosecuted because of 'mitigating circumstances,' as in some instances involving first offenders or persons receiving professional treatment outside the criminal process."[89]

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83. Of the 100 Project "comparison" cases that had been normally processed through the criminal justice system, 38 were released to the community by prosecutor dismissals.

84. Of the 100 "comparison" cases, 20 received suspended sentences and probation, after conviction.

85. Of the 100 "comparison" cases, 15 were sentenced to jail, following conviction.

86. Of the 100 "comparison" cases, three were committed to a mental hospital: two as "sexual psychopaths" and one as not-guilty-by-reason-of-insanity.

87. The cost analysis undertaken by the Project research evaluation team, described *infra* at pp. 517, 522 indicated mental health diversion can be carried out on an on-going basis for $311 per client as compared with $355 per "normally" prosecuted defendant. The National Advisory Commission cited this Project's demonstration experience as evidence that "diversion involves substantially less direct cost than formal [criminal] processing." COURTS, *supra* note 3, at 28. As the Commission went on to note "[t]hese figures do not take into account indirect savings from diversion such as preventing unemployment, reduction of future earnings, and welfare needs." *Id.* These are the additional costs customarily attributed to custodial criminal dispositions.

88. *Id.* at 860-61.

89. *Id.* at 239.

II

THE WASHINGTON, D.C. MENTAL HEALTH DIVERSION PROJECT[90]

INTRODUCTION

Consultations with District prosecutors preliminary to the start of Project operations disclosed a disinclination to elaborate on the "invisible" ways in which discretion not to prosecute was exercised and on any underlying operational standards or policies.[91] There was mention in the office of the principal prosecutor[92] of "first offender" handling of cases,[93] and also of "pre-trial probation," but no hard information was elicited concerning numbers or types of cases receiving this treatment, the process of selection, the meaning of "first offender," or any terms and conditions placed by prosecutors on accuseds securing dismissals on such a basis.[94]

The municipal prosecutor's office[95] informed the Project that, for

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90. *See* note 12, *supra*.

91. The Advisory Commission on Criminal Justice Standards and Goals has recognized that "[d]iversion traditionally has been an informal procedure which police and prosecutors have been reluctant to discuss—in part because they fear public disapproval." COURTS, *supra* note 3, at 28.

92. At the time of the Project, the United States Attorney had responsibility for the prosecution of most serious crimes in the District of Columbia. This included not only violations of the federal criminal laws (such as income tax evasion, mail fraud, narcotics offenses) but also crimes which in other cities were entrusted to local or state prosecutors, such as homicide and robbery. He is appointed by the President with the advise and consent of the Senate for a term of four years. REPORT OF PCCDC 236-37, 326-29.

93. One month before the NIMH-funded "mental health" diversion project began, a U.S. Labor Department funded first offender "job" diversion project (*Project Crossroads*) was started in D.C. General Sessions Court. In general, it appears that while both projects were in operation, *Crossroads* diverted first-offender, non-violent property offense cases, and the instant Project diverted first and multiple offender, intra-family aggravated assault, sex, non-violent property, and simple drug offense cases. *Crossroads* has been absorbed into the Probation Department of D.C. Superior Court, and reportedly, presently diverts first-offender, non-violent property cases and simple drug (marihuana possession and use) cases.

94. The National Crime Commission had observed that some prosecutors sometimes exercised their discretion to divert and not prosecute: first offenders; persons whose offenses arose from drinking or mental problems, if the offenses were minor; cases involving assault or theft within families or among friends; persons passing checks with insufficient funds; shoplifters when restitution was made; persons accused of statutory rape when both boy and girl were young; and teenage automobile thieves where the purpose was joyriding; the Commission also had noted "more often than not prosecutors exercise their discretion under circumstances and in ways that made unwise decisions all too likely." REPORT OF THE PCLEAJ 133.

95. At the time of the Project, in the District of Columbia, the D.C. Corpora-

some time, it had pursued an informal practice by which persons accused of certain sexual offenses, mainly exhibitionism, could have their cases *nolled* if they showed evidence of being in, or getting into, private psychiatric treatment. A letter from the accused's attorney was the usual assurance the prosecutor obtained that "diversion" to treatment was actually made. Not all persons charged with the minor sexual offenses coming under the jurisdiction of this office were so diverted. Studies made by the Project indicated that a number of persons so accused during 1968 were put to trial or otherwise convicted, and were fined or sentenced to jail; and, also, that several were committed as "sexual psychopaths" to the District's mental hospital. It could not be ascertained whether those who did not get diverted to private psychiatrists, but were prosecuted or hospitalized instead, received different treatment because of disparities in their ability to secure private therapy. At the time of our initial inquiry, the prosecutor's office policy to permit such "diversion" was under "reconsideration."

The present study was designed to test the feasibility of mental health diversion from the criminal process in the District of Columbia. The Project expected to learn if the people and agencies directly concerned could agree to let accused offenders with mental problems choose between going the normal criminal prosecution routes and being diverted to community mental health programs. It sought to learn if accused persons would elect community treatment in place of prosecution—notwithstanding the latter's potential for outright release. It attempted to discover what methods could be used, what structure could be established, to locate such accuseds, afford such options to them, and learn what accuseds, choosing diversion, benefited from it. For those who opted and qualified, would their defense lawyers go along? Would prosecutors? Judges? Would private and public mental health workers and agencies be willing and able to work with Project clients despite the well-known reluctance of such agencies to get involved in criminal court cases. Did the accuseds get into treatment programs? Did they need or want other help? Did diversion "label" or stigmatize them, or cause any prejudice to their

tion Counsel had responsibility to prosecute all violations of a municipal nature. A large proportion are traffic, disorderly conduct and public intoxication matters. Others relate to city regulations on housing, sanitation and employment. The office also bears primary responsibility for the handling of many juvenile matters and serves as advisor to various agencies of the D.C. Government. REPORT OF THE PCCDC 271, 333-35.

legal rights? Would forensically-sensitive information about their involvement in the Project or their mental conditions be used "against" them in any proceeding? Would they be rearrested or convicted with any less or greater frequency than would be expected had they received no option to be diverted? Finally, could diversion to community mental health programs be accomplished as cheaply as prosecution?

The Washington, D. C. mental-health diversion Project was organized adjunctively to the criminal court system of the District of Columbia, in order to obtain reliable answers to these and related questions. The answers received, as described below, were positive; however these answers are qualified by the particular structures and procedures employed in the design and execution of the Project—procedures which other diversion projects may or may not be required or permitted to employ, as a consequence of various factors, including the specific rules and guidelines and agencies which may be prescribed in legislative, judicial or administrative authorizations of diversion. For example, on October 3, 1973 the U.S. Senate passed the bill, S.798, "to authorize a program of community supervision and services for persons charged with offenses against the United States." This proposed diversion legislation permits considerable flexibility in the policies and procedures and agencies which may be adopted for diversion in different jurisdictions. Thus, although "local public, non-profit, or private" agencies, such as those which administered the original pilot projects may administer the new structured diversion programs, adjunctively to the courts, so may bail agencies, correctional authorities, and court probation offices. Again, under the "flexible" structure prescribed by S. 798, while an informal admission of guilt may be required as a condition of diversion "eligibility" in one jurisdiction, it need not be required in another; no pilot project reported any such requirement; whereas prosecutors may be given "unfettered" discretion to terminate diversion programs underway, and resume prosecution, discretion of this scope did not exist in the pilot mental health diversion project described below, and it is questionable whether it existed in the pilot job-diversion projects. It cannot be assumed that such differences in the agencies and structures of diversion will not generate unpredictable differences in program results.

The new federal programs of diversion appear likely to be subject

to overall review by "community advisory committees" whose membership is expected to include not only lawyers and judges, but representatives from mental health and other community agencies which need to be involved in the delivery of services to diverted accused offenders. If the federal structure, as intended, becomes a model for the states, and, as also intended, becomes integrated with state and local systems, diversion structures will need to involve court officers—judges, prosecutors, defense attorneys, probation and parole personnel, and bail-agency workers—capable of performing altered roles,[96] and community social service agencies and workers capable of cutting across professional and jurisdictional lines.[97] Workers from the "medical, educational, vocational, social and psychological" fields, as well as "corrective and preventive guidance, training, counseling," and "half-way house" personnel need to be introduced to the goals and techniques of diversion. This account is intended to mark out a practical beginning of the informing process.

Hypotheses Tested

The Project tested the following social-legal hypotheses: (i) that it was feasible to establish a "mental health" pre-trial diversion unit by which accused persons would have an option to be treated in the community instead of prosecuted or hospitalized;[98] (ii) that this unit could function autonomously,[99] obtaining cases from defense attorneys, prosecutors, and judicial officers;[100] (iii) that the exercise of the option for diversion would not prejudice the accused in any way;[101] (iv) that participation in community treatment programs would deter

96. On the possibility that a prosecutor may alter his traditional role through diversion, *see* statement of Robert F. Leonard, Prosecuting Attorney, Genesee County, Mich., in *1973 Hearings*, *supra* note 16, at 414:

> My office is no longer viewed as merely 'that place which puts people away.' It is felt to be rather a place where citizens can expect thought to be given on any individual case as to what disposition will best benefit society and the individual involved. Briefly, it means a prosecutor who prosecutes cases when warranted, but who also seeks diversion from the traditional justice system, when that is warranted.

97. See the statement of Lucien Zamorski, representing the National Association of Social Workers. *Id.* at 423-29.

98. The feasibility of mental health diversion is discussed *infra* at pages 457 et. seq. *Compare* S. 798 § 2.

99. *Compare infra*, text at page 462, *with* S. 798 §§ 3(5), 4, 6(a) and 7(c).

100. *Compare infra*, text at pages 461-475, *with* S. 798 §§ 3(a), 5 and 7(b).

101. *Compare infra*, text at pages 462-469, *with* S. 798 §§ 5 and 6(b).

the persons involved from further criminal behavior as effectively as would the "normal" criminal process;[102] (v) that it was unnecessary to the unit's methods and goals to secure admissions of 'guilt' or of criminal "responsibility," from diverted offenders.[103]

The Subjects of Diversion

Although the Project's diversion subjects included more than 160 criminal defendants, the primary diversion subjects were 100 persons accused of misdemeanor crimes[104] by prosecutors in the District of Columbia,[105] whose post-diversion careers were monitored for recidivism. Demographic data on these subjects may be summarized as follows:

Sex		Age	
Male	82	Mean	28 years
Female	18	Range	18-73 years
Race		**Prior Record**	
White	47	Prior Arrests	60
Black	53	No Prior Arrests	39
		No data	1
Residence			
District of Columbia	70	**Offenses Charged**	
Non-Residents	30	Sex Offenses	58
		Non-Violent property offenses	23
		Drug Offenses	19

Secondary subjects of the study were the more than sixty additional accused persons who were referred for diversion but who were not included in the recidivism research, for the reasons stated *infra* note

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102. *Compare infra* text at pages 506 and 522 *with* S. 798 § 2.

103. This was not a hypothesis which the Project was designed to test, but is a conclusion which the author believes may be fairly inferred from the data. *Compare infra* text at page 499 *with* S. 798 § 2.

104. Some of these involved felony charges broken down to misdemeanors; *see* page 458 *infra* and note 149 *infra*. *See* REPORT OF PCCDC 239, 253-55. "A survey of the files of the United States Attorney indicates that there are numerous reasons for no-papering or for downgrading felonies to misdemeanors." *Id.* at 239. *Compare* S. 798 § 3(1).

105. *See* notes 92 and 95 *supra; compare* S. 798 §§ 3(1), 4 and 5.

169. These persons were charged with crimes of the same types as were the primary subjects, with the addition of intra-family assaults.

The Sources of Diversion

The offices of the public prosecutors were the sources for most referrals of accused-offenders to the Project. Referrals also came from individual defense lawyers and from the public defender service[106] as well as, in a few cases, from judges of the criminal court.[107] In every accepted case, the subject, as well as the prosecuting and defense attorneys, consented[108] to participation. In every *papered* diverted case the judge[109] approved the dismissal of charges or *nolle prosequi.*

The Feasibility of Mental Health Diversion

The threshold question investigated by this Project concerned the feasibility of establishing a *mental health* pre-trial diversion unit within an urban system for the administration of criminal justice.[110] The question of feasibility embraces a number of factors, including the ability to select divertible cases,[111] and the willingness and ability of the accused offenders, their lawyers, the prosecuting attorneys, the judges, and the social and mental health workers necessarily involved to embrace the policies and practices of the diversion unit.[112] The cost of operating the diversion unit should also be considered; postulated as an alternative method of dealing with accused offenders, its costs should be compared with those of the system which it would replace.[113]

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106. At the time of the Project, accused felons and misdemeanants appearing before the U.S. Branch of the Court of General Sessions, who were indigent were considered entitled to, and automatically assigned, counsel under a plan approved pursuant to the Criminal Justice Act. *See* Report of PCCDC 338-48 for a description of the methods and agencies involved.

107. This was in the D.C. Court of General Sessions, now the D.C. Superior Court.

108. *Compare infra,* text at pp. 462, 487 and 489, *with* S. 798 §§ 3, 5, 7.

109. *Compare infra,* text at pp. 475 and 477, *with* S. 798 § 7.

110. *See* pages 458-59 *infra.*

111. *See* pages 492 et. seq. and 496 et. seq. *infra.*

112. *See generally* text at pages 458 et. seq. and 478 et. seq. *infra; compare with* S. 798 § 8(a).

113. *See* pages 506 et. seq. and 522 et. seq. *infra; see* Courts, *supra* note 3, at 28.

Types of Divertible Accused Offenders;[114] *Exclusions;*[115]

The methods and considerations by which the project and the prosecutor offices arrived at the *types* of accused offenders which might be diverted, and the *criteria* for inclusion and exclusion within those types, as well as the methods by which cases were actually screened, evaluated and placed are described below. Excluded theoretically were felony cases (not felony cases "broken-down" to misdemeanor cases), cases involving drug addicts, and cases where the accused could not be released on bail, bond, or recognizance. Excluded in practice were cases where treatment in the community on an outpatient basis could not be considered and cases where the nature or circumstances of the offense (e.g., assault on a police officer), or the defendant's criminal record (numerous arrests and convictions for serious misdemeanors or felonies), did or would cause prosecutors to resist proposals to divert. Also excluded in practice—at project-staff courthouse screening or during project evaluation—were accused persons, coming within the eligible categories, who could not make bail, who evidenced no need for therapy or therapeutic counseling, or who displayed inappropriate or no motivation for treatment.[116]

Over the course of the project, persons charged with the following types of crimes actually were referred and accepted for diversion:

(a) *Intra-family assault crimes:* involving charges of threats, child abuse, simple assault, sexual assault, carrying a deadly weapon,

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114. S. 798 § 2 is permissively all-inclusive: "[D]iversion can be accomplished in appropriate cases" and should be "made available to persons accused of crime who accept responsibility for their behavior and admit their need for such assistance." The National Advisory Commission sets out certain "factors that should be considered favorable to diversion," including youth, treatable mental illness, and the likelihood that the charged criminal behavior is related to a remedial social or personal problem. COURTS, *supra* note 3, at Standard 2.1.

115. S. 798 excludes no accused offender from eligibility for diversion although predecessor bill S. 3309, printed at *1972 Hearings*, *supra* note 16, at 4, excluded persons charged with crimes of violence or who had records of two or more convictions with unserved sentences or who had previously been diverted. S. REP. No. 93-417, *supra* note 10 at 6 suggests that "individuals with patterns of repeated criminal violations or assaultive and violent behavior would have been dropped from consideration." The National Advisory Commission set forth certain factors "unfavorable to diversion, including a history of use of physical violence, involvement with organized crime, and a history of anti-social conduct: COURTS, *supra* note 3, at Standard 2.1.

116. *See* note 118 *infra*.

and disorderly sex. Some of these involved behavior which might have been charged as felonies, rather than misdemeanors. Examples: a "carrying a deadly weapon" case actually involved the complaint that the accused "shot at wife with pistol;" a "simple assault" case actually involved the complaint that the accused "tried to strangle sister with a rope;" a "threats" and "simple assault" case actually involved the complaint that the accused "tried to strangle wife;" a non-papered "citizen's complaint" of assault case actually involved the complaint that the accused "shot his wife."

(b) *Non-violent property crimes:* involving charges of shoplifting, receiving stolen goods, petit larceny, unlawful entry, destruction of property, false pretenses, attempted burglary, tampering with auto and arson. Here, cases involving the charges of "attempted burglary" or "false pretenses" might have originated as felony cases of "burglary" or "false pretenses." Arson *is* a felony.

(c) *Minor sexual offenses:* involving charges of indecent assault, attempted sodomy, sodomy, solicitation for lewd and immoral purposes, indecent act, indecent exposure, peeping tom, indecent sexual proposal, disorderly sex, indecent gesture, and indecent act on child. "Sodomy" is a felony and "attempted sodomy" probably is a "broken down" charge of sodomy. The "indecent act on child" was likely a felony act of "carnal knowledge."

(d) *Drug Cases:*[117] involving use or possession of illegal drugs (marihuana, LSD, and others); possession of implements of crime relating to such drugs; and violations of the Uniform Narcotics Act.[118]

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117. The diversion of such "simple" or minor drug cases is distinguished from the diversion of hard-drug addicts. *See* note 13 *supra*.

118. Not all charged or arrested persons falling within these four categories during the period of the Project were referred for diversion. Whereas all persons charged with the stated sex offenses probably were referred to the Project, the referred property, drug, and intra-family assault cases constituted only a portion of the cases involving those types of charges arising in the prosecutors' offices during the periods of Project acceptance. The screening and selection procedures were not established with the rigorousness necessary to insure that exclusions of eligible defendants from the diversion opportunity for extra-program reasons could not occur. *See* text *infra* at pages 458-59. The project did not demonstrate that diversion can be conducted in a "fair" and "even-handed" way. It seems likely that some procedure for "appeals" from adverse screening decisions will have to be developed to help insure fair administration of the discretion to divert. *See* note 37, *supra*.

Placements of Accused Offenders; Their Mental Problems

The Project experienced maximum success in placing accused drug offenders and sex offenders into the full range of community treatment programs available in the District. More than two-thirds of referred non-violent property offenders and intra-family assault cases also were placed in treatment or counseling programs. However, not all four categories of cases were evaluated and placed by the Project with the same degree of success. Table I lists the placements for all four categories of accused offenders.

