10-1-1973

The Dade County Pretrial Intervention Project: Formalization of the Diversion Function and Its Impact Upon the Criminal Justice System

Thomas K. Petersen

THE DADE COUNTY PRETRIAL INTERVENTION PROJECT: FORMALIZATION OF THE DIVERSION FUNCTION AND ITS IMPACT UPON THE CRIMINAL JUSTICE SYSTEM

THOMAS K. PETERSEN*

I. INTRODUCTION: DIVERSION AND THE CRIMINAL PROCESS

The concept of pretrial intervention (or its synonym, pretrial diversion) was initially discussed as a rehabilitative strategy of potential value to the criminal justice system in 1967 by the Presidential Commission on Law Enforcement and the Administration of Justice.[1] In 1970, the President's Task Force on Prisoner Rehabilitation again suggested the implementation of diversion programs.[2] The viability of the concept was supported by the Attorney General in 1971 in a speech to the National Conference on Corrections, in which he included pretrial inter-

* Director, Dade County Pretrial Intervention Project, B.S., 1963, Columbia University; J.D., 1966, Columbia University.

1. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 134 (1967), which recommended the "[e]arly identification and diversion to other community resources of those offenders in need of treatment, for whom full criminal disposition does not appear required."

2. PRESIDENT'S TASK FORCE ON PRISON REHABILITATION, THE CRIMINAL OFFENDER—WHAT SHOULD BE DONE? 22 (1970).

vention as one of the objectives of the Nixon Administration's Justice Department program.[3]

These endorsements of the diversion principle, as well as the experience of the intervention experiments now in operation, indicate a relatively broad spectrum of support for the diversion strategy on the part of the national criminal justice system's participants and critics, irrespective of their proximity to the prosecution or defense positions on that spectrum.[4] It would seem, however, that the fact that all of the existing intervention programs, with the exception of Operation Crossroads in Washington, D.C. and New York's Manhattan Court Employment Project, have been operational for a period of less than two years, would indicate that the basis for the support must not consist, at least in its entirety, of the statistical data that the experiments have thus far generated.

It appears that to a great extent, two factors account for the acceptance of the intervention strategy to date: (1) The fact that diversion is neither novel nor esoteric, but, in fact, provides formalization of a long accepted concept, and (2) The intervention strategy is tailored to the realities of our contemporary urban criminal justice systems.

A. *Pretrial Diversion: Old Wine in a New Bottle*

Although the scarcity of literature on the subject would indicate otherwise,[5] diversion from the prosecutorial system at any one of a number of points subsequent to the alleged commission of a criminal act, has

---

3. 10 CRIM. L. REP. 2239-40 (1971). The Attorney General stated that:

> In many cases, society can best be served by diverting the accused to a voluntary community-oriented correctional program instead of bringing him to trial . . . . I am therefore directing the Executive Office of United States Attorneys and the Criminal Division of the Justice Department to study the feasibility of enlarging the area of criminal cases in which the prosecutor might be justified in deferring prosecution in favor of an immediate community-oriented correctional program.

Id. at 2240.

4. Affirmative comment regarding the Dade County Project, for example, has been expressed by the Public Defender's Office (Letter from Philip A. Hubbart, Dade County Public Defender, to Michael Samuel, Governor's Council on Criminal Justice, September 10, 1971); State Attorney Richard E. Gerstein, who initiated the Project and whose office supervises its operation (Letter from Richard E. Gerstein to Michael Samuel, Governor's Council on Criminal Justice, September 9, 1971); Director Jack Sandstrom of the Dade County Corrections and Rehabilitation Department (Letter from Jack Sandstrom to Thomas K. Petersen, November 14, 1972); Director E. Wilson Purdy of the Dade County Public Safety Department (Letter from Director Purdy to Thomas K. Petersen, December 4, 1972); and the editors of the Miami Herald (Editorial, Miami Herald, June 12, 1972). The letters are on file in the Office of the State Attorney.

5. The leading article on the subject is Brakel, *Diversion From the Criminal Process: Informal Discretion, Motivation, and Formalization*, 48 DENVER L.J. 211 (1971); much of the present section of this paper is based upon that work. *See also* Freedman, *The Professional Responsibility of the Prosecuting Attorney*, 55 GEO. L.J. 1030, 1035-36 (1967); Kaplan, *The Prosecutorial Discretion—A Comment*, 60 NW. U.L. REV. 174 (1965); Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 YALE L.J. 543 (1969).

historically played a major and important role in the criminal justice system, and has been an integral part of that system. It has been estimated that a decision not to charge an apprehended offender is made in one-third to one-half of all cases.[6]

The decision by a department store not to initiate the arrest and prosecution of an apprehended shoplifter, based upon a reluctance to become involved in a criminal case, coupled with recovery of the pilferred merchandise; and, the reluctance of police officers to make arrests in family disputes despite the fact that provable criminal acts have taken place, based upon realistic determinations that it would be improvident to burden the courts with cases that will later be abandoned by a reconciled spouse-victim, are examples of long existing diversion methods.

Another point at which diversion has traditionally occurred has been at the police station, where youthful first offenders have been the beneficiaries of police decisions to employ a warning and to rely upon parental punitive measures as alternatives to the utilization (and resultant burdening) of the criminal justice system's resources.

Still another stage for diversion has been the prosecutor's office, wherein, assuming police and victim have made the decision to arrest and charge, the final decision whether to prosecute is made. Even in those jurisdictions where prosecutors do not perceive their discretion as permitting a decision not to prosecute except where the case is not provable, major ingredients in a close question of provability are certainly the character of the defendant and severity of the alleged offense. In other prosecutorial offices, it is certainly not unusual for prosecutors to defer prosecution based upon facts such as the defendant's offer to cooperate in the solving of other cases.