TABLE I[119]

Principal Placements of Intra-Family Assault Cases, Minor Sex Offense Cases, Non-Violent Property Offense Cases and Simple Drug Cases

	Family (N=27)	*Sex* (N=78)	*Property* (N=25)	*Drugs* (N=33)
Private Psychiatrist	3	11	2	2
Counseling Relationship	2	10	6	11
Family and Child Services	3	1		1
Dr. Foy—Georgetown	1	13		
Area B Mental Health Center	3	5		
Area C Mental Health Center	1	5		
Area D Mental Health Center	2			
Saint Elizabeth's Hospital	1			
D. C. Institute for Mental Hygiene	1	1	2	2
Northern Virginia Mental Health Center	2			
Narcotics Rehabilitation Center		1		1
Washington School of Psychiatry		4		1
Georgetown University Clinic		4	2	1
Free Clinic				3
Rockville Community Mental Health Center				1
Bethesda Mental Health Center				5
Group Therapy Center of Washington		1		1
Arlington Mental Health Center		3		

Alcoholics Anonymous		2		
Albert Deutsch Center		1		
Employments or Employment Rehabilitation			3	
None (Terminated or Dropped Out)	9	13	9	4

Among the mental problems identified among the accused offenders accepted by the Project were: schizophrenia, depression, passive aggressive states, paranoid personalities, hysterical conditions, sexual deviancies, compulsive and other neuroses, alcoholism, drug addiction, and schizo-affective, organic, and immature typologies.[120]

Diversion Advantages and Disadvantages for Accused Offenders

A *voluntary* pre-trial diversion program will be feasible with respect

119. Of twenty-seven referred intra-family assault cases, eighteen (67%) were placed in treatment or counseling programs. Four could not be evaluated or placed and five were either terminated during the evaluation process or dropped-out following attempted placement. Of twenty-five referred non-violent property offense cases, nine either terminated during evaluations or dropped out after initial placement efforts. Thus sixteen of those referred (64%) were placed in community treatment programs. The numerous group of referred accused sex offenders and the group of referred simple drug offenders responded more positively to the Project's program. Of seventy-eight referred persons in the accused sex offender group, sixty-five (83%) were placed. Of thirty-three referred accused drug offenders, twenty-nine (88%) were placed.

The sixty-six successful sex offense cases were diverted to the full range of treatment programs available in the District. Thirteen of those referred were placed in therapy groups organized at the Georgetown University Medical Center by the Project's medical director, a psychiatrist. Eleven were placed with other private psychiatrists. Twenty-eight were placed in treatment programs of both public and private mental health centers; ten were involved in counseling relationships; two were referred to the programs of Alcoholics Anonymous; one was placed at the Narcotics Rehabilitation Center.

Of twenty-five referred accused property offenders, two entered treatment with private psychiatrists, one entered an area community mental health center program (two failed to enter), four were placed with private mental health agencies, three were involved in job rehabilitation programs, and six entered counseling relationships. The attempted diversions were unsuccessful in nine property cases.

Of twenty-seven referred accused intra-family offense cases, four were placed with private psychiatrists, three entered Family and Child Services programs, six entered area community mental health center programs, one voluntarily entered Saint Elizabeth's Hospital, two entered private agency programs, and two were involved with supportive counseling relationships. Nine could not be placed.

120. These diagnoses were contained in the Project's files on its clients but were not communicated to prosecutors or defense lawyers. *See* page 499, *infra*.

to accused persons deemed eligible, as well as their lawyers, if the likely advantages to participation outweigh the likely disadvantages. In short, diversion must be more attractive than prosecution. We assumed that the definite prospect of involvement in mental health treatment programs in the community would be preferable to the uncertain prosecutorial prospect of a jail sentence or probation if convicted, unconditional freedom if acquitted, or hospital confinement if suspected or found to be not guilty by reason of insanity, incompetent to stand trial, or "sexually psychopathic."[121]

Elements of Voluntariness;[122] *Project Autonomy*

To implement the policy that mental health diversion would be voluntary for the accused, certain practices were adopted by the Project. At the courthouse the accused was verbally informed by the diversion unit's court liaison of the voluntary nature of the Project and his participation in it. Upon the accused's first visit to the diver-

121. A problem with this assumption is that even persons without mental problems might be expected to prefer treatment of their non-existent problems to prosecution. The fact that to the maximum possible extent, the Project adopted a "social" rather than "medical" approach to the "mental problems" of its clients, and avoided reportorial use of traditional psychiatric nosology, meant that the Project's mentally-ill clients were not operationally diagnosed as such, and were not in this sense induced to "accept a mental illness" in exchange for diversion from the criminal process. Similarly charged accuseds without any treatable problems at all presumably obtained no diversion opportunities, but this should not imply they were prosecuted; they may have been released outright by the prosecutor for any of the many "non-meritorious" or "meritorious" reasons which enter into prosecutorial decisions to no-paper or nol prosse, as described *supra* at pages 447 et. seq. This may not resolve the diversion problem of inequality in treatment of accused offenders theoretically equally situated except for the presence in one and absence in the other of a treatable problem. For "minor" or "marginal" accused offenders, the National Crime Commission and the National Advisory Commission seem to support the proposition that they be screened-out, or possibly be placed under probationary types of surveillance-counseling supervision. *See* REPORT OF PCLEAJ 133-34; CORRECTIONS, *supra* note 3, at 73-94. The concept of "decriminalization" tends to merge here with the design of diversion. Professor Daniel J. Freed has identified "diversion" and "decriminalization" as the "two major themes . . . for the reform of criminal justice administration." Statement of February 12, 1974, *supra* note 16. There is some apprehension that authorization of diversion will serve to delay or prevent desired decriminalization. *See* Statement of Raymond T. Nimmer, *supra*, note 16.

122. Voluntariness may be seen as a matter of degree; the accused offender given the "option" to be diverted is likely to have felt (correctly or incorrectly) that the threat of prosecution "hanging over his head" would probably be actualized if he declined the offered alternative. The problem is sometimes identified as involving a "constructive coercion." *1974 Hearings* at 83.

sion unit's offices, he was reminded of this feature of the program, this time by a social work counselor, and given a brief, simple consent form to read and sign if he decided to enter the diversion program. His lawyer was advised orally by a staff member of the program's voluntary aspect, and told that his client would be accepted only with his and his lawyer's consent. This policy was also explicitly presented in written descriptions of the program distributed to the public prosecutor and legal defender offices, other lawyers, community mental health workers and agencies, and other interested persons and organizations.

The accused was also advised by the Project's staff that his participation in the program until trial (usually 90 days from acceptance)[123] would be likely to result in the dismissal of the charge or charges pending against him at that time; he was informed that he would be free to withdraw from participation whenever he wished, but that a withdrawal before trial would mean his case might not be dismissed. He was further advised that the diversion unit expected him to continue in the treatment program, after and despite dismissal of the legal charge(s), for such time as appeared beneficial.[124]

Problems of Confidentiality and Adversary Use of Project Information

In addition to the policy of voluntariness, it was necessary that participation in our program by an accused could not prejudice him legally, or in any other way, lest diversion be avoided by him. Legal prejudice could occur if information developed by the Project concerning an accused's mental condition or concerning his involvement in the offense of which he was charged were available for use "against" him in a criminal proceeding or in connection with employment or other desired activities. At no time was it anticipated by the Project, or suggested by prosecutors or judges, that the Project should ascertain or report on the subject's legal guilt or his willingness to accept "responsibility" for his criminal behavior. One source

123. *Compare* S. 798 § 7, which provides a twelve-month "continuance without final disposition" of the criminal charges, pending completion of the diversion program as certified by the diversion authority or its termination by the prosecutor or committing (judicial) officer. *See* the text *infra* at note 137.

124. A survey by Project staff showed that 79 of 118 Project accepted cases continued their involvement in the mental health programs beyond dismissals of the charges in their cases. *See infra*, text at page 468.

of concern, however, was the possibility that the courts (prosecutors and judges) might use Project information concerning an accused's mental condition in this or another criminal proceeding against the accused as *prima facie* evidence sufficient to commit him *involuntarily* to a mental institution to determine whether he was "competent" to stand trial, and/or "responsible" for the offense with which he was charged.[125] Initially, one of the prosecutor offices expressed interest that our unit might develop and make available (to "both sides") detailed information regarding the accused's mental condition, in forms that would be pertinent to such commitments. The public defender agency expressed concern over the risk of "adversary" use of Project information, including even the bare information of referral to a "mental health" project. It expressed reluctance to refer clients to the Project if the Project were free to turn down a defense-proposed diversion, and if the prosecutor or judge would be free to make adverse use of the information that the defendant's lawyer considered a "mental problem" might be involved. Eventually "both sides" went along with the following policies[126]

125. On the problems and practices involved in this area, see the important study by A. R. MATTHEWS, MENTAL DISABILITY AND THE CRIMINAL LAW (1970) Matthews reports that in the courts of the District of Columbia and other cities that he studied for the year 1964, in nonfelony cases, it was usually the prosecutor or judge who raised the mental competency to stand trial issue; this was done orally with compulsory commitments to mental hospitals for examinations of from one to three months duration ordered "as a matter of course on information usually supplied by the police or custodial officials. Reasons given may be that the accused appeared 'a bit odd,' was violent, or attempted suicide. A clerk or bailiff may even suggest the question." *Id.*, at page 78. *A fortiori*, a report by a mental health diversion unit that an accused was suffering from "schizophrenia" or "sexual deviancy" or a "paranoid personality" would supply adequate basis for an involuntary hospitalization. The collection of legal and clinical materials which offers maximum insight into the practices and problems in this area still is KATZ, GOLDSTEIN and DERSHOWITZ, PSYCHOANALYSIS, PSYCHIATRY AND THE LAW (1967).

126. *Compare* the provisions in S. 798 § 6(b) which except "on the issue of guilt" would fail to afford protection against adverse use—of "statements made or other information given by the defendant in connection with determination of his eligibility for such a program," "statements made . . . while participating in such a program," "information contained in any . . . report made with respect thereto," or "any statement or other information concerning his participation in such program"—in any judicial proceeding involving such offense or other offense or other proceeding where the defendant's mental condition or disposition may be placed in issue by the court or attorney for the government, e.g., in bail revocation, sentencing, parole, competency to stand trial, insanity defense, and sexual psychopath proceedings, where commitments can result. The Model Code of Pre-Arraignment Procedure would totally ban the use of statements and information

adopted by the Project in this area: (1) all cases within specific offense categories would be invited for referral, thus minimizing the risk of "adversary" advantage being taken of the *fact* of referral; (2) no information concerning an accused, secured through the Project, would be used in any criminal proceeding growing out of the current charges, without the consent of both sides; and (3) Project reports concerning the accused would avoid recitation of findings or conclusions in forms useful to forensic commitments of persons to mental institutions, or for insanity defense and competency to stand trial examinations. Thus, our reports normally were not couched in traditional forensic terms of psychoses, neuroses, and character disorders, and were, by comparison with traditional psychiatric reports to criminal courts, sparse in detail. No case or situation was brought to the Project's attention in which Project information was used against an accused in any criminal or mental commitment proceeding. Our information was eventually utilized in the administrative disposition hearings, and (by inference at least) in the judicial proceedings involving dismissal of the charges under which the accuseds originally had been referred to our Project, both described *infra*.

The possibility that Project information concerning an accused's mental condition or the fact of his participation in our unit's program might somehow be used adversely to affect him in connection with employment was considered by our staff to be sufficiently remote that no steps were taken to further obviate that prospect.[127] The alternative prospect of acquiring a criminal arrest or conviction

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developed in connection with pre-trial screening conferences and examinations, except as stipulated otherwise by the parties. MODEL CODE OF PRE-ARRAIGNMENT PROCEDURES §§ 320.3(3) and 320.5(3) (Tent. Draft No. 5, 1972). The National Advisory Commission seems not to have dealt with the problem.

127. The possibility that Project information might be used adversely in another way, was raised by the prosecutor's office, which, at one point, questioned whether accused persons, dependent for their jobs upon driving licenses, might not prefer a criminal record over diversion to the Project, since licenses to operate motor vehicles had been suspended in the District of Columbia in cases of persons known to have been treated for mental disorders or committed to mental institutions. The question was resolved, for Project purposes, by adoption of the policy that the Project would undertake to provide or secure competent legal representation for any person threatened with loss of his motor vehicle license by reason of participation in the Project being made known to the Motor Vehicle Bureau. No such threatened loss came to our attention. However, loss of a job by a Project client did result from his acquisition of a criminal arrest record. *See* the discussion in the text at note 130 *infra*.

record was felt likely to be at least as threatening a risk to job opportunities. It was determined as policy that all unit information and files concerning an accused would be treated as "confidential" and, if necessary, be defended against legal investigation or subpoena by, among other means, resort to the doctor-patient evidentiary privilege,[128] deemed to attach to the relationship established when an accused formally entered our unit's clinical evaluation and placement program, supervised and attended as it was by psychiatrists.[129] No adverse use of, or attempt to use, Project information was known to have been made concerning any accused's employment. It is known, however, that at least one referred accused sex offender lost his job of fifteen years standing with a federal departmental agency which learned he had been *arrested* for an "indecent act." Although it is not known whether he was reinstated after his case was *nolle prossed* following his diversion into a treatment program, the likelihood that he was not points up an important limitation on the value of diversion in avoiding the stigma of a criminal "record."[130]

In order best to support the voluntary, non-prejudicial, and non-adversarial elements of the diversion program it was Project policy to maintain autonomy[131] in operations and supervision. Like the

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128. The lawyer-client privilege could not appropriately be resorted to although the Project's legal director was a member of the local bar, inasmuch as the Project was organized to function independently of the defense arm and defense agency, and in such a way as not to displace defense representation of diverted accuseds.

129. *See* note 12 *supra*.

130. *Query* the advisability of expunging the arrest record in diverted cases. Compare the setting aside of convictions after a first-offender accused has completed a rehabilitative drug program subsequent to an entry of a plea of guilty under the Comprehensive Drug Abuse Prevention and Control Act of 1970, Public Law 91-513. Will unsuccessful "job" divertees be stigmatized by that information being made available to the courts? It is no secret that the willingness and ability to keep a job is considered an important indicia of self-discipline and responsibility among criminal justice system workers, as among the middle-class generally. It is possible that diversion to jobs and job-training is considered punitive by some law enforcement officials. The proposal by the Department of Justice that diversion to employment rehabilitation programs be permitted only on the basis of guilty pleas might have pushed the premise even farther: job-holding is a punishment, perhaps a lightened community version of the old chain-gang. Compare the concept of "occupational therapy" in mental health treatment settings.

131. S. 798 would permit a "local public non-profit or private agency" to administer diversion, in cooperation with the court. Bail agencies, correctional authorities, and probation offices also could be involved. S. REP. No. 93-417, *supra* note 10, at 11. The Judicial Conference urged that the Federal Probation system be designated in the legislation as the exclusive federal diversion agency. *Id.* The

District's bail agency, which operated as an autonomous unit of the government, the diversion Project was independent and separate from both prosecutor and defense operations; and, as has already been noted, it operated independently of the court itself, and its judges. It seemed of importance that a mental health diversion unit have autonomy and integrity from and within the criminal justice system, and this feature of the diversion unit was consistently stressed.

Program Advantages over Prosecution

The question of feasibility with respect to accused offenders is probably most directly related to the advantages which may be anticipated and/or obtained by accuseds who are given the opportunity to be diverted from the criminal prosecution process into a community health program. The Project presumed the following negative advantages: (a) no adversary trial; (b) no jail or supervised probation; (c) no criminal record of conviction; (d) no prejudice of rights. Positive advantages presumed included: (e) treatment opportunities; (f) improved social competence and/or mental or emotional condition; and (g) decreased likelihood of rearrest and fresh conviction. One irreducible potential disadvantage was that a *nolle prosse* or dismissal, as a result of diversion, might not neutralize the stigma of the arrest record involved as effectively as would an acquittal.[132]

None of the Project's diversion clients went to jail as a result of original charges, although five (who were among seven *judge-referred* cases) did acquire records of conviction therefrom.[133] Apart from these, the only formal courtroom proceedings which involved the Project's clients consisted of brief hearings in which the charges against them were dismissed or *nolle prossed*. On the other hand, 35 of the 100 normally processed *comparison-case* accuseds, discussed *infra*, acquired criminal records of conviction—15 being sentenced to jail and 20 receiving suspended sentences and probation. Two others from the comparison group acquired records of sexual psychopathy, one acquired a not-guilty-but insane record, and at least 38 were re-

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Bureau of Prisons is another likely contender. Prosecutors interviewed by the Project expressed the view that diversion probably would best be conducted by an "independent" agency, which should itself select cases, subject to prosecutor consent, for diversion. *See* p. 474 *infra*.

132. *See* notes 127 and 130 *supra*.

133. The diversions through *direct* judicial officer action were aberrational; the Project did not program for referrals from judges.

leased as a result of prosecutor dismissals. The negative advantages which accrued to the Project's diversion clients, in avoiding those risks of jail and criminal, insanity and psychopathy commitments and records, seems plain and substantial. That the avoidance of these risks of being convicted, stigmatized and/or committed to jail or hospital was an advantage felt by the accused misdemeanant population is consistent with the steadily increasing rate of accuseds' participation in our Project during the two years of diversion operations.

We also inferred that most of the Project's diversion clients recognized the advantages offered by diversion in the opportunities provided them to receive needed treatment, including group and individual psychotherapy, counseling, and social assistance. An investigation by the Project research staff of 141 diversion clients' participation in the Project's programs showed that while twenty-one (15%) of the accused persons referred to the Project were not accepted by it, or rejected it, only nine (8%) of the 118 accepted cases "dropped-out" of the Project's programs prior to the date set for their trial, and seventy-nine (67%) continued their involvement beyond dismissals of the charges in their cases. Although we did not directly measure the positive program values experienced by diversion clients, or determine how long they remained with the programs in which they were placed or the reasons for their eventual terminations from those programs,[134] the high rate of diversion-client participation beyond their trial dates, and charge dismissals, makes it seem likely that the treatment diversions were experienced by them as beneficial, or potentially beneficial, in the areas of mental or emotional condition and social competence. With the possible exception of the two "comparison" cases committed as "sex psychopaths" to the District's mental hospital, and the five accused sex offenders reported by the municipal prosecutor as having probably obtained private treatment, no "comparison" case accused, whether convicted or freed, is known to have received such opportunities. Finally, since fewer diversion clients than "comparison" subjects were arrested during the one-year average recidivism research follow-up period, we estimated that diverted subjects experienced no disadvantage with respect to ability to avoid repetition of behavior leading to arrests.

134. These are all matters which should be measured in future diversion projects of this type. The National Advisory Commission has said: "Concerted efforts must be made to determine the benefits and costs of various types of diversion programs." COURTS, *supra* note 3, at 28.

With few exceptions, the referred subjects' own lawyers approved of the diversion in lieu of prosecution of their clients. In two or three reported cases, however, accuseds wishing to be diverted are known to have discharged lawyers who had advised them, instead, to go to trial.

No significant negative attitude regarding involvement in the diversion program appears to have developed at any time among the accused offender population from which our subjects were selected, or among the legal community which defended them; in the great majority of cases, diversion was selected by the accused when offered the opportunity. The feasibility of a mental health pre-trial diversion program operating as an optional and autonomous factor within the criminal justice administration system was in this way demonstrated with respect to persons accused of the designated intra-family assault, sex, drug and non-violent property offenses, and with respect to their lawyers.

Feasibility for Prosecutors

Before the start of the Project, a cooperative understanding concerning the Project's general plans was reached with the two public prosecutor offices having jurisdiction over criminal complaints, and both offices actively participated in the implementation of both the research and service aspects of Project operations.

During initial discussions with the Project's legal director, one chief prosecutor explored the possibility of making Project psychological manpower resources available for mental examinations of the large number of accused offenders awaiting such examinations in jail because of insufficient space and resources at the District's mental hospital. It was also questioned, later, whether the diversion Project unit might function as an adjunct of the prosecutor's office. These ideas were not adopted by the Project.

Discussions with the principal chief prosecutor and senior assistants in his office uncovered interest in the possibility of diverting persons charged with certain kinds of offenses into flexible, non-custodial treatment modes, as an alternative to insanity defense pleas, trials, and commitments. Although this positive response included consideration of some major felony offenses, it was determined that felonies would not, as such, be included within the formal scope of the diversion unit's initial operations. Nevertheless, as indicated above, among

persons referred by prosecutors to the Project and accepted by it for diversion were some accused offenders whose misdemeanor charges had been broken-down from felonies.

Although the principal prosecutor's office acknowledged it exercised discretion to drop charges in some cases, this was used mainly or exclusively for "first offenders." There was no specification of the types of situations or offenses involved, and there was concern that the practice, termed by the office as "pre-trial probation," might be misunderstood; similarly, the prosecutors feared that the goals and processes of our Project might be misinterpreted. Prosecutors were also concerned that defense attorneys, learning of cases in which prosecutorial discretion had been exercised to "divert" defendants charged with offenses comparable to those being brought against their own clients, might insist that their clients had a right to the same treatment. "How can we say which cases to divert? How can we tell who should be entitled to diversion?" The Project's answers lay in its policies that it would accept no accused for mental health diversion unless a prospect for treatment was seen, or without *both* the attorney's, the accused's, and the complainant's agreement to the diversion. From the prosecutorial standpoint, however, an office which agrees to diversion in one case but not in another not obviously different in its circumstances, will find difficulty in defending its action. Prosecutors would, in effect, be relinquishing a degree of their more-or-less unshared, untrammelled, and invisibly exercised discretion—to defendants, their lawyers, and diversion Project staff.[135] Countervailing benefits for prosecutors consisted of alleviating their case over-load, uncovering mental health resources for the kinds of cases some prosecutors wish to see handled outside the normal criminal correctional process, and development of "legitimate," more

135. The Department of Justice successfully pressed for changes in the draft federal diversion legislation, as now evidenced in S. 798 § 3. *See* testimony of Mike McKevitt, Assistant Attorney General, Office of Legislative Affairs in *1973 Hearings, supra* note 6 at 396:

> By providing that eligibility for pretrial diversion rests solely within the discretion of the U.S. Attorney, S. 798 has attempted to overcome one of the Department's most serious objections to the previous bill. As we have made clear . . . the U.S. Attorney must be given maximum flexibility in matters related to prosecution and his traditional discretionary authority must not be compromised.

The bill's proponents appear to have sought to redistribute the prosecutor's discretionary power with respect to diversion cases between the judicial (committing) officer and the new administrative head of diversion.

constructive, and "safer" alternatives to prosecution and outright dismissal.[136] Of less obvious attractiveness would be the emergence of visible criteria and procedures for the exercise of prosecutorial discretion with respect to the disposition of such cases.

From the Project's standpoint, the initial steps of the principal public prosecutor office's participation in the Project seemed guarded and halting. It required four months for the Project to secure the first fifteen referrals, three months to divert them and satisfy the prosecutor's office concerning the diversions, and six additional months to begin to receive a regular flow that resulted in fifty additional cases. By comparison, the next ninety-four cases were referred to the Project, and diverted, within a seven-month period. By comparison, prosecutors in the municipal prosecutor's office, once a threshold cautiousness lasting one month had been overcome, cooperated energetically, and without evident reservation, with the Project's policies and procedures. That office's greater readiness to cooperate in diversion may be explained by the facts that mental health diversion was already underway in the other prosecutor's office, the crimes over which it had jurisdiction were less serious, and this office was already engaged in *unstructured* mental health diversion of some cases, that is, diversion without benefit of regular procedures or resources.

Initially it did not appear desirable to prosecutors, that all types of misdemeanor cases arising in their offices be deemed eligible or suitable for mental health diversion. The principal prosecutor's office already was cooperating with *Project Crossroads'* diversions to job-programs of youthful *first offender* accused misdemeanants, particularly those charged with non-violent property offenses like petit larcency, unauthorized use of motor vehicles, and receiving stolen property. Another objection was the possibility that the public or the press might misinterpret an "open" referral process to mean that all crimes and criminals were imagined by prosecutors to be possible products of mental illness. Finally, if defense lawyers and the defender

136. These were benefits perceived by Project-involved prosecutors; *see* pp. 473 et. seq. *infra*. They are benefits predicted by the National Crime Commission: *see* REPORT OF PCLEAJ at 133-36.

agency aggressively pressed for "diversion" in all kinds of cases, this might disrupt rather than complement traditional methods of processing cases, and disconcert rather than satisfy other persons involved—including complainants and the arresting police.

Prosecutorial considerations also negated a Project plan of mental health diversion for periods lasting as much as one year,[137] prior to charge dismissal. Although some prosecutorial interest in this proposal was evidenced, ninety days of program involvement (and of trial date postponement) was all the prosecutor's office was prepared to agree to; this policy came to be implemented by the defense lawyer's motion for the ninety-day postponement of trial needed for the diversion—a tactic which avoided potential allegations of denials of the right to speedy trials,[138] and did not unduly postpone the movement of cases to trials, dismissals, or guilty pleas, or add to the clutter or burden of the District's criminal court calendar. Project policy was accordingly established to aim for an accused's placement in a treatment program, or supportive counseling relationship, within ninety days after Project acceptance,[139] although Project research follow-up might continue for a year or more, and diverted accuseds would be encouraged to continue in treatment programs for as long as appeared beneficial. In exceptional cases, one or more additional ninety-day periods, necessitating additional trial continuances, were agreed to by prosecutors in order to obtain effective placement in mental health programs, where extensions were requested by Project staff, and continuances could be secured from the courts concerned.

A reliable index of prosecutor approval of pre-trial mental health diversion opportunities is found in the number and types of cases which they agreed to have diverted. The two prosecutor offices involved with our Project agreed, during a twenty-three month period, to an attempted diversion to community mental health programs of 160 accused offenders coming within the Project's four main cat-

137. *See* note 123 *supra*.

138. S. 798 § 5 conditions diversion upon a knowing and intelligent waiver of the right to speedy trial and any applicable statute of limitations.

139. See the text at page 496 *infra* for the methods used for placing clients in community programs within 90 days.

egories (Table 2).[140] After a year's experience with the Project and its practices, the rate of diversion had appreciably accelerated. Some fifty cases were referred by prosecutors over the final four-month operational period and diverted at an average rate of four persons per week.[141]

Interviews Revealing Prosecutor Attitudes:

The Project's behavioral scientist[142] interviewed sixteen prosecutors in the office of the principal public prosecutor between seven and ten months after the inception of the Project operations. The results showed that prosecutors generally found the Project valuable in

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140.

TABLE 2

Charges against Persons Referred for Mental Health Diversion

Intra-Family Offenses	
simple assault	13
CDW	3
threats	3
child abuse	2
sexual assault	1
disorderly	2
ADW	2
Total	27
Minor Sexual Offenses	
indecent assault	1
indecent exposure	39
indecent act	11
peeping tom	4
indecent proposal	2
indecent gesture	1
disorderly sex	3
attempted burglary	1
soliciting for lewd purposes	5
soliciting prostitution	1
sodomy	4
attempted sodomy	6
Total	78
Non-Violent Property Offenses	
petit larceny	10
shoplifting	1
receiving stolen property	3
unlawful entry	2
arson	2
attempted burglary	2
false pretenses	2
destruction of property	2
attempted destruction of property	1
Total	25
Simple Drug Cases	
possession of marihuana	8
Uniform Narcotics Act violation	14
Possession of implements of crime—UNA	12
p.i.c.—dangerous drug	1
Total	35
Miscellaneous	
carrying deadly weapon (non-family)	2
assault deadly weapon (non-family)	1
Total	3

141. Those referrals involved a fairly wide variety of misdemeanor offenses, but still primarily came from the four categories of cases, as follows: four intra-family assaults, nineteen minor sexual offenses, seven non-violent property offenses, nineteen simple drug cases, and three miscellaneous offenses.

142. For the Project's staff composition, *see* note 12 *supra*.

reducing the caseload of their office, in providing them with an alternative to prosecution or dismissal, and as affording a new form of "supervision" of charged but released criminal defendants.[143] Three prosecutors said the Project was important to economically impoverished accuseds who were not able to get into mental health treatment otherwise, and others stressed its importance for sex and family offense cases. Most prosecutors expressed the view that the Project should not be limited to first offenders, nor even to misdemeanants;[144] a number said the Project would appropriately be involved with persons charged with *incest, consensual sodomy, unauthorized use of vehicles, assault with a deadly weapon within families, child abuse, drug possession* (but not drug sale) and *certain types of larceny*. Opinion was expressed that the Project not take cases involving narcotic drug sales, violence against persons (except intra-family), and other "dangerous" defendants. The prosecutors also felt that a pre-trial diversion unit should be *independent* of the prosecuting (and defense) agency, and should *itself* select cases for diversion, provided that prosecutor consents were obtained. A number expressed a belief that the Project needed some "hold," such as a threat of prosecution, on potential diversion clients to get them into treatment; one suggested that because "these people are disturbed" they cannot otherwise be expected to choose treatment.

Most of the interviewed prosecutors, in one way or another, expressed the view that "jail" was ineffectual, or worse, as a deterrent to recidivism, and a number indicated their judgment that the District's main mental institution was no better than the District's jail. There was general acknowledgement that the traditional prosecutorial-correctional system was a "revolving door" for many offenders, and that other methods should be tried. All but two said they saw no conflict between the operation of this type of diversion project and a "law-and-order" philosophy.[145]

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143. Note that this concerns immediate and short-term supervision of a person who is released immediately following arrest, to be distinguished from the long-term supervision familiar to probation services.

144. One prosecutor stated: "We've been sending you felonies all along, since the actual offense was a felony." Another noted: "Most cases in the Court of General Sessions are really felonies which have been routinely broken down to misdemeanor charges," but he also pointed out that police sometimes "overbook" felonies in order to avoid legal restrictions on arresting persons without warrants.

145. *See* note 82 *supra* for a different opinion; *see also* PACKER, *supra* note 82.

Feasibility for Judges

Prosecutors have the discretion to drop charges and "no-paper" cases without judicial approval. Once charges have been "papered," it is the practice for the prosecutor formally to move their dismissal before a judge, who, in the absence of exceptional reasons, orders the dismissal, which is recorded by the clerk of court. Notwithstanding the limited and *pro forma* involvement of judges in the Project's operations, it was considered essential to bring the goals and operational policies to the attention of the chief judges of the District's criminal and appellate courts, as well as of interested individual judges, in advance of project operations. While criminal court judges were not asked to refer cases to the Project, some judges did; one insisted on convicting, but not sentencing, accused persons—prior to diverting them. For the most part, the role of judges was limited to granting requested trial continuances needed for the diversions to take place and to ordering the dismissals requested by prosecutors in papered, diverted cases. That it was possible to conduct a program of diversion almost "invisible" to the judges is a reflection of the "low-visibility" of the discretion normally lodged with prosecutors by law and legal practice.[146]

Feasibility For Police

Prosecutors expressed concern over the impact diversion might have upon the police whom they depend upon to bring in their cases. Although some concern was expressed by prosecutors that the police might be displeased with the dropping of charges in cases which, presumably, otherwise would be prosecuted "with the full force of the law," no serious question of this type seems to have arisen. Moreover, conversations between Project staff and chiefs of the morals squad of the District's police department disclosed an interest in the

146. The "re-active" role of judges in the program we designed and executed was a function, in part, of the fact that the Project did not seek to divert convicted offenders, nor putative offenders involved in plea-bargaining with the prosecutors. There is little doubt that diversion can be administered as a dispositional alternative in such situations and sentencing processes, and that judges in such situations might play "pro-active" roles. *Query* whether, to the extent such "diversion" would lead to institutionalization (imprisonment and/or hospitalization) of accused offenders, it should be defined as diversion from the criminal process. *See infra*, text at note 192. S. 798, while it grants to judicial officers an essential role in diversion to community programs, does not appear to contemplate diversion to institutions nor diversion as an outcome of guilty plea bargains or trial convictions.

potential use of mental health diversion procedures, at the police level, with respect to some types of offenders, including prostitutes. This was a category of offender, however, which the Project had decided probably would not be appropriate for mental health diversion.

Feasibility For Community Mental Health Agencies and Workers

Court-seasoned psychiatrists and other mental health workers in the District of Columbia initially exhibited reluctance to get involved with the treatment of Project cases, because their prior experience with "court cases" had taught them that long periods in courtrooms and adversary proceedings, wasteful and demeaning from their standpoint, would be entailed. Project workers were required to describe to community mental health workers in detail and at length the ways in which "diversion" cases would differ from "competency" (competency to stand trial) and "productivity" (insanity defense) proceedings, and why it was quite unlikely that they ever would be called to testify in court about *diversion* cases. In time, workers, reassured on this and related concerns about confidentiality and voluntarism, actively participated in the Project's operations. Additional concerns of community mental health center staff which Project staff sought to resolve were: the non-referral of clients residing in areas outside a center's particular "catchment" area; the therapeutic motivation of clients with pending charges; and the degree of autonomy retained by the centers to accept or reject cases referred by the project.

The Project was able, with increasing effectiveness and rapidity, to place clients presenting mental or emotional problems in a variety of private and public mental health treatment programs in the District of Columbia, and—when referred subjects lived or worked there—also in nearby Maryland and Virginia. The therapeutic settings included group therapy, individual therapy, vocational rehabilitation, and family and individual counseling.[147]

147. The types and identities of psychiatric and non-psychiatric service agencies in the greater Washington area at which the Project was able to place defendants included:

Georgetown University Department of Psychiatry
D.C. Institute of Mental Hygiene
Washington School of Psychiatry
Group Therapy Center of Washington
Bethesda Community Mental Health Center
Spring Road Mental Health Center

A number of the Project's criminal cases involved transient persons who were in the city for short periods of time. At Project request, these subjects, usually students or salesmen, were granted permission by involved prosecutors to return to their permanent residences to live, provided they promised to continue their involvement with the Project, and to return for their disposition hearings and/or trials. Such situations required that the Project arrange for treatment placement in community agencies at the client's place of permanent residence; this usually involved locating a suitable facility, contact by phone or letter, maintaining contact, and arranging for the client to return for the disposition hearing and/or trial.

Non-Psychiatric Services and Community Agencies

Throughout intake and placement, the Project was able to help clients resolve non-psychiatric problems, and meet non-psychiatric social needs. Many subjects and their families, in addition to their criminal case problems, were faced with such problems as finding a job, emergency money, food, housing, marital strife, etc. While these problems might contribute to mental or emotional disturbances, their attempted resolution required the Project staff to secure a working knowledge of available social service agencies.

The Project referred some of its clients, for jobs and job-training, to *Crossroads*, the other diversion project operating in the District. It also accepted from *Crossroads* several accuseds who otherwise would not have been able to secure mental health evaluation or treatment.

Narcotic Addiction Rehabilitation Center
Washington "Free Clinic"
"P Street" Adolescent Clinic
Area B Community Mental Health Center
Area C Community Mental Health Center
Area D Community Mental Health Center
Rockville Community Mental Health Center
Arlington Mental Health Center
Northern Virginia Mental Health Center
Georgetown University Community Studies Program
National Capital Housing Association
National Capital Day Care Association
Gospel Mission
Buffalo Bill's Restaurant (three of the Project's clients were placed in jobs here)
Project WIN
Goodwill Industries
Training Corporation of America

counseling and therapeutic relationships, if and as necessary, to fill gaps in the community's treatment system.

"In-House" Project Programs

It proved desirable and feasible for the Project staff members to engage in supportive counseling relationships with, and to organize and conduct therapy groups for, a number of the Project's clients, partly because of an unreadiness or inability of existing community resources to accept and actively work with these clients, and partly because of Project staff motivation in working with these clients. The Project concluded that a diversion unit will be more effective in placing a maximum number of divertible accused persons into treatment programs within the short time limits which crowded court calendars and pending criminal court proceedings tend to impose, if the unit's staff has the capacity not only to place its clientele in the broadest range of community service programs, but also to provide supportive

Procedures for Mental Health Diversion

Establishing Offense Categories for Diversion

The methods used to determine "target" types of accuseds to divert involved analytical, clinical, administrative, and political considerations and negotiations. An early Project memorandum directed to this question, prepared by the Project's medical director (a psychiatrist), suggested five potentially divertible categories of misdemeanor offenses "based upon traditional mental health interest, research, and treatment and rehabilitation experience," and graded according to clinical estimates of divertibility.[148] This analysis was, in part, derived

148. The memorandum suggested the following potential categories:
(1) The offending behavior *is itself a major symptom* of mental disorder: (e.g. indecent act—homosexuality and exhibitionism in males, pedophilia, incest; seduction—especially of minors by adults; prostitution—in many instances).
(2) The offending behavior *is suggestive of interpersonal family turmoil* and/or *intrapersonal distress* (mood disorder, thinking disorder, brain disease): (e.g. adultery; cruelty to children—within a family especially; petit larceny—especially in certain age and social groups; kleptomania and addiction; non-support; assault or threatened assault in menacing manner —occurring between family members).
(3) The offending behavior *is somewhat suggestive* of interpersonal family turmoil and/or intrapersonal distress (mood disorder, thinking disorder, brain disease): (e.g. assault; bad checks; embezzlement (under $100.00);

from and related to the battery of misdemeanor offense categories contained in the D. C. Criminal Code, and certain compilations of felony and misdemeanor offenses obtained from the office of the principal prosecutor.[149] Further Project consideration of the question resulted in the initial judgment to "divert" two types of cases coming within the two categories having highest predictable divertibility potential, and meeting the following criteria:

1. Indecent act charge, or other charge indicating male exhibitionism
   a. under 50 years of age
   b. any number of previous convictions for the same offense
   c. may have had previous psychiatric study and therapy
   d. exclude male prostitutes and homosexuals
2. Assault or threatened assault in a menacing manner, within the first degree of kinship
   a. no age limit; however, adults only
   b. no previous conviction of assault

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false pretenses; possession of obscene pictures—especially in certain age groups; soliciting for lewd or immoral purposes; threats to do bodily harm; unlawful entry—especially in certain age groups).

(4) The offending behavior by itself *is not suggestive* of mental disorder: (affray; carrying dangerous weapon; disorderly house; fornication; fraudulent advertising; gambling pools and bookmaking).

(5) Offenses where the behavior involved is *unclear:* (e.g. accessory before the fact as principal; concealment by conditional vendee; destroying movable property; destroying private property—arson; unlawful use of property (UUV).

149. Of particular interest was a listing of "Lesser Included Offenses for Standard Crimes in the District of Columbia" since some of the cases referred for diversion in the course of the Project were found to involve felony charges "broken-down" to misdemeanors, for example "assault with a dangerous weapon," a felony carrying a maximum term of imprisonment of ten years, could be broken-down to a misdemeanor charge of "simple assault" (maximum one year) or "carrying a dangerous weapon" (maximum one year) or "threats" (maximum six months). Similarly, the felony "carnal knowledge," threatening a maximum penalty of thirty years, could be broken-down to a misdemeanor charge of "indecent act," or "attempted carnal knowledge" carrying maximum penalties of one year. The felony of "forgery" (one to ten years) could be broken-down to the misdemeanor "false pretenses" (one year); the felony of "burglary" (five to 30 years) could be broken-down to the misdemeanors of "attempted burglary (one year); or "destroying private property" (six months) or "petit larceny" (one year); the felony of "rape" (30 years) could be broken-down to the misdemeanor offense of "attempted rape" (one year) or "indecent act" (three months) or "simple assault" (one year); and so on.

c. male or female defendants, including
spouse against spouse, (excluding separated or divorced couples)
parent against child or stepchild,
child against parent or stepparent,
sibling against sibling.

These became in fact the initial categories of persons to be referred to the Project for diversion by the prosecutor offices.

An early meeting with a representative of the principal prosecutor's office produced the following agreed-upon list of offense categories as potentially divertible from both the Project's and the prosecutor's points of view; with the exceptions of "soliciting for prostitution," "chronic gamblers," "unauthorized users of vehicles," and "purse-snatchers," all came to be categories from which the Project's clients were drawn, in the *phased* order shown:

Phases I ("Pilot"), II, III
marital offenses (husband-wife assaults)
child abuse

Phases II, III
indecent exposure
voyeurism (peeping tom)
indecent act or proposal
soliciting for prostitution or lewd and immoral purposes

Phases II, III
simple marihuana cases
dangerous drugs (other than heroin), e.g., "LSD"

Phases II, III
attempted arson (first offense)
"chronic" petty offenses, e.g., shoplifting
bad-check passing
unauthorized use of vehicles ("joy-riders")
purse-snatching

Criteria of Inclusion; Exclusion; Re-inclusion

The decision to divert initially one offense category at a time, over a period of several months' time, was reached in consultation with the principal prosecutor's office: the basic consideration here was the

hypothesis shared with the court's prosecutorial system that this procedure would afford needed elements of control and perspective over the diversion. Recidivism research considerations, particularly those going to the need to establish "comparative" groups of charged offenders, processed normally through the system, also were influential. And, the utilization of "categories" rather than a "drop-by" method of referral, was expressly mentioned by the public defender agency as a referral method considered less vulnerable to "adversary" use and misuse of *the fact* of referral.

The decision to divert cases involving misdemeanor charges but not felonies, unless broken-down to misdemeanors, reached in consultation with the principal prosecutor's office, was based on an eventually shared purpose to determine whether persons accused of minor offenses could successfully be diverted, before seeking to divert persons charged with offenses of a more serious nature.[150] Initially, the "pilot" group of referrals for diversion was restricted to "first offenders," i.e. persons with no record of prior conviction of assaultive crime. In fact, however, second offenders were referred by at least one prosecutor, and after the pilot phase of the Project, no express limitation on prior offenses was maintained. Two-thirds of the accused offenders referred, diverted, and followed-up for recidivism had prior arrest or conviction records.

Persons charged with prostitution offenses were excluded as a divertible category, despite Project and prosecutor interest in seeking to divert them,[151] because the Project concluded that the financial rewards of prostitution and the "pimp system" made successful placement in treatment programs highly unlikely. Persons charged with gambling offenses, favored by the Project, were excluded as divertible subjects in part because of the principal prosecutor's belief that the types of lawyers engaged by such persons would not cooperate with the Project. Automobile "joy-riders" (unauthorized use of a vehicle) were excluded by the prosecutor's office because these mainly involved young persons who already were the special target clientele of *Crossroads*. Simple marihuana and other drug-use cases initially were ex-

150. S. 798 places no eligibility limit on divertible defendants according to the gravity of the charges against them, their "dangerousness," their past criminal record, and so forth. *See* note 115 *supra*.

151. The Metropolitan Police Department also expressed interest in experiments with the "mental health" diversion of arrested prostitutes, as an alternative to the "revolving door" of arrests and fines or jail.

cluded as a divertible category by the prosecutor because a newly appointed chief initially considered it "a very serious offense;" such cases eventually came to be referred and diverted. Alcoholics were initially excluded because of Project doubts concerning their amenability to treatment; this opinion later was revised, in part because alcoholics were not always effectively screened out, and several persons charged with offenses related to alcoholism were accepted and diverted. Persons charged with a variety of minor sexual offenses initially were not accepted by one prosecutor's office as a divertible category, but subsequently came to be included—following the Project's success in diverting this type of case from the other prosecutor's office. Certain kinds of non-violent property offenses, as well as intra-family assault cases, were included because of a shared interest in diverting cases where experience suggested that normal prosecutorial methods were frequently unavailing in preventing recidivism, and where mental illness was thought possibly to be causally involved.

Administration of the Criteria

Locating Divertible Cases:

The methods used for locating accused subjects varied during the course of the Project. Initially the "pilot" group of intra-family assault cases came from individual assistants who were assisted in the process by Project research staff assigned as court liaisons to the prosecutor's office. The procedure for locating potential divertees utilized by the prosecutor's office was developed in consultation with Project staff; it was described in a prosecutor's office memorandum dated February 17, 1969 entitled *NIMH Project for Pre-Trial Diversion of Accused Offenders*, which was distributed to all assistants.

Subsequently, locating cases became a principal function of the Project's court liaison who was present at the prosecutor's office each morning from 9:00 to 12:00. He was based at the main front desk where he could examine the arrest and lock-up lists, make calls to and receive calls from the Project's own offices, confer with assistants concerning cases he or they believed suitable for diversion, and have screening interviews with potential divertees. Eventually, as described below, it no longer proved necessary for the Project liaison to be based in the prosecutor's office, and most cases were located by direct telephone contacts initiated by individual assistants and by defense lawyers.

The process by which cases were located for referral was informal but not unstructured. After the eligibility categories had been established, standards for selection were set down on a criteria card prepared by the Project and distributed to the prosecutors.[152] This card also described the steps to be taken leading to the informal screening hearing at the courthouse, where the initial agreement to divert would occur.

The Project also developed a checklist of procedures used by the Project liaison at the prosecutor's office.[153]

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152. The terms of the criteria card distributed in the office of the principal prosecutor were as follows:

1. Cases may be either citizen's complaint or arrest cases. All parties (including complainant) must agree to the accused's participation in the Project.
2. Current categories of cases being accepted: misdemeanors involving (a) husband-wife assaults, parent-child assaults and child abuse, (b) sexual deviancy, whatever the charge, (c) non-violent property offenses including shoplifting, bad-check writing and false pretenses.
3. Select cases in the above categories where the possibility of arrest and prosecution would be high, absent referrals to the Project.
4. Clients should not be narcotic addicts (hard drugs).
5. Clients should meet Bail Agency requirements for bail, bond, or recognizance if already under arrest.
6. Defense attorneys must request 90-day continuances in cases where there has already been an arrest.
7. Set up an informal hearing with a Project representative, an Assistant U. S. Attorney, the accused and the complainant. If no Project representative is present in order to set up the hearing, call the Project.

153.

1. Check Marshall's list (lock-up list) in the U. S. Attorney's Office to see if any cases appear to fit into a Project criteria.
2. Interview in lock-up and if case meets Project criteria for diversion (a) give accused a Project card, and (b) go up to U. S. Attorney's Office and check if papered.
3. If papered and paper is still in the U.S. Attorney's Office, get an assistant to write on paper "OK for Project" and sign the card stating no objection to 90-day continuance. Either append the card to the paper or take the card (and perhaps the paper) up to assignment court. If paper in assignment court—go up and get it and bring it down to the U. S. Attorney's Office and repeat procedures. If case has not been papered yet get B. H. (U.S. Atty. liaison) or any assistant to paper it and clear it for Project.
4. Get name of defense attorney, if assigned in the criminal justice office, and notify him about the Project or pick up his name in assignment court.
5. Defense attorney should request continuance at arraignment if it has been possible to contact him before and clear Project with him

Locating cases in the principal prosecutor's office occurred in three "phases." The first or "pilot" phase involved locating cases concerning intra-family assaults. The second phase occurred when the Project also located cases involving non-violent property offenses, such as petit larceny, false pretenses, and unlawful entry; minor sex offenses, such as indecent act and sodomy; and, eventually, simple drug-use and possession cases. In the third phase the Project accepted located cases on an "open" basis, i.e., cases involving charges of all the above types of offenses, and others selected for referral by individual prosecutors and defense lawyers, on an *ad hoc* basis.

Cases coming from the municipal prosecutor's office were initially limited to those involving charges of indecent exposure. Subsequently, any case involving an alleged sexual offense coming under the jurisdiction of this office could be referred to the Project, including indecent act, attempted sodomy, solicitation for lewd purposes, and sex vagrancy.[154]

Screening of Subjects in "Lock-up" and "On-bail"; Obtaining Consents:

Once the criteria for selection were established, locating accused subjects, screening them for referral, and obtaining necessary consents from them, from the prosecutor's office, and from defense lawyers, were the main foci of the referral stage of the diversion process. In general the methods used were the same whether the accused was

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and his client. Or if the continuance cannot be arranged, then the assistant will allow a regular trial date to be set and we will attempt to get the defense attorney to agree to participation in the Project and he can then get the continuance, i.e., before original trial date comes up.

154. The criteria card provided:

1. Category of cases being accepted: misdemeanors involving any offense of sexual deviancy, for example, Peeping Tom, Indecent Exposure, Indecent Act or Proposal, and Disorderly Sex where arrest grew out of deviant behavior.
2. No age limitation.
3. All parties must agree to the accused's participation in Project.
4. Clients should not be narcotic addicts (hard drugs).
5. Clients should meet Bail Agency requirements for bail, bond, or recognizance if already under arrest.
6. Defense attorneys must request 90-day continuances in cases where there has already been an arrest.
7. Set hearings for any afternoon between 1 p.m. and 3 p.m. and notify Mr. S. B. or N. G., of the Project's staff.

in the courthouse "lock-up," or on bail. The respective roles and tasks performed by Project staff and court officers changed somewhat as experience was gained in the course of the Project's operations.

By Project Court Liaison: During Phases I and II, the Project's court liaison (a law student or social work counselor) had responsibility for screening located suitable subjects for referral, and for securing oral consents from the defense attorney involved, the assistant involved or the prosecutor's office liaison. Consents of the accuseds themselves, to Project participation, were subsequently obtained in writing. During Phase I, and initially during Phase II, this screening process involved interviewing clients at the courthouse and arranging for and being present at informal screening hearings, usually in the assistant's cubicle, in each case. In addition, the Project liaison had to inform the prosecutor's office liaison and the assistants as well as the defense attorneys, on a day-to-day basis, about the Project's criteria for referral, its objectives in screening a client for referral, and the tasks which the Project was prepared to undertake for its clients.[155]

By Defense Attorneys' Action: Throughout the term of the Project, defense attorneys brought cases they had located to the attention of the Project for screening. In such situations, the defense attorney himself sought prosecutor clearance through the assistants or the prosecutor's office liaison.[156]

By Prosecutors' Action: The assistant prosecutors during Phase I, located divertible cases, brought them to the attention of the Project for screening, and participated in the informal screening hearings. They also were the officials from whom the Project liaison had to obtain consents for diversion referral. In Phase II they continued to "flag" cases and sit in on the informal hearings, but were no longer authorized to consent to diversion referral; this had become the prosecutor's office liaison's job. In Phase III they referred cases to the Project for screening either directly by telephone or indirectly by

155. He was responsible too for walking the client to the Project offices for the first appointment during Phase I and for setting up the first Project appointment during Phases II and III.

156. He also sought clearance from the Court, at arraignment of his client, when requesting a 90-day continuance, for diversion purposes. He would be present at the informal screening hearing which occurred in the assistant prosecutor's cubicle, when diversion was discussed and proposed.

suggesting referral to the defense attorney and/or the prosecutor's office liaison.[157]

By Prosecutor's Office Liaison Action: During Phase I there was no liaison to the Project designated as such by the prosecutor's office, though there was a "quasi-liaison," an assistant assigned as a person with whom Project staff could deal if problems arose. He did not function to consent to cases for diversion or to hold the informal screening hearings. During Phase II, prosecutor's office liaisons were appointed and functioned to flag cases for referral and to consent to cases brought up by the Project's liaison, by assistants, or by defense attorneys for diversion, as well as to participate in the informal pre-dismissal "disposition" hearings, described below. During Phase III of the Project, most diversion referrals were by telephone and informal screening hearings were not held. The Project's liaison no longer functioned at the prosecutor's office and went there only to solve specific problems brought to his attention. The prosecutor's office liaison in Phase III no longer functioned to flag cases, but primarily to consent to cases for diversion, hold the pre-dismissal "disposition" hearings, and deal with specific problems as they arose.

The Screening Process

In the Prosecutor's Office:

During Phases I and II of the Project, the Project's liaison, stationed at the main front desk of the prosecutor's office where all cases got papered, checked the marshall's list of people who already were arraigned and who usually were being held at the lock-up in the courthouse, awaiting bond hearings, and the lock-up list of those who had been arrested within the past 48 hours, but who still awaited arraignment, for suitable cases for referral.

In addition to locating clients charged with Project-suitable crimes, the liaison would attempt at this step to "screen-out" defendants according to Project-stipulated and prosecutor-agreed criteria, especially persons arrested on a drug related offense, as well as those arrested on other charges, but who were on hard drugs.

The liaison also examined the arresting officer's case-jacket which had been prepared for court, including the officer's fact-sheet on the

157. At all times, they consented to the defense lawyers' requests for continuances of trials, for purposes of the accuseds' participation in the diversion Project.

accused and the attached prior arrest record. The Project's liaison would question the police officer for "excludable" characteristics; e.g., whether the person was "on drugs" although without a record of drug use, whether he or she had exceptionally weak community ties, or a lack of funds, which might legally preclude making personal or financial bond. The liaison would thereafter proceed to the lock-up to screen the accused, unless the accused already had been released (by making stationhouse bond or other means) before the Project had become involved.

In the Lock-up:

The lock-up consisted of a large enclosure which might contain 30 to 40 people. Screening a client meant gaining admission into the lock-up and there attempting to interview the accused to determine if he was likely to cooperate once released. Because the conditions of this initial screening interview were perceived by Project staff as dehumanizing (for the interviewer and the accused), the Project attempted to have its location moved into the prosecutor's office; the procedural complexity of such a release made this impossible.

Bail agency staff in the lock-up were able to inform the Project's liaison whether particular prospective clients were likely to make bail. If not, this factor normally precluded the accused from being considered further in the screening process. If bail seemed assured, the liaison would talk to the accused, explain the Project and invite his consent. The liaison also would make a fairly detailed check on the accused's background (marital situation, employment, community ties, education, prior arrests on similar charges) which could be checked against the record in the prosecutor's office, or at the bail agency, to help appraise the accused's credibility. The next step was to locate the defense attorney, explain the Project to him and learn whether he was willing to have the client referred for diversion to the Project.

Acquiring Defense and Prosecutor Consents:

Generally persons in the lock-up would have their counsel appointed at the time of arraignment, although some had private counsel. The Project's liaison frequently had to locate defense counsel later the same morning, during arraignment in assignment court, or he would go to the Criminal Justice Act office to get counsel's name, and phone him for the Project office.

Once defense counsel was located and had signified that diversion would be acceptable, the liaison would locate the prosecutor who had papered the case for his approval of diversion. Often the prosecutor would be consulted prior to the defense attorney, to get his prospective consent, especially if defense counsel was not easily located or was not yet appointed or otherwise retained. The prosecutor's office liaison or, in Phase I, the prosecutor who papered the case, would write "referral approved" on the case-jacket, in this way notifying the prosecutor in assignment court to cooperate in securing a continuance. The defense attorney, finally, would move the judge for a 90-day continuance, which request avoided speedy trial issues.

"Informal Screening Hearing"—Accuseds' "Suitability":

During Phase I and most of Phase II, the Project's liaison set up an informal screening hearing, in the prosecutor's office, for each potential diversion. Attending were: the accused, the complainant and/or an arresting police officer, the defense attorney, the prosecuting attorney or the prosecutor's office liaison, and the Project's liaison. The Project's liaison would explain the Project and make certain the accused understood what his responsibilities to the Project were and what the Project's responsibilities were to him. The Project's liaison would also make the final determination as to suitability for diversion. If the accused were found "suitable" (i.e. potentially divertible) the Project liaison walked with the client to the Project offices to begin evaluation, or he arranged a first appointment.

The informal screening hearing, like the other screening procedures at the courthouse, did not comprise an adequate vehicle for determining suitability for diversion, although it was sufficient for screening purposes. Experience showed that only the in-depth evaluative interviews at Project offices (see *Evaluation and Placement*), provided a complete basis for realistic suitability determinations.

Prosecutor's Office "Turn-Over" Problem:

During approximately two and one-half years of operations, five different *liaisons* (including the "quasi-liaisons" of Phase I) were appointed by the prosecutor's office. As one liaison became familiar with the Project and his role, he would be transferred from that office. Similar "turn-over" rates applied to the other assistants working with the Project, with similar retrogressive, if unavoidable, effects. Preceding Phase III, however, the prosecutor's office appointed a new

liaison with a promise that he would function in that capacity for some time. When this promise was fulfilled, and the turnover in assistants also decreased markedly during this period, the added stability and regularity helped make the Project's courthouse operations more rapid and effective, and gave the Project's courthouse work greater recognition. By the time of Phase III, courthouse screening methods had been greatly simplified. The Project's reputation with the prosecutor's office was established, and all assistants were educated as to what the Project did and could do. The Project was more visible to the assistants (and to defense attorneys), whether or not a Project liaison was maintained in the prosecutor's office.

Elimination of the Informal Screening Hearing:

One result of these developments was that by Phase III, the informal screening hearings were no longer held at the prosecutor's office. Questions involving divertibility for the most part were handled by telephone. Although the accused, during this phase, received his first introduction to the Project "second-hand," no increase in unmotivated or mismotivated subjects was noticed, following elimination of the informal hearing. Thus, during Phase III, the locating-screening stage of the diversion process shifted from Project staff to prosecutor's office staff: most referrals for diversion were direct telephone referrals from the prosecutor's office liaison, individual assistants, and individual defense attorneys. The Project's liaison no longer assumed major responsibility for locating and screening cases for the Project. The prosecutor's office liaison was similarly affected. Although he continued to refer cases to the Project, flagging cases became a secondary role. His most important functions had become consenting to diversion of cases located by assistants for referral to the Project, keeping track of all cases referred, and holding informal "disposition" hearings for *all* cases. The Project's screening role was now carried out by telephone and by its evaluation process at its own offices.

Project Reception of Subjects—Intake Screening

Prosecutor and Defense Lawyer Telephone Referrals:

During Phase I, following the informal screening hearing in the prosecutor's office, the Project liaison normally walked with the accused to the Project's offices which were, originally, only several blocks away. The process during the beginning of Phase II was sim-

ilar in that accuseds screened for referral were usually escorted to the Project offices by a Project social work counselor. In Phase III, most courthouse-originating referrals came by telephone and were handled by a social work counselor-receptionist.

Negotiations with the prosecutors' offices, coupled with efforts aimed at "educating" defense attorneys as to how the Project could serve particular types of defendants, resulted in an increasing number of telephone referrals by defense attorneys. Such referrals were handled differently than those coming directly from the prosecutors and the court. A receptionist-social work counselor would often explain the operations of the Project to the defense attorney, and also outline the steps which the attorney needed to take in order to obtain the consent to diversion of the prosecutor and the necessary 90-day continuance, thus effectively beginning the diversion process. The suitability for diversion of a defense-referred subject was then initially screened by the social work counselor during this telephone conversation. Determinations of probable divertibility in this situation depended almost entirely upon description of the nature and surrounding circumstances of the charge. If the client's behavior indicated possible emotional or mental problems, the social work counselor would schedule an appointment for the defendant; she would also contact the Project's court liaison to facilitate obtaining the needed prosecutorial consent.

Subject Consent to Diversion and Release of Information:

When the diversion client arrived at the Project for his first appointment, the social work counselor would explain the function of the Project and make it clear to the client that he was being seen only for an evaluation, during which the client's participation could be terminated at any point by him or, if there was a lack of cooperation, by the Project. He was told that a final decision on acceptance for diversion would depend on the outcome of a subsequent clinical conference, where the evaluation findings were presented and considered. The diversion client's response was observed by the social work counselor as indicative of the client's desire to cooperate and the level of motivation present to deal with his problem, if any.

Three administrative forms were completed during the intake interview: (1) an 11-page background information form ("Form I") con-

taining a number of key questions indicative of the client's family situation, marital problems, monetary problems, psychiatric history, etc.; (2) a "release of information" form, which enabled the Project to contact and request information from hospitals or other social service institutions with which the client might have had past contact; and (3) a "consent" form by which the client who agreed to participate in the Project consented to a submission of reports concerning his Project involvement to the prosecuting and defense attorneys. The above aspects of the intake procedure were performed by a social-work counselor or a professional social worker during Phase I and the beginning of Phase II. Later, the completion of the administrative forms became the sole responsibility of a social work counselor.

The Project's intake procedure also included a social work interview. Handled by a professional social worker during the early phases of Project operations, but not thereafter, the social work interview was designed to inform the Project about the client's childhood and adolescent experiences, sexual development, job history, etc. The in-interview usually was completed within one and one-half hours, after which an appointment would be arranged for the client with the Project psychiatrist.[158] The psychiatric interview might be completed in one session but more often required subsequent interviews, which also were arranged by a social work counselor.

During Phase III operations, the functions of the professional social worker were eliminated and the role of the Project psychiatrists became mainly that of consultation. The new clinical design responsible for these changes encompassed an expanded version of the original social work interview, which required the social work counselor to conduct two or three one-hour or one and one-half hour sessions with the client. These sessions were designed to reveal whether the client had specific problems with which the Project could assist him. The social work counselor would compose a report of the three interviews for presentation at the clinical conference, described below. Whenever difficulties in identifying an emotional or mental problem

158. The making of such scheduled appointments by Project clients might entail some difficulty, if the client had home or job or transportation problems to solve. Did the client have transportation to the office? If not, a counselor would pick the client up at his home or job. Was the client able to get time off from his job? If not, the counselor, depending upon whether the employer knew, or could know, of the charge, would contact the client's supervisor at work to see if arrangements could be made for the client to complete his intake interviews.

were encountered, the social work counselor would arrange for psychiatric interviews. Thus, with the expansion of the social work counselor's role, the intake process merged with that of evaluation.

Project Acceptance and Evaluation of Subjects

Acceptance For Diversion:

Cases were "accepted" into the Project at two times. A tentative screening acceptance occurred at the prosecutor's office (or in some cases over the telephone) when the Project agreed to consider a case for evaluation. The second acceptance occurred at the Project's clinical conference when it was decided whether the Project would work with the case, i.e., complete the evaluation and seek to place the person charged in a treatment program. Difficult cases might require additional clinical conferences.

Evaluation For Mental Health Diversion—Changes in the Process:

During the 24 months of clinical evaluation operations of the Project, several changes took place. Originally a traditional clinical model of intake and evaluation was utilized with a fixed hierarchy: paraprofessional, social worker, psychiatrist, team conference. This entailed a somewhat rigid, time-consuming sequence of evaluation procedures. As the Project matured, the clinical model changed, incorporating ideas from the field of community psychiatry, especially the abolition of the hierarchy and the encouragement of autonomy and augmented responsibility at the social work counselor staff level. These changes affected many aspects of the Project's work, including speed of intake, evaluation and placement, staff composition and dispositions. In view of the bearing of clinical evaluation methods upon the question of cost, time, and man-power feasibility, this section depicts the Project's clinical operations, in some detail, over the three Phases of the study.[159]

159. The Project's clinical procedures have been separated, for analytic purposes, into three phases previously alluded to. The first phase, involving the so-called "pilot group," entailed clinical evaluations and treatment placement recommendations for eighteen subjects. All were persons accused of intra-family assault, including three cases of child-abuse. The second phase involved clinical work with fifty clients in four broad but specifically-defined offense categories, namely, intra-family assault cases, non-violent property offenses, drug use or possession cases, and minor sexual offenses. These defendants were seen during a 12-month period. The third and final phase, which occupied the last eight months of Project clinical

Phase I: The pilot groups of subjects were evaluated through what, in retrospect, appeared to be overly structured procedures. Subjects were led through an orderly and organized sequence of clinical meetings and interviews, with emphasis on the filling-out of forms. The first contact with the clinical operation of the Project involved an interview by the subject with a social work counselor for the purpose of completing a detailed personal history and background form (Form 1). This task might take as long as two hours. Following this, the Project's professional social worker saw the client for one and one-half or two hours, and frequently conducted a second interview of similar duration. Finally, the psychiatrist saw the client for one or two visits of one to two hours each. If psychological testing was warranted, arrangements were made with a clinical psychologist affiliated with the Project to do so. The client's spouse or "significant family members" were also seen by either the social worker or psychiatrist, and sometimes by both. All clinical material gathered during these multiple interviews was written up and presented at a staff conference. The intake process, as described, sometimes took three weeks before conference could take place. The conference was attended by all persons who evaluated the client and at least one other staff psychiatrist or the medical director, who was a psychiatrist. Frequently other staff members, and occasionally the legal director, were present. At this large conference, a team effort was made to formulate the psychodynamics and ego defenses of the case. The psychiatrists present would make a clinical diagnosis and prognosis, and then decide whether treatment would be recommended. If treatment was proposed, a plan was formulated by the psychiatrists and given to the counselor for implementation. A formal report to the defense and prosecuting attorneys was drafted by the examining psychiatrist and "edited" and cleared by the Project legal director.

Phase II: The early months of this phase were devoted to an attempt to simplify the clinical operations and procedures devised during the first phase. It was found practicable to function without the professional social worker. Other staff changes occured during this period including a decrease of psychiatrists' time on the Project and a corresponding increase in the counselors' time. Coincident with these

work, involved some ninety-four clients and an open-intake system without Project-stipulated limitation by offense categories, but involving diversion mainly within the same categories.

developments, and perhaps related to them, was the temporary falling-off of cases referred to the Project by the prosecutors. This phenomenon was related to political issues, in particular to a change in political Administration and in the identity of the principal chief prosecutor. Project staff morale was affected adversely by this development and by another unanticipated problem: a need to move the Project offices from their original location, near the court house. The clinical conference schedule broke down both in format and frequency. Staff members, who thought they understood their roles, were faced with change and the need for new role definitions. Phase II came to be perceived by Project staff as transitional, and occupied with growing pains that affected all members. Two positive gains involved the paraprofessional counselors: they became more confident in their clinical tasks and they learned how to use the treatment resources available in the community.

Phase III: During this period the clinical staff became more cohesive and effective in its teamwork, with a comfortable adaptation to an increasing case load. Some administrative reorganizations occurred after the move of the Project offices to its new location, beyond walking distance, but within a short public transportation ride, from the courthouse. A better organized and more effective conference became the backbone of clinical working procedures. The counselors attended a series of teaching sessions on interview techniques. Weekly conferences were held with all counselors in attendance where all active cases were discussed as to current status and anticipated future changes. The clinical staff conference developed into a freewheeling discussion of cases, with the main focus not on formal diagnosis, but rather on the problems a particular client presented to an evaluator, and on projected difficulties in placement and follow-up.

By the beginning of Phase III the psychiatrist had stopped routinely seeing all subjects himself and the evaluation became the responsibility of the counselors. The overall supervision of Project operations by the legal director also required less time, as a law and psychology trained "administrative director" took over most staff supervisory and coordinating tasks. The staff psychiatrist functioned less as *the* expert and more as a resource person at the clinical staff conference, at which the counselor presented the case with a formulated treatment plan. As counselors grew more confident of their ability to evaluate cases, they also prepared clear and precise reports. Only rarely would

the counselor need to reinterview the subject because of an incomplete evaluation. The counselor came to anticipate difficulties in the evaluation and to present them at the staff conference, prior to his completed evaluation, for guidance as to how to conduct future interviews. The counselors often initiated steps to implement the treatment plans they presented. Whereas placement had once been slow and difficult, it now was a smooth and efficient process with accused subjects rapidly being placed in settings they felt comfortable in, and which were also acceptable to the prosecutors. In addition to their other responsibilities, the counselors themselves prepared the formal written reports to be sent to concerned prosecuting and defense lawyers, to which the psychiatrist usually added a final paragraph summing up the clinical evaluation of the client. These reports were now reviewed by the Project legal director only periodically.

The development of clinical operations within the Project through three discrete sequences was paralleled by a development of the skills and clinical responsibilities of the social work counselors. In general, placement of Project clients was more successful in Phase III than in earlier phases.

Successful placement for Project and, thereby, court purposes meant referral of a subject to a treatment agency that agreed to accept him, and the establishment of an ongoing relationship between the accused and the agency or the Project, beyond initial contact. Project counselors employing a traditional psychiatric clinic model, comparable to a child guidance clinic, initially related to their clients without emotional investment. They felt expected to behave scientifically and objectively toward clientele. This produced a degree of role strain and inappropriateness which occasionally resulted in psychological abandonments of bewildered and anxious clients. When the counselors had learned to establish early alliances with their clients, emotional investments were sustained and expanded not only through the periods of evaluation but often far beyond placements and the beginnings of therapy. Emotional commitment on the part of the counselor resulted in a better definition of their clients' needs, and more appropriate, acceptable, and accepting treatment plans.

As others have observed,[160] the speedy and encouraging engagement of a person's first motivation for treatment will yield the best treat-

160. *See*, for example, the testimony of prosecutor Robert F. Leonard, in *1973 Hearings*, *supra* note 16 at 406.

ment results and the smoothest entry into treatment. The Project's counselors and psychiatric staff re-learned this familiar lesson after some early frustrations and failures. During the peak period of case load, the time element was crucial, and counselors went quickly "to bat" for clients, who needed and wanted help right away. Final conferences were held with a minimum of delay, treatment plans were anticipated and occasionally implemented before conference.

Project experience suggests that the average person, formally accused of crime for the first time, is awed and confused by the complex criminal justice system, its many players, procedures and rituals. If this same person is subsequently, or even alternatively, introduced to a complex mental health system, with an equally confusing number of specialists, interviews and rituals, he is likely to feel up against a formidable structure indeed. He will feel that he has to do or say something "special" to finally insure the help he believes was promised early in his acquaintance with the diversion system. The Project made all changes possible to obviate this condition. For the most part, evaluative screening for treatment was ultimately conducted by the counselor himself, without the client being subjected to a battery of diagnostic interviews or test situations. The worried, beleagured client found in his consistent and supportive counselor a guide to the mental health system, an advocate of his case, and a broker for treatment, when it was indicated.

The progressively greater contributions to the evaluation-placement process—the central element in diversion—made by Project-experienced paraprofessionals is suggested by the following sequence: during Phase I operations (lasting four months), two psychiatrists, one social worker and two social work counselors were involved in evaluating and placing eighteen accuseds-clients; during Phase II operations (lasting twelve months), two psychiatrists and four social work counselors were involved in evaluating and placing fifty accuseds-clients; and during Phase III operations (lasting eight months), one psychiatrist and four social work counselors evaluated and placed ninety-four accuseds-clients.

Project Diversion to Community Mental Health Services; The Paraprofessional Staff "Counseling" Function:

The recommendation of the Project clinical staff served as the catalyst for beginning the placement stage of the diversion process.

Depending upon the results of the clinical evaluation, placement of a client in an appropriate therapeutic setting might involve: group therapy, individual psychotherapy, vocational rehabilitation, or family or individual counseling. Such placements were not always with established mental health service agencies and were not exclusively for treatment of a classified mental illness; for example, in one case a client was recommended to engage in a counseling relationship with a priest who had known him since early childhood. In a number of others, counseling relationships were established with Project social work counselor staff, pending, but sometimes in lieu of, placement in a mental health therapy program.

Increasingly throughout the three phases of the Project, placement was the responsibility of social work counselors, although the project's psychiatrists participated too. The mechanics of effectively placing a client involved: (1) informing the client of the clinical conference recommendation and helping him face the realities of the problems which had brought him to his present situation;[161] (2) contacting the placement facility to arrange the client's entrance—in some instances the client was requested to contact the placement facility, as part of the therapeutic plan; (3) responding to placement facilities requests for summaries of Project evaluations, before they accepted clients; (4) finding supportive social services and substitute treatment programs when the suggested placement facilities reported themselves unable to accept clients; (5) insuring that clients kept their appointments at treatment facilities, which sometimes required that counselors accompany clients there; (6) maintaining regular "follow-up" contacts with placement facilities to insure that Project clients were attending and to learn if the therapist felt that therapy could be supported in any manner; (7) recording the above in the client's project folder, and writing reports for the prosecutor and defense lawyer, outlining the course of the client's involvement in the treatment program.

During Phase III, counseling relationships were set up between the social work counselors and some eighteen accused-subjects, pending placements of the clients in psychiatric treatment programs. This

161. This is related to, and may be considered the Project's alternative to, the admission of guilt which, for example, was urged by the U. S. Department of Justice to be made a condition precedent to diversion. S. 798, in its preamble, suggests diverted persons should be accuseds who "accept responsibility for their behavior and admit their need for (rehabilitative) assistance."

type of interim "placement" required the Project social work counselor to see the client in weekly sessions of one hour or more, during which the counselor established rapport with the client and offered him guidance with his problems. When special difficulties were encountered the social work counselor consulted with the Project psychiatrist.

Originally, placement was seen as a complex process of relating to treatment agencies by: (a) knowing the places, the people, the systems, and their particular assets and liabilities; (b) building rapport with them, based upon mutual respect; (c) working as a "broker" or "match-maker" between our clients and treatment agencies, with diversion cases being accepted, in part, as a function of the known availability of treatment resources in the community. Prior to the referral of the first group of cases, Project psychiatrists had responsibility for developing relations with the District's "area" community mental health centers, and the Project's professional social worker had similar responsibility with respect to the District's employment assistance agencies pending collaboration with *Crossroads*. Meetings were held by this staff with the heads of pertinent programs, at which the purposes and planned procedures of the diversion unit were explained, and expressions of cooperation were solicited. Meetings of this type were also held with the administrative head of the District's mental health directorate and key officials concerned with the provision of mental health services to the courts, including the director of Legal Psychiatric Services. Gradually, Project contacts with the mental health and rehabilitation agencies devolved upon the social work counselors, who, supported by the Project's professional psychiatric and legal staff, established and maintained a wide range of referral, placement, and follow-up contacts with individual treatment workers in the agencies involved.

In part because of the inability of existing treatment resources to accept placement of the Project's clients within the time limits necessary to the accomplishment by the Project of its special aims, but in part also because of the Project staff's interest in gaining such experience and providing such services, Project social work counselors undertook, as mentioned above, to enter into supportive relationships with a number of Project clients; and the Project's psychiatrist-medical director undertook to organize and conduct therapy groups

for a number of the Project's accused sex offender cases at the Georgetown University Medical Center.

The results of the placement process, according to the several categories of diverted offenders, are described *supra* at note 119.

Project "Slim" Reports to Prosecutors and Defense Attorneys—Project "Oversighting" of Accuseds

The method, contents, and timing of reports developed by the Project concerning accuseds being diverted were important in several respects. First, they provided the court—more specifically, the prosecutor's office—as the social agency "responsible" for the accused's situation, and the defense lawyer, with the information that another agency, the Project, a community related agency, was involved in an "overseeing" relationship[162] with the accused. They also communicated basic data about the accused's mental, emotional, and social problems, and what was being done about them, and some prognosis by the Project and/or by other social agencies. At no time and in no way, however, did the Project reports convey information concerning the accused's legal "guilt," assumption of moral "responsibility," or feelings of "remorse" or "repentence."[163] And they avoided the use of traditional psychiatric nosology.

The principal prosecutor initially asked the Project to report as much detailed information as possible concerning the accused's mental or emotional problems, including diagnosis, but at no time did he request information related to the accused's guilt, complicity or remorse. Since we wished to minimize the likelihood that our reports would be used in an adversary way in proceedings "against" the accused, we limited the diagnostic information provided, and in most cases, avoided attaching mental illness labels. Prosecutor experience, familiarity, and growing confidence in the Project's policies and procedures led to an acceptance of the non-psychiatric style of the Project's "slim" reports; prosecutors found the information we provided adequate for their purposes of being informed of the ac-

162. The author suggests the term "oversight" be used instead of "supervision," for the over-seeing activity performed by diversion units with respect to clients whom they have placed or are placing in "service" programs, in the community. The term "oversight" might help distinguish diversion activity from other activities such as probation or parole "supervision."

163. *See* note 161 *supra*.

cused's situation and treatment efforts until the time of trial or dismissal.

It proved necessary for the Project to make a first report ("interim preliminary report") within ten days of the accused's referral to the Project. Its purpose was vital—to let the prosecutor (and defense attorney) know that the referred accused had, in fact, showed up at the Project's offices and was involved in the Project's diversionary process of evaluation and placement.

Next came the "preliminary report" furnishing the Project's "evaluation" of the accused's problems, and its recommendation for dealing with them. Thereafter, brief "weekly reports" in a set form were sent to advise whether the Project continued to be involved with the accused, whether the accused was generally cooperative, whether he was then involved in an on-going therapy program, and whether his address had changed. Finally, there was the "disposition report" which recapped the accused's situation and what had been done about it, and included the Project's recommendation for disposition. In time, the "weekly report" type of form was used also for both the "interim-preliminary report" and the "preliminary report," while the final or "disposition report" became the only detailed report.

Legal Disposition of Subject's Criminal Charges; Informal Prosecutor Disposition Hearings; Project Recommendations

The Project's legal involvement with clients culminated with a *disposition hearing*, initially held in the office of the chief assistant prosecutor, but subsequently and normally held in the individual prosecutor's cubicle. It was the adopted procedure that the decision to no-paper or *nolle prosse* the diverted case would officially be presented, or confirmed, to the accused at this hearing.

During Phase I, which included the eighteen "pilot" cases of intra-family assault, disposition hearings tended to be sporadic, without structured procedure. Doubts as to whether disposition hearings would be held during this phase arose mainly as a function of two types of cases being diverted at this time: one involving formal charges, and the other involving citizens' complaints in which hearings were not held. In the charged cases from this early group, hearings were usually held a few days before trial. Present were the chief assistant prosecutor, an assistant, the accused, the complainant-wife,

the defense attorney, and three Project representatives, including research staff.

By Phase II, the procedures had become sufficiently defined so that a disposition hearing was held in the office of the prosecutor involved for each person who had been charged with an offense and referred to the Project for diversion. The Project regularly undertook to remind the prosecutor and defense attorney that the client had a trial date scheduled for the following week, and that a disposition hearing should be held before that time. Once a hearing had been set for a certain date and time, the Project also took steps to assure that the defendant would be present. Normally, the disposition hearing was scheduled before but on the same date as the trial.

During most of the diversion operations, both the prosecutors' offices assigned prosecutor liaisons to handle the Project's diversion cases, including the disposition hearings. Occasionally, the prosecutor liaison would not be available because of other duties and the Project's liaison would locate a substitute prosecutor. If the hearing was scheduled for one of the early days of the week, the atmosphere was confused and chaotic, with police officers in and out and around the cubicles and crowding the corridors, looking for prosecutors to paper their cases.

At the hearing, based upon the Project's follow-up and disposition reports, the prosecutor would decide either to dismiss the charges or to go ahead with trial. The Project liaison saw the prosecutor alone and answered any questions concerning the reports sent by the Project to his office. He would also be asked whether the Project felt that the client would recidivate. Any special factors concerning the diversion or the accused's situation would also be presented to the prosecutor in advance.[164]

In all cases in which Project clients had continued to work with their problems, Project reports would be favorable—even if a success-

164. For example, one subject had been arrested for an offense which was linked to a drinking problem. She had been placed in therapy to help solve the drinking problem and had displayed progress. Nevertheless, on what was considered to have been one of the more stressful days of her life, i.e., the day of the disposition hearing, she reverted to alcohol to help get through the hearing. The Project liaison informed the prosecutor that the client had been drinking earlier but reaffirmed the final report's assessment that the client had made progress with her alcoholic problem. The prosecutor accepted this interpretation of the situation, with the result that the hearing proceeded satisfactorily, and the case was *nolle prossed*.

ful placement in a treatment facility could not be made, or was not indicated. A favorable "disposition" or "final" report normally sufficed for the prosecutor to dismiss the charge. The accused would be informed by the prosecutor that, based on a favorable recommendation by the Project, his office was going to enter a *nolle prosequi* in the case. The subject was also informed that the charges pending against him were going to be dismissed, subject to being reopened if some extraordinary situation arose. The accused was told that the possibility of reopening the case was not to be considered a threat, but that under the law, there were circumstances where a charge could be reinstituted. Finally he was informed that if he got into trouble again, the prosecuting office would have no choice but to prosecute. The accused was requested to call either the prosecutor's office or the Project for assistance if he at any time felt he might again get involved in criminal behavior.

After the hearing had ended, the prosecutor noted on the criminal case jacket that the case was to be *nolled*. The subject accused was then told he or she should go to the courthouse and wait until his or her name was called. When this occurred, the accused would be expected to stand, at which time his or her case would be formally dismissed by the judge. Both the defense lawyer and the Project liaison usually went to the courtroom to assist the client, in case of questions.

In every case but one where the Project's report was favorable, the prosecutor dismissed the charges. In the lone case where the charges were not dropped, the reason given by the prosecutor was that the accused subject had recidivated (i.e., been re-arrested) after being referred to the Project. On that occasion, the prosecutor consolidated the charges so that all the charges, including those for which he had been referred to the Project, came up on the same day, before one judge. The Project was used here to help support a recommendation in connection with the client's sentencing.

In other Project cases where clients recidivated (were re-arrested) before the trial date, the Project's recommendations for diversion were nevertheless accepted, and the charges were dropped; the subjects were advised to use the resources of the Project whenever they felt help was necessary.

Requests for Additional Time to Divert:

Occasionally, the Project liaison informed the prosecutor that the

Project felt more time was needed to deal adequately with the accused-subject's needs. On those occasions, the Project would request the prosecutor's consent to additional 90-day continuances, which never were refused. The defense lawyer and subject would also be informed by the Project when it considered additional time to be needed for diversion; the regular disposition hearing would nevertheless be held, and the defendant required to go to court at that time to get the additional necessary continuance. During Phase II, a more convenient method was found to secure additionally needed time. Whenever the Project believed a continuance would be necessary, the defense attorney would be contacted and informed that a continuance was recommended and that he should try to obtain a *praecipe* form of request for a continuance at least 48 hours prior to the scheduled trial date. He was also told that the Project would notify the prosecutor in order to remove any difficulty in obtaining the latter's consent to the *praecipe*. The defense attorney filled out the form requesting a continuance on behalf of the accused and obtained the prosecutor's signature signifying that the government agreed to a continuance. The form was then submitted to a judge who granted the request, without necessity for the defendant's presence in court.[165]

Diversion Project Staff; Data and Forms

A fairly traditional hierarchy characterized the Project's initial staff composition, with a lawyer-teacher "legal director" and a psychiatrist-teacher "medical director" serving as operational co-directors of the Project. The legal director[166] was mainly responsible for the

165. Phase III was similar to Phase II except that the time scheduled for the hearing was changed from the morning of trial to the afternoon of the prior Friday. This was found to be a better arrangement, for two reasons. Under the prior arrangement, the rooms and corridors where the hearings were held tended to get over-crowded with police officers searching for prosecutors to paper their cases, making it difficult to hold disposition hearings without continuous outside pressures interrupting them. Friday afternoons, by comparison, were quiet; the prosecutors had sufficient peace and time to talk with the accuseds. Another advantage arose from the fact that Friday hearings gave the prosecutor's office sufficient time to notify the witnesses involved that the case had been disposed of and that their presence was no longer necessary—saving the government twenty dollars a day per person.

166. The author of this article was the Project's Legal Director, it's program director, and the author of the Project's Final Report to N.I.M.H., January 1, 1972.

study's design, as proposed to the granting agency, for the overall supervision of its implementation, and for reporting the progressive and final results to the granting agency. He also had the special task of securing necessary cooperation from the prosecuting and defense agencies involved; he and the medical director were directly responsible for "negotiating" the categories of cases to be diverted with the prosecuting agencies. The medical director was responsible for obtaining the cooperation of mental health workers and agencies, and for supervising the evaluation methods of the Project. Midway through the Project's operations, the full-time position of administrative director was created and filled by a psychology-trained law graduate who had, until then, been involved mainly with assisting the co-directors and conducting legal research.

A behavioral scientist was in charge of the "process" research, the research concerning problems encountered in establishing a mental health pre-trial diversion unit. A research (and clinical) psychologist, later aided by a consultant research design social scientist, was responsible for the design and implementation of the recidivism research. A professional social worker functioned during the early stages of the Project in various areas, including the interviewing of clients and the establishment of relations with vocational rehabilitation agencies. Three consulting psychiatrists, interested in innovative methods of working with mentally ill accused offenders, were at various times affiliated with the Project's staff, mainly to assist in evaluation and placement of clients.

From four to six social work counselors (or assistants) formed the backbone of the Project's clinical team and did a variety of tasks, including screening-evaluation, placement and counseling of clients; perhaps their most complicated job was Project liaison at the courthouse. The principal social work assistants included (at various times) two law school students, a college student receptionist-secretary, an inner-city paraprofessional, and an ex-inmate paraprofessional with prior experience with the District's offender rehabilitation project. He and a law student developed and carried out, at different times, the court liaison tasks. The Project's court liaison had to exercise discretion and sensitivity in seeking appropriate referrals to the Project from the prosecutors' offices. This involved establishing working relationships with the prosecuting attorneys. He was responsible for getting the assistant involved in each case to agree to his client's being

referred to the Project. If the case presented unusual problems, the Project's legal director or administrative director was called on to assist the parties involved in clarifying legal issues, duties and responsibilities, and, where appropriate, to assist in seeking to have the case referred to the Project. The Project liaison was responsible for seeing that the accused showed up at the Project offices to begin his interviews. He occasionally administered a general intake interview (Form 1) and social work interviews. He arranged for the psychiatric interviews, secured the accused's signature on various consent agreements, and began working with his case as soon as the psychiatric and social work staff had established a treatment program for the accused. In some cases he or the social work counselor, having obtained a signed consent form from the accused, had to obtain the client's previous records from mental health facilities or other institutions with which the accused had been involved. He made follow-up contacts with the client at least once a week and recorded these. This might involve telephone contact, office appointments and field visits. He presented his cases at the weekly follow-up meetings which were found necessary to avoid "losing" track of cases diverted or in process of diversion, and related what was going on with the client, what had been accomplished, what needed to be done. He wrote weekly follow-up reports and, if necessary, interim preliminary reports after conferences with psychiatrists and other staff members. The prosecuting and defense attorneys received these reports to keep them advised of the clients progress and present status.[167]

167. A number of forms were developed by the Project to collect, retain and utilize information regarding each accused-subject. *See* the text *supra* at note 158. Included were:

A "Basic Data Form," in the shape of a large index card, upon which the receptionist recorded a few basic facts concerning each referral, elicited and received normally by telephone, including the accused's name, address and telephone number, the identity of the prosecuting and (if any) defense attorney, the D. C. Code Section charged with having been violated, and the trial date, if set.

A short (two paragraphs) "Consent Agreement" in which the accused signified that he understood the Project's features and purposes, volunteered to participate in it, knew reports concerning his involvement in it would be communicated to the prosecutor and his own lawyer, and understood that he would be free at any time to terminate his relationship with the Project but that the prosecutor and his lawyer would be notified of such termination.

Another short "Complainant Consent Agreement" form used mainly in intra-family assault cases, in which the complainant signified his understanding of the Project and agreed to withdraw his or her complaint upon the accused's satisfactory involvement with the Project.

Research Methods

Recidivism Research

Introduction:

Basic to the Project and to the continuing demands of criminal justice system experimentation in reform is the hypothesis that the diversion of accused offenders will not result in more *crime* in the community than could be expected using conventional prosecutorial and correctional methods. In order to test this hypothesis, the Project made a study of the "recidivism"[168] of one hundred of our divertees as compared to a similar group of other accused defendants who had not had the opportunity to participate in the Project. Since future experimental as well as service programs of "diversion" are expected to be required to establish data on recidivism, the procedures employed by our Project are described in detail.

Development of Recidivism Research Design:

Several general approaches were initially considered for conducting the recidivism study. Of these, two appeared theoretically applicable. One was to compare the rate of recidivism of Project clients to the general recidivism rate for misdemeanants in the District of Colum-

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A one-sentence "Consent Agreement" by which the accused authorized the Project to receive, from cooperating public and private agencies, information and reports concerning him or her, in their possession.

"Form 1," an 11-page social-psychological background information form, which included basic data concerning the accused's family situation, education, marital problems, monetary situation, psychiatric history, and so on, which was used by the staff for clinical evaluation and placement.

"Form 2," a one-page clinical evaluation and placement form on which there were recorded the evaluator's judgments concerning the *optimum* mental health program and any other rehabilitative programs recommended for the accused, as well as the feasible recommendations for these types of programs—given the known available facilities.

A "Clinical Evaluation Summary" form, which recorded the staff or consulting psychiatrist's judgments concerning the accused's ego strength, prognosis, and diagnosis, and the recommended treatment plan.

A "Follow-up" form, on which were recorded the dates and places and means of contacts made by the social work counselors with the accused or the treatment or rehabilitation agency concerning the accused and his involvment in the program.

168. For purposes of this study, "recidivism" was equated with re-arrest and not conviction. The design and execution of the recidivism and cost analysis research was the special responsibility of Dr. Steve Karp, of the George Washington University Department of Sociology.

bia. This approach was found not feasible on practical grounds, as no such data was found to be available in usable form. The second general approach, which was adopted, involved the use of a *control* or *comparison* group of offenders. Such a group would be "followed-up" to assess recidivism in the same manner as diversion clients, but would not obtain any of the other services provided for clients of this Project. This approach offered the possibility of comparing two groups equivalent except for their participation in pre-trial mental health diversion. Any differences which might be found in recidivism between the two groups could then be attributed to diversion.

The optimal method for carrying out such a control group study, from a research point of view, was to identify a pool of potential diversion clients and then assign each, at random, to either the diversion or control group. Such random assignment could be expected to maximize the likelihood that diversion and control groups were similar with regard to all possible characteristics which might affect recidivism except, of course, participation in the diversion Project, the characteristic under study. A proposal to use this optimal approach met firm opposition, on legal and ethical grounds, from the principal prosecutor's office, and was abandoned.

Another possibility—found acceptable to Project staff as well as to both prosecutor's offices—was to select a separate comparison group from whatever court records were available and to match these cases to the Project's clients in as many ways as possible to attempt to insure comparability of the groups on characteristics of possible relevance to recidivism. Although this approach was less desirable than the randomized control study which had been earlier proposed, it was considered the most feasible approach. We designated this approach as a "comparison" rather than "control" group study.

Further consideration and negotiation of the best means of obtaining comparison-group cases produced an agreed-upon procedure whereby, after completing referral of all subjects in the specific categories agreed to for pre-trial diversion, the principal prosecutor's office would continue to refer names of otherwise "eligible" subjects. The Project would not divert or even contact such individuals personally, but rather use their records for comparison group purposes. This approach initially resulted in so few referrals of comparison cases that it also was abandoned in favor of procedures, described below, which utilized court and prosecutor records.

Definition of the Pre-Trial Diversion Follow-Up Sample:

Through its history, the Project received 164 subjects for diversion. However, not all of these clients were followed-up to determine whether they had "recidivated" following participation in the Project.[169] The noted research-oriented decisions reduced to 104 the number of clients who were followed up to assess recidivism. Of these, 58 were accused of minor sex offenses, 23 of property offenses, 19 of minor drug offenses and four fell into a class of miscellaneous offenses. Although the last four were followed up (none recidivated), it was felt that it would be particularly difficult to obtain an appropriate group of comparison cases to match with these "miscellaneous offense" clients, who tended to have been accused of crimes against persons and to have been brought up on weapons or assault charges.

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169. A major subgroup of clients entered the Project during its final stages, in the fall of 1970. In order to complete the Project by June, 1971, it was necessary to complete the follow-up studies on recidivism by February, 1971, so that time would be available for collection and analysis of data and development of an account of the results. Thus, for these latter clients, it would have been possible to follow them for no more than three to six months after they entered the Project. It was felt this would not be a sufficient period of time in which to arrive at any meaningful data on recidivism. A minimum of six months from the time of entering the Project was set for follow-up, and there accordingly were dropped from the recidivism aspect of the Project, those clients (more than forty) who had not been in the Project long enough to permit at least six months' follow-up.

A second group of subjects eliminated from the recidivism aspect of the research were those persons charged with intra-family assault, including child abuse. For the most part, these were the Project's earliest clients, seen at the outset of the Project. This decision, made prior to the Project's gaining any information about their recidivism status, was based upon several considerations. It was very difficult to define the group legally. Many of these clients were never formally charged or arrested, but were sent through the Citizen's Complaint Section of the U. S. Attorney's Office. This had the effect of distinguishing these clients from all of the others, who had been formally charged with crimes. Similarly, assessment of recidivism of this group was complex and difficult because of the citizen's complaint aspect. Would the Project, for example, consider a client, initially brought to its attention via a citizen's complaint, as a recidivist, if a new complaint were lodged against him, or would it be required, as with all other clients, that he be arrested and formally charged with a crime? This problem was compounded by the fact that many of the citizen's complaints were initiated by the spouse of the client. It was readily conceived that recidivism of such a client might hinge more on how well he was getting along with his wife at a particular time than on whether he had committed some new crime following participation in our Project. In view of these considerations, it was felt that inclusion of the Project's intra-family assault and child abuse cases in the follow-up study of recidivism would serve to obscure, rather than clarify, an understanding of the effects of pre-trial diversion.

In this way, the Project ended up with 100 of its 164 diversion clients as the subjects for its study on recidivism.

Depending upon when they entered the Project, clients were followed for a period of from seven to 21 months from the date of initial contact with us. Table 3 below[170] provides the distribution of periods of follow-up. It will be seen that on the average, clients were followed for 12.2 months.

Procedures for Selection of a Comparison Group:

The principal sources of comparison group subjects came from records of individuals arrested prior to the start of the present Project, principally during 1968-69.

In order to minimize the possibility that biased comparison group selection, rather than effects of pre-trial diversion, would be the principal factor in determining relative rates of recidivism, comparison cases were selected to match, as closely as possible, clients with regard to several criteria:

Nature of the offense. Of particular importance here was consideration of both the formal charge and the description of events which brought on the charge, so that comparison cases might not include—to a greater extent than clients—individuals charged with more serious offenses who had had their charges reduced (e.g., a client charged

170.

TABLE 3
Follow-Up Periods for Checking Recidivism

Number of Months	*Number of Clients*
7	1
8	12
9	16
10	23
11	4
12	12
13	3
14	1
15	4
16	5
17	2
18	5
19	5
20	1
21	6
Mean Number of Months	12.23

only with receiving stolen property should not be matched with a comparison case originally arrested for burglary who had had that charge subsequently reduced to receiving stolen property).

Sex
Race
Age
Prior arrest record

Place of residence (District of Columbia or elsewhere). Matching in this category was particularly important because the follow-up procedures checked for recidivism only in District of Columbia courts; thus, were the comparison group to have more D. C. residents than the client group, there could be greater likelihood that members of this group would commit future offenses in D. C. and would show up as recidivists in D. C. court records.

Other proposed categories of matching, such as education, history of prior psychiatric treatment, employment status, marital status and household income could not be used due to the frequent lack of such information in the records of comparison cases. Table 4, below,[171]

171.

TABLE 4
Characteristics of Diversion and Comparison Groups

	Diversion Group	*Comparison Group*
Number	100	100
Male	82	89
Female	18	11
White	47	44 (46%)*
Black and other	53	51 (54%)
Unknown		5
Age range	18-73	18-73
Mean age	28	29
Prior arrest record	60 (61%)	47 (61%)
No prior arrest record	39 (39%)	30 (39%)
Unknown	1	23
D. C. resident	70	67 (71%)
Non-resident	30	27 (29%)
Unknown		6
Sex Offenses	58	58
Property offenses	23	23
Drug offenses	19	19
Range—months of follow-up	7-21	7-21
Mean months of follow-up	12.23	12.23

* Where, on some items, status of all subjects was not known, percentage figures were computed on the assumption that the unknowns would split in the same proportion as known subjects.

provides data for clients and comparison cases on the various categories used for matching.

As specific procedures for selection of comparison cases varied according to the nature of the offense, these will be described separately.

Comparison Cases, Minor Sex Offenders: The comparison group of minor sex offenders was collected from the files of the Corporation Counsel's Office. The files were searched for all sex offenders charged during the calendar year 1968, the year preceding initiation of our Project. This type of comparison group selection was simplified because of the procedure followed by the Corporation Counsel's Office of maintaining a separate file of sex offenders. Table 5 below[172] provides matching data on client and comparison cases charged with sex offenses.

Comparison Cases, Non-Violent Property Offenders: For this group the Project research staff used the computerized index prepared by

172.

TABLE 5
Minor Sex Offenses

	Diversion Group	*Comparison Group*
Number	58	58
Female	2	3
Male	56	55
White	23 (40%)*	26 (49%)
Black	35 (60%)	27 (51%)
Unknown	0	5
Age range	18-73	20-73
Mean age	33	34
Prior arrest record	37 (65%)	26 (74%)
No prior arrest record	20 (35%)	9 (26%)
Unknown	11	23
D. C. resident	44 (76%)	38 (73%)
Non-resident	14 (24%)	14 (27%)
Unknown	0	6
Type of offense		
Indecent exposure	29	30
Indecent act	10	10
Peeping tom	4	6
Disorderly sex	5	9
Soliciting, lewd purposes	1	0
Soliciting, prostitution	2	0
Sodomy and attempted sodomy	5	3
Other	2	0

* See footnote to Table 2, above.

the Criminal Clerk's Office of the Court of General Sessions. The cases are compiled monthly (with an annual index) and include all offenders handled by the court. This also includes cases in which the defendant was "no-papered" by one of the prosecutor's offices, thereby never having been formally before the court. The cases are listed alphabetically by the defendant's last name. In addition to the defendant's name and charge, the index lists the case number, the file date (when the case was papered or no-papered), judgment date (for cases which were disposed of by a judge), disposition date, bond amount, and disposition.

To obtain the comparison group, the diversion group was surveyed to determine its basic personal data characteristics. This included offense, prior criminal record, race distribution, and residence. Then the index was entered at every 50 pages and the first two names of persons charged with one of the non-violent property offenses were drawn. For example, the diversion group had 11 petit larceny cases. Research staff entered the index at every 60 pages and drew the first two names charged with petit larceny. If there was an alias mentioned, a third name was drawn. This resulted in 44 names. These were then looked up in the files of the D. C. Bail Agency. From these files personal data characteristics were obtained for all cases. Using that information, the final selection took place and 11 cases were drawn that best matched the characteristics of those in the diversion group charged with petit larceny.

In the case of the receiving stolen property category, the index was entered at every 25 pages, resulting in 87 cases from which three were drawn. This procedure continued until the 23 cases for the comparison group were secured.

Table 6, below,[173] provides matching data on client and comparison cases charged with property offenses.

Comparison Cases, Simple Drug Offenders: The procedure was essentially the same as described above for minor property offenses. One difference was that there was no attempt to break the group down by more specific legal charges. All comparison group members were charged with violation of the Uniform Narcotics Act. The index was entered every ten pages, resulting in 113 persons and 19 were selected from these; a personal data characteristic that was important in matching this comparison group to the diversion group was level of education. Since many of the diversion group were college students, it was necessary to ensure that this was also true of the comparison

group. Table 7,[174] below, provides matching data on minor drug offenders in client and comparison group.

173.

TABLE 6
Non-Violent Property Offenses

	Diversion Group	*Comparison Group*
Number	23	23
Male	15	18
Female	8	5
White	6	2
Black	17	21
Age range	18-47	18-46
Age mean	25	28
Prior arrest record	17	19
No prior arrest record	6	4
Prior psychiatric treatment	8	9
No prior psychiatric treatment	13	12
Resident of D. C.	18	19
Non-resident	5	4
Type of offense		
Petit larceny	11	11
Unlawful entry	2	2
Receiving stolen property	3	3
Arson	1	1
Burglary	3	3
Destruction of property	2	2
Robbery	1	1

174.

TABLE 7
Minor Drug Offenses

	Diversion Group	*Comparison Group*
Number	19	19
Male	11	16
Female	8	3
White	18	16
Black	1	3
Age range	18-23	18-29
Mean age	20	21
Education		
8th grade or less	0	0
9th-12th grade	8	8
Some college or more	12	10
Unknown	0	1
Prior arrest record	6	2
No prior arrest record	13	17
Resident of D. C.	8	10
Non-resident	11	9
Type of offense		
Possession of marihuana	2	1
Violation of Uniform Narcotics Act	16	18
PIC-dangerous drugs	1	0

It should be noted from Tables 3-7 that comparison and clients were matched very closely on all of the variables used. This does not, of course, guarantee that the groups did not differ in other ways which could be relevant to recidivism.

Procedures for Obtaining Follow-Up Data on Recidivism:

For purposes of the present Project, recidivism was defined as being *charged* with any new crime other than a traffic offense during a specified period following the charge which brought the client to the Project or into the comparison group. As has already been noted, this follow-up period varied from seven to 21 months.

For the diversion group, the date when the client was first seen by a member of the Project staff was considered the beginning of the time period. For the comparison group, the beginning time was the date of the original charge which led to that person being selected for the comparison group. The end of the time period for the diversion group was generally January 30, 1971. For the comparison group, sex offenders, who were selected for 1968 offenses, were checked through December 31, 1969. Drug and property offenders, selected for 1969 offenses, were checked to November 30, 1970, and January 30, 1971, respectively.

We thus had follow-up data covering a longer period of time for the comparison cases than for Project clients. In order to equate follow-up periods of the two groups, so that clients would have as much opportunity—with regard to time—in which to recidivate as comparison cases, the following procedures were adopted.

Each sex offender among the comparison sample was randomly paired with one client sex offender. The comparison subject was then followed up, for purposes of the present study, for as long as had been the client with whom he was paired. Thus, for example, if comparison case *A* was paired with Client *L* and Client *L* had been followed up for only eight months, *A* would be considered in terms of possible recidivism only during his first eight months of follow-up. This procedure also was followed for property and drug offenders. Thus, the duration of follow-up was exactly equated for client and comparison groups.

There were several problems with the above procedures. First, it was possible to check for recidivism only in the District of Columbia. Since about 30% of both the comparison and diversion groups

were non-residents, this undoubtedly resulted in an underestimate of the total number of recidivists. However, as pointed out earlier, since the number of non-residents in each group was equal this should have had no effect on the relative recidivism rates of clients and comparison cases.

Another difference between comparison cases and clients was that 32% of the comparison cases had to serve an average of 45 days in jail for the offenses which brought them to our attention, whereas all diverted clients avoided this through participation in the Project. It is difficult to assess the effects of this on rates of recidivism in the two groups, in part because criminal behavior within jail is rarely reported.

Also, the time period during which they were studied was slightly different for the diversion and comparison groups. The comparison group was checked for recidivism in 1969 and 1970, whereas the diversion group was checked in 1970 and 1971. There may have been changes in arrest procedures, charging procedures, and in the accumulation of data for the computerized index between 1969 and 1971. It was assumed that these differences are slight and would not substantially affect the general results.

The total length of time over which recidivism was checked (12 months) must, however, be cited as an important limitation of the present study. For instance, Adams, et. al.,[175] found in a number of studies for the D. C. Department of Corrections that recidivism increased consistently during the second and third year of time in the community. A longer period of follow-up would have been useful in ascertaining the absolute figures for recidivism, but, in the Project's opinion, the relative figures were likely to remain the same.

Cost Analysis Research

With increasing frequency, studies evaluating new approaches to corrections and rehabilitation have addressed themselves not only to traditional methods of assessing the benefits of such approaches, as rates of recidivism, but also to the costs of the new programs relative to the costs of the procedures they are designed to replace. Adams[176] cites a number of studies using cost analysis techniques and suggests

175. Adams, et. al., *Post-Release Performance of 432 Reformatory Releases*, RESEARCH REPORT NO. 11, D. C. DEPARTMENT OF CORRECTIONS (1969).

176. *Id.*

that such techniques should be a regular part of corrections research.

For the present Project a cost analysis was designed to answer two questions: How much does it cost society to divert an accused criminal to community mental health resources? How much does it cost not to divert him, i.e., to let him proceed through the normal criminal process? By comparing the two answers, there can be calculated the net cost to, or gain by, society in providing mental health pre-trial diversion services to accused offenders.

On their face, these questions appeared relatively simple to answer. The cost of pre-trial diversion could be calculated by taking the cost of the Project and dividing it by the number of clients serviced. The cost of not being in the Project could be arrived at by computing the various costs of trying, and incarcerating or following on probation, those of the comparison cases which resulted in convictions. However, this simplicity is deceptive. With regard to pre-trial diversion costs, the costs of a demonstration research project do not represent the costs merely of providing services to clients. The Project contained a research program as well as numerous activities and costs associated with carrying out the special functions of a demonstration grant. On the other side of the ledger, the Project made use of numerous community resources to help its clients—acting as a referral or placement agency for treatment services offered in the community. As some of these community resources are operated with public monies, expenses incurred by these agencies on behalf of the Project's clients might be considered as part of the costs of pre-trial diversion.

With regard to comparison cases, i.e., to accused persons processed through the court system in the normal manner, the costs associated with trial, incarceration or probation actually represent only a small part of the surface of public expenditures. Other aspects of public cost, difficult to assess, might include the following considerations.

A considerable number of the comparison sample of accused offenders used in the present study received a jail term of some duration. Such individuals were, by being incarcerated, taken out of the class of wage earners. Some of the societal costs that would result from this include a reduction in taxes paid while in jail, the family of the prisoner going on welfare, and reduced job possibilities (and thus income and taxes) after being released from jail, due to a prison record. To further extend these possibilities, one might pose possible mental health disturbances arising for both the prisoner and his family as a

result, at least in part, of his being jailed. Ideally, a comparison of social costs, in the broadest sense, of pre-trial diversion and normally prosecuted cases would require a long-term, intensive follow-up of individuals, with the opportunity to record various instances of use of public services. This was, of course, impossible for a Project having limited duration, funds, and manpower. The cost analysis was therefore restricted to relatively few items of immediate cost which could be ascertained from Project and public records. Such limitations suggest that the results of the cost analysis should be considered only in terms of representing immediate and obvious costs.

Procedures:

Three types of cost estimates of pre-trial diversion were obtained. The first (and least pertinent) estimates the cost, per client, of providing a mental health pre-trial diversion *demonstration* project. This was obtained by dividing the total cost of the grant project by the total number of clients processed for diversion purposes. As part of the total cost of the Project, there was included an estimate of trial and related costs for those clients who dropped out of the Project and were tried on the original offenses which had brought them to the attention of the Project.

A second estimate of costs of pre-trial diversion considered only those costs of the Project involved in service to clients, eliminating costs attributable to the research aspects of the Project. In order to obtain this estimate, the total cost of salaries of Project staff members during the life of the Project was allocated either to research or to clinical (service) activities. It was calculated that 50% of total Project salaries was paid for research staff or research activities of clinical staff and administrators. On this basis, 50% of the cost of the demonstration Project was allocated to research and 50% to service. The second estimate of the per client cost of an *innovating* pre-trial diversion service, was obtained by dividing 50% of the total cost of the Project over its life by the total number of clients serviced.

A third estimate of costs of pre-trial diversion took into consideration the fact that the Project could not and did not uniformly provide services in a manner that was most efficient and least costly. For example, considerable time and expense was devoted to initial contacts with prosecuting and other court officials, to recruitment, to exploration of various types of accused offenders to work with, and of various

methods of providing the diversion services involved. It was not until relatively late in the Project that the experiences derived during the early history could be translated into smooth, efficient, and relatively inexpensive methods of providing the diversion services. In order to estimate the cost of providing mental health pre-trial diversion services in an ongoing, efficient manner, an estimate was obtained of per client cost of such service during the three months' period of highest client intake (July through September, 1970). This was obtained by taking total Project costs for the three-month period, subtracting 50% of those costs as being allocated to research activities, and dividing the resulting total expense by the number of clients processed during the three-month period.

To estimate the costs of not receiving pre-trial diversion services, a sample of the 100 comparison cases selected for assessing recidivism was used. 25 of the 100 comparison cases—minor sex offenders, non-violent property offenders, and minor drug offenders—were selected at random from the total group of comparison cases falling into each offense category. Court and bail records were searched with regard to each of the 25 companion cases in order to determine the costs incurred for these individuals due to *trying* them, *imprisoning* them, following them on *probation*, and/or *evaluating* and *treating* them for *mental-illness*. Estimates of the cost of each of these activities were based upon the estimates obtained for the Offender Rehabilitation Project of the Legal Aid Agency for the District of Columbia by the Institute of Criminal Law and Procedure of the Georgetown University Law Center, as being most appropriate to represent costs in the District of Columbia courts and correction system. Because these costs were based upon figures for 1967-1969, 5% was added to them to account for increased salaries and other costs in the two years ensuing between the Offender Rehabilitation Project and this study. Figures for cost of trial and cost of processing of prisoners from court to prison and then out of prison were based upon various estimates provided by other correction studies, since the Offender Rehabilitation Project provided no estimates for these items.

Research Findings

Recidivism Findings

The basic objective of the recidivism research was to ascertain whether accused persons who secured pre-trial diversion to the treat-

ment programs of our Project would be any more likely to commit further crimes, or to be accused of their commission, than comparable individuals processed normally through the criminal justice system. Table 8[177] contains the basic findings of the recidivism study. Twelve of 100 accused persons referred to the project for diversion were re-arrested, as compared to 15 of 100 comparison cases. Although this difference is not statistically sufficient to show that persons referred for diversion will do *better* than normally prosecuted cases, the data does support the hypothesis that pre-trial diversion to mental health treatment programs of certain kinds of charged offenders will not lead to a higher incidence of arrest-recidivism than normal prosecutorial procedures. To put this another way, mental health diversion is shown to be at least as likely as criminal prosecution (and non-prosecution) to prevent recidivism, at least among certain kinds of offenders.[178]

It should be noted that four of the 12 persons included in the diversion group recidivist count had, in fact, not been finally accepted or placed by the project, having instead been deemed inappropriate for diversion sometime during the evaluation process. It was decided not to exclude them from the diversion group for purposes of the recidivism research, because their recidivism was considered to be as relevant to the diversion process as the recidivism of comparison cases, *nolle prossed* for whatever meritorious or non-meritorious reason, would be relevant to the prosecutorial process. It should also be noted that

177.

TABLE 8
Recidivism Rate for Diversion and Comparison Groups

	Diversion Group N=100 Number of Recidivists	*Comparison Group* N=100 Number of Recidivists
Minor drug offenses	0	1
Minor property offenses	5	10
Minor sex offenses	7	4
Total	12	15

178. The above finding should be considered having in mind that although recidivism was defined in terms of subsequent arrests, many arrests do not result in convictions, but rather in dismissals and acquittals. For example, in the District of Columbia, some 48 percent of persons charged with misdemeanor offenses in the D.C. Court of General Sessioons in 1965 were acquitted or had their cases dismissed. *See* PCCDC. Fifty percent case "mortality" was the national estimate made by the PCLEAJ.

at least four of the Project's eight placed clients who recidivated were rearrested only *during* the project's evaluation and placement process, that is, before, not after, the dismissals of their cases.

In addition to the above comparison of recidivism rates among clients and comparison cases, an analysis was also made of personal characteristics among recidivists and non-recidivists among our group of clients. This was designed primarily to attempt to find clues—through differences in these groups—to social and personal characteristics which contributed to the likelihood that an individual would recidivate despite participation in the diversion project.

Table 9[179] provides comparative data from recidivist and non-recidivist diversion clients. Due to the small number of recidivist clients, formal statistical comparison of the two groups was not warranted. However, a more qualitative and speculative analysis of the trends might serve to provide some hypotheses regarding characteristics accompanying recidivism among clients.

Regarding offense category, accused property offenders tended to be the most likely group to recidivate and accused drug offenders the least likely. Accused drug offenders were also the youngest group. Re-

179.

TABLE 9
Comparison of Predictor Variables
for Non-Recidivist (88) and Recidivist (12) Diversion Clients

Predictor	*Non-Recidivists*	*Recidivists*
1. Present offense		
Minor sex	51	7
Non-violent property	18	5
Minor drug	19	0
2. Median age	24.8	32.5
3. Sex (% male)	82%	92%
4. Race (% non-white)	48%	92%
5. Church attendance (% regular church attenders)	29%	42%
6. Marital status (% never married)	53%	83%
7. Median years at present address	1.90	1.50
8. Median years of education	11.88	9.00
9. Median annual take-home pay	$4,167.00	$4,375.00
10. Employment at time of arrest (% employed)	75%	75%
11. Employment at time of entering project (% employed)	74%	67%
12. Median number of prior convictions	0.50	2.50
13. Median number of prior arrests	0.79	4.00
14. Living arrangements as a minor (% from broken homes)	35%	42%

cidivists tended to be older than non-recidivists; they were also more likely to be male and black. Recidivists tended to be more regular churchgoers (or at least tended more often to report regular church attendance) than non-recidivists. Recidivists were more likely never to have been married (despite the fact that they were older) and were less-educated by several years. Despite their lack of education, and, as mentioned below, their lower level of employment, they appeared to earn a few hundred dollars more per year than non-recidivist clients. Although the two groups did not differ with regard to the percent of each employed at the time of arrest, fewer recidivists were employed by the time they entered our project. In general, level of employment was lower for recidivists, who tended toward semi-skilled or unskilled jobs than non-recidivists who, on the average, were skilled to semi-skilled. The recidivist group had a worse criminal history, with more past arrests and convictions than non-recidivists. The former were also slightly more likely to have come from "broken-homes."

In general, the picture of the Project's recidivist clients is not far different from that of any group of individuals likely to be arrested and charged with crimes. Perhaps the only surprising results of this comparison had to do with church attendance, with the recidivists more regular churchgoers than non-recidivists, and with regard to take-home pay, with the less skilled and less educated recidivists reporting higher salaries than non-recidivists. Beyond these characteristics, it was generally the case that circumstances surrounding recidivists among our clients were more negative, from a socially adaptive point of view, than those surrounding our non-recidivist clients.

The total length of time over which recidivism was checked (12 months) is an important limitation of the present study. For instance, Adams, et. al.,[180] have found, in a number of studies for the D.C. Department of Corrections, that recidivism increased consistently during the second and third years of time in the community. A longer period of follow-up would be useful in ascertaining the absolute figures for recidivism but, in the Project's opinion, the relative figures are likely to remain the same.

180. *See* note 175 *supra*.

Costs Findings

Table 10[181] provides details of the three estimates obtained of cost of pre-trial diversion services. When one considers the total cost of the demonstration project divided by the number of clients serviced (the least pertinent to *service* costs), per client cost of $2,006 is obtained. This suggests the obvious conclusion that the cost of servicing clients in a demonstration project, with its research component and evolution of methods, is quite high. A second estimate, which removes the research component but analyses costs over the entire operational service period, shows a cost per client of $1,009. This suggests that it is quite expensive also to provide service for clients at the same time as a project solves problems and develops methods for providing such services.

The third estimate of cost of pre-trial diversion appears most pertinent to understanding what such a program would cost if one were to begin it today, having available the knowledge contained in this report, gained through the evolution of the present Project. This estimate was based upon costs of providing services to clients during a peak three-month period of service operations of the Project. Costs

181.

TABLE 10
Costs per Client of Pre-Trial Diversion

Type of Estimate		
Cost per client of running demonstration grant project	Total budget of project	$326,783
	Number of clients	164
	Cost per client	1,993
	Plus adjustment*	13
	Total cost per client	$ 2,006
Cost per client of running demonstration grant project minus research costs	Total budget of project	$326,783
	Research costs	163,391
	Net without research	163,392
	Cost per client	996
	Plus adjustment	13
	Total cost per client	$ 1,009
Cost per client of running demonstration grant project minus research costs during peak intake (July through September, 1970)	Total budget of project (July-September, 1970)	$ 35,180
	Research costs	17,590
	Net without research	17,590
	Number of clients	59
	Cost per client	298
	Plus adjustment	13
	Total cost per client	311

*Adjustment based upon added expenses of clients who drop out of project and face charges for the original offense that brought them into the project.

per client were $311. This is the Project's best estimate of what it would cost to carry out pre-trial mental health diversion on an ongoing, service-oriented basis.

Table 11[182] provides estimates of cost per comparison case for five items: trial, court-directed mental observation, incarceration, processing of prisoners to and from jail, and probation. Where fines were assessed by the court, it was assumed that they were collected, and the total of fines was subtracted from the total of expenses. The average cost per comparison case associated with the above activities was $355. Of the 25 comparison cases in the sample, ten were *nolle prossed* or no-papered, one was sent to the District's mental hospital for observation and 14 went to trial. Of the latter, eight received jail sentences and six probation.

Comparison of the per client costs of pre-trial diversion to comparison case costs suggests that although it is far cheaper to process prisoners through current trial procedures than to operate a demonstration research pre-trial diversion project, if one more appropriately considers only the service aspects of pre-trial diversion, functioning in a reasonably efficient manner, the cost per accused person drops below that of prosecuting him in the conventional manner. Thus, it was concluded that mental health pre-trial diversion services can be provided—on an ongoing basis—at $40-$50 less per accused person than it costs to process that person through usual court procedures.

It should be noted, however, that the above analysis and cost figures

182.

TABLE 11

Costs per Comparsion Case for Trial, Incarceration, Mental Examination, and Probation Procedures

Item of Expense	*No. Comparison Cases*	*Length*	*Item Cost*	*Total Cost*
Trial	14		$200	$2,800
Mental Hospital	1	3 mos.	357	1,071
Jail	8	12 1/3 mos.	223	2,743
Processing to jail*	8		75	600
Probation	6	85 mos.	21	1,785
		Subtotal		8,999
		Minus fines		130
		Total cost		8,869
		Cost per comparison case		355

*Includes transportation, record keeping, and other expenses related to process of incarcerating and releasing a prisoner.

are based upon a limited number of items of cost to society. With regard to the comparison cases, no attempt was made to estimate indirect costs such as would arise from loss of job and reduction of future earnings potential and increased family welfare needs that would likely result from incarceration of misdemeanants processed through the usual procedures. No estimate was made of costs to society of the mental health services provided to some of our clients by the public agencies involved. Although it is not possible to say exactly how these two kinds of omissions should be compared, one may speculate that mental health services of the type associated with the present project presents a better prognosis than incarceration for the future financial independence (and thus reduced dependence upon social and welfare agencies) of accused misdemeanants.

Conclusion

The findings support the original hypothesis that it is feasible to introduce an autonomous "mental health" diversion unit into the pre-trial structure of an urban criminal justice system. All necessary elements of the existing system collaborated with the unit's policies and procedures—including accused offenders, their lawyers, prosecutors, judges, and psychiatrists and other workers in private and public mental health treatment agencies. It was shown possible to identify categories of divertible accused offenders, to obtain referrals of persons within these categories, and consents from prosecuting and defense attorneys, and to evaluate and place these persons with moderate to high rates of success in mental health treatment and other social service programs within the community—on a voluntary basis, without prejudicing their rights, and with discouragement of further criminality from them at least as great as could be expected were they to be prosecuted normally. It also appears that a *service* diversion unit to carry out such work can be operated at a social cost no greater than the costs of prosecution. And there is no need in this process to require divertible accuseds to admit guilt.

Coda

Congress shortly may authorize diversion for any person charged with a federal offense.[183] Given the federal imprimatur, diversion will

183. *See 1972 Hearings* and *1973 Hearings*, *supra* note 16, and *1974 Hearings*, *infra* this note. S. 798 passed the Senate on October 3, 1973. It, H.R. 9007, and

likely be adopted widely throughout the United States by other legislative and administrative authorities concerned that "our prisons are just not working; our correctional policies are not correcting. Recidivism is far more common than rehabilitation. . . . [I]f we are to stop the cycle of crime-jail-crime, we need alternatives to institutionalization."[184] It is recognized that diversion "is no panacea."[185] Perhaps it is the impression this instrument gives of being innovative but safe, a mechanism of radical reform which nevertheless bears the seal of conservative law enforcement agency approval,[186] which accounts for its political appeal and likely entry into the nation-wide competition for new solutions to the old problem of crime. Congress has been informed that the pilot diversion projects, and their "second-generation" replications, have shown "the effectiveness of community treatment" and how "in many cases society can best be served by diverting the accused."[187] The process of transforming the experimental learning into a legislative prescription suggests, however, that plain differences will exist between the demonstration-research models and the diversion structures likely to be incorporated into the federal system of criminal justice. And, some limitations of the experiments so far undertaken, including that reported on above are being ignored.[188]

H.R. 10616, also relating to pre-trial diversion, are pending in the House. The provisions of these bills are compared in *Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 93rd Cong., 2d Sess., at 6-7, 15-18 (1974) [hereinafter cited as *1974 Hearings*.]

184. *See 1973 Hearings, supra* note 16 at 7.

185. *Id.* at 2.

186. *See* the organizations listed in the text to note 16, *supra*. In the *1974 Hearings, supra* note 183, there was additional support from spokesmen for the Bureau of Prisons, the Federal Probation Services, the Administrative Office of the U.S. Courts, the Department of Justice, the National Legal Aid and Defender Association, the American Bar Association, and the Federal Probation Officers Association.

187. *1973 Hearings, supra* note 16, at 7. The Chairman of the Section of Criminal Law of the American Bar Association stated "that a sufficient numer of experimental projects have been undertaken to warrant a major step forward. . . ." *Id.* at 376. *Compare* the Statement of Daniel J. Freed in *1974 Hearings* at 144 et. seq. The ABA National Pretrial Intervention Service Center has published a *Portfolio of Descriptive Profiles On Selected Criminal Justice Intervention Programs* (April, 1974). The unpublished *Report to N.I.M.H.* on the instant project, submitted in January, 1972 by this article's author, has been cited, e.g., by the National Advisory Commission on Criminal Justice Standards and Goals, in COURTS, *supra* note 3, at 28-36.

188. The pilot projects have not yet demonstrated, for example, how the pros-

Some alterations in the basic features of the original diversion construct and the pilot project design appear to be the result of positions pressed upon the legislators by spokesmen for some elements of the nation's criminal justice apparatus, notably the Department of Justice,[189] the Judicial Conference,[190] and the American Bar Association.[191] Potential deviations from the original design attributable to representations by these organizations include diversion structure authorization in forms which would require or permit charged offenders to be "diverted" from one federal law-enforcement agency to another, instead of to community service agencies independent of the criminal justice system; require or permit diverted persons to have their social behavior "supervised" in lieu of having their social problems "serviced" in the community; require or permit diversion staff to be controlled by a law-enforcement agency, rather than by an independent or autonomous authority, or by a non-criminal justice agency or consortium of agencies, working in the community; and require or permit public prosecutors to condition diversion on formal or informal admissions of guilt by potential divertees, and to decide which will be diverted and which will not, in their discretion.[192]

These are respects in which the political process is affecting the diversion construct while it gets incorporated into the federal system of criminal justice. The modifications are attracting opposition from quarters originally supportive of the diversion concept; the argument is being advanced that diversion should not be institutionalized within the framework proposed and under the postulated conditions without further experimental work first being conducted and sub-

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ecutor's discretion might, in the service of diversion, be subjected to legal rule. They have indicated how the power to *nol pros.* or dismiss might be divided-up among decision-makers inside and outside the criminal justice system, and how its exercise might be shared, to a degree, with the accuseds and their accusers as well. Inadequate attention has been paid in the experiments, however, to the possibility of generalizing into "standards" subjective judgmental criteria used by pilot project staff in reaching conclusions and estimates concerning defendant eligibility, suitability, motivation, treatability, performance, and so on. *See* notes 37 and 39 *supra*.

189. *See, e.g., 1972 Hearings, supra* note 16, at 139 et. seq.; *1973 Hearings, supra* note 16, at 392 et. seq.; *1974 Hearings, supra* note 183, at 26 et. seq.

190. *See, e.g.*, S. REP. No. 93-417, *supra* note 10, at 11; *1974 Hearings, supra* note 183, at 6, 91 et. seq.

191. *See, e.g., 1973 Hearings, supra* note 16, at 8 et. seq.; *1974 Hearings, supra* note 183, at 104 et. seq.

192. *See, e.g., 1973 Hearings* at 393 et. seq.; *1974 Hearings* at 28, 95; S. REP. No. 93-417, at 15-16.

jected to adequate evaluation.[193] The structure of diversion which has received the most recent attention of the Congress has never been tested or evaluated.[194] Under this proposed structure, *exclusive* diversion authority would be vested in a government agency, the Federal Probation Service: to investigate at the request of U.S. Attorneys the backgrounds of charged offenders prior to their arraignments, to propose diversion for those whom probation officers consider good risks, and to supervise the behavioral life styles of those among these whom prosecutors find fit to be recommended to federal judges for diversion. Prosecutions could be reinstituted when probation officers considered that conditions of diversion had been violated.[195] It is difficult to resist the question—if this is diversion, is the game worth the candle?[196] Especially taking into account the additional problems that would be presented by such systems of *pre-trial probation*, or *deferred prosecution*,[197] and the enlarged, rather than circumscribed, discretionary licenses which would be offered the public prosecutor.[198]

193. *See 1974 Hearings* at 78 et seq., 82 et seq., 137 et seq., and 144 et seq.

194. *See 1974 Hearings* at 2-3, which reprints H.R. 9007 which would designate the Administrative Office of the United States Courts and the Federal Probation Service as the diversion agencies, and which leans upon the results of *Project Crossroads*. The Final Report of *Project Crossroads* is reprinted at page 10 et seq., but this report was made prior to the absorption of *Project Crossroads* by the Probation Department of D. C. Superior Court. *See* note 93 *supra*. The Department of Justice would prefer that its Bureau of Prisons manage federal diversion; *see 1974 Hearings* at 28.

195. *See 1974 Hearings* at 1-40, 91-124. *See* note 76 *supra*.

196. Arguably *yes*, if avoiding criminal convictions and imprisonments for some defendants are sufficient goals; arguably *no*, if the servicing of defendants' social problems and needs and the regulation of prosecutorial discretion are essential goals. And *see* notes 197 and 198 *infra*.

197. Some of these will be dealt with in a forthcoming article; *see* the text, *supra* at note 15. *See* the criticisms presented by Daniel J. Freed and others in *1974 Hearings*, *supra* note 183, at 78, 82, 137 and 144. *See also ABA Monograph on Legal Issues and Characteristics of Pretrial Intervention Programs* (April, 1974). The National Caucus of Labor Committees (P.O. Box 1972 — GPO — New York, N.Y. 10001) in an undated factsheet entitled "The LEAA Destruction of The Judicial System" argues that pretrial diversion can be used as a "rubber stamp, one court appearance procedure to funnel ghetto youth, and later, unemployed workers, into work programs and mandatory 'behavior modification'. . . . This outlined system does away with the Bill of Rights, the Constitution, and reduces the lawyer to an onlooking clerk in a rubber stamp process."

198. In testimony during the course of the 1974 Hearings on diversion, Congressman Robert W. Kastenmeier developed evidence that, in connection with its administration of an analogous program of "deferred prosecution" of youthful offenders, the Department of Justice had instructed prosecutors under its supervision—all United States Attorneys—to exercise their discretion so as to exclude

from eligibility a politically disfavored class of charged offenders who might otherwise have been suitable for deferred prosecution and diversion. The Department's rule, or standard, or instruction, in this regard, was not visible; neither was the underlying reason; nor was the manner in which the exclusion was administered by the system of federal prosecutors. There was, however, a visible result: during the two years reported on, many youthful defendants charged with violating federal auto theft, burglary, embezzlement, forgery, larceny, postal, and regulatory laws, were offered diversion opportunities, and diverted, while many youthful defendants charged with violating the national selective service laws were not. The dialogue between the Chairman of the House Subcommittee and the senior district judge from Chicago is instructive concerning a problem of prosecutorial discretion, bearing on diversion, which neither H.R. 10616, H.R. 9007 nor S. 798 would solve:

> Mr. Kastenmeier: The question goes to this class of persons as first offenders, young people, who would on the surface seem to qualify clearly in terms of good risk for the program and yet there were so few. Was there a conscious effort to screen out selective service violators?
>
> Mr. Campbell: I would say so. We are referring here to the conduct of the U.S. Attorneys. Our probation service could only take those that the U.S. Attorney gave us. The U.S. Attorney did not give us very many selective service cases, and purely from my own observation, I do not know anything official about it, but I would say that is a correct reflection of the attitude of the Department of Justice toward those violations at the time referred to in the two years in our statistical table. I think the Department was urging the prosecution of every one of those cases on the U.S. Attorneys, and I think that is the reason they have diverted so few. . . . But the statistics to which you refer, Mr. Chairman, are only those referred to us and our probation service by the U.S. Attorneys who I think were under direction that all such cases should be prosecuted.
>
> Mr. Kastenmeier: Thank you very much.

1974 Hearings at 100-01. This type of discretionary selection by the prosecutors may constitute unconstitutional discriminatory enforcement of the laws within the meaning of such cases as Oyler v. Boyles, 368 U.S. 448 (1962) and Yick Wo v. Hopkins, 118 U.S. 356 (1886). The Justice Department's informal exclusion of accused selective service law violators from diversion eligibility also provides an illustration of the *de facto* exercise of legislative power by an executive branch agency. Conventional political-legal theory holds that power of this scope legitimately may be exercised only by the legislature or, when expressly delegated by the legislature to an independent or departmental agency, then by a rule-making process of the agency in which interested and affected parties are enabled to participate. The local *advisory committees* provided for by S. 798 would constitute more appropriate agencies than the Department of Justice or the U.S. Attorneys for adoption of policy rules of this type, relating to diversion eligibility. *Compare* the recommendation that mixed citizens-officials "Policy Appraisal and Review Boards" be established to regulate the discretion of police, by J. Goldstein, *supra* note 4, at 588-89. *See* DAVIS, ADMINISTRATIVE LAW (5th Ed., 1973) at 477-515.