A final stage in the post-arrest chain of events, at which diversion occurs, if somewhat more subtly, is at the trial itself. Most prosecutors are famaliar with the feelings of frustration inspired by an acquittal explainable solely upon a reluctance of the trier of fact to convict an appealing or sympathy-evoking defendant, despite overwhelming factual evidence of guilt.

In his thorough analysis of traditional diversion methods such as those discussed above, Samuel Brakel characterizes such practices as lacking in formality, low in observability, and devoid of such institutional elements as specialization of personnel and thorough data gathering and reporting."[7] Each of these characterizations are both accurately perceived and significant. Lack of formality will result in arbitrariness; low observability may well breed diverse decisions based on favoritism or other

6. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY, 133 (1967).

7. Brakel, DIVERSION FROM THE CRIMINAL PROCESS: INFORMAL DISCRETION, MOTIVATION, AND FORMALIZATION, 48 DENVER L.J. 211, 227 (1971).

unacceptable inducements or considerations. Absence of data gathering and reporting permit no evaluation of the efficiency of traditional diversion, particularly in terms of economics and recidivism in comparison to criminal prosecution. Finally, and most significantly, traditional diversions of the types discussed above permit neither rehabilitative effort nor supervision since, generally, they are not coupled with referral for treatment or an evaluation designed to ascertain whether there exists a need for treatment. In this sense, traditional diversion is more aptly described as reversion to whatever status or condition preceded (and perhaps inspired) the criminal act in the first place.

Despite these liabilities, however, the acceptance of traditional diversion by both the public and the participants in the criminal justice system has not been seriously questioned. Historically, there has been an apparent consensus that some offenders, either due to age, background, disability, or to a combination of these and other factors, might best be handled by means other than criminal prosecution, be it by parental authority, medical or psychiatric treatment, or merely by a decision that the criminal act is trivial and unlikely to recur; and, that the best interests of the actor and society would be served by not prosecuting.

The acceptance of diversion practices over the past decade undoubtedly has been heightened by the influx into the criminal justice system of the large number of youthful narcotic offenders.[8] In particular, the apparent softening of the public's attitude toward criminal treatment of the youthful first-offender possessor of marijuana, coupled with the persistence of a high volume of such offenders, will probably continue to provide an important area for both traditional and formalized diversion, as will possession of other "soft" drugs by young first offenders.[9] In these cases, there is a public willingness to view the offense as not requiring the full application of the resources of the criminal justice system. It is also recognized that the indiscriminate prosecution of each and every such offender would spread even more thinly the already over-

8. The national increase in narcotic arrests in general, including marijuana, is illustrated by the fact that in 1968 the increase in narcotic arrests from 1967 was 59.9%, an increase that exceeded by 30% the next largest percentage increase in a crime category. Numerically, the number of narcotic arrests in 1971 (323,337) was fourteen times the number of narcotic arrests (23,430) in 1960, while the number of total arrests increased only by approximately one half between 1960 (3.6 million) and 1971 (5.9 million). F.B.I. UNIFORM CRIME REP. (1971). In Dade County in 1971, narcotics offenders represented 18.3% of the offenders classified by the Corrections and Rehabilitation Department, numerically representing 1,352 of a total population of 7,386 offenders. REPORT OF DADE COUNTY CORRECTIONS AND REHABILITATION CLASSIFICATION SECTION, OCT. 1, 1971-SEPT. 30, 1972. In 1966, narcotics violators represented only 3% of arrests. Study conducted by VISTA Bail Reform Project covering a period from Nov. 1, 1966 to Oct. 31, 1967. This study is on file at the Office of the State Attorney. Thus, in 1971, more than seven times as many narcotic offenders were arrested as in 1966.

9. For example, 25% of offenders accepted for participation in the Dade County Intervention Project during its initial year of operation were charged with marijuana possession. FIRST ANN. REP.: DADE COUNTY PRETRIAL INTERVENTION PROJECT (1973).

taxed resources of the system. These factors have always been basic to all diversion decisions of whatever type.

Pretrial intervention programs, then, may be accurately regarded as attempts to formalize a long-existing and extremely important component of our criminal justice system. Despite the long standing acceptance and practice of the diversion strategy, it has not been until the recent introduction of formal intervention programs, operated as professionally staffed components of urban prosecutorial offices, that the liabilities inherent in traditional, informal diversion, as discussed above, have been eliminated. In particular, such programs (1) operate formally, utilizing procedures arrived at in conjunction with the prosecutor, defense bar, police, and courts; (2) are high in observability by virtue of the visibility of their procedures and decisions both to the public and to the components of the criminal justice system; (3) are charged with maintaining and reporting accurate data; and (4) utilize professional personnel, afford diagnosis and supervision, and maintain coordination and contact with available community rehabilitation and treatment facilities.

B. *The Pretrial Period and the Metropolitan Criminal Justice System*

A second factor which would appear to account for the inception and acceptance of the pretrial intervention strategy is its compatability with the realities of the criminal court system in our major cities. A first reality compatable with an intervention strategy is that a substantial majority of individuals arrested and charged with criminal offenses have, in fact, committed the acts alleged. Although of critical importance to the trier of fact in a criminal case, the presumption of innocence is based on considerations, albeit extremely important ones, which do not include statistical probability. In Dade County, for example, during 1971-1972, 83% of defendants charged in the Dade Criminal Courts pleaded guilty and only 2% requested trial by jury.[10] As appears to be true in all major cities, Dade County's criminal courts are neither structered nor equipped, physically or philosophically, to afford a trial to all defendants on the assumption that a large number of them are innocent. On the contrary, the system functions upon the assumption that the great majority of cases will be disposed by guilty plea and numerous incentives exist in the system to insure this result.

Secondly, based in theory upon the presumption of innocence and perhaps also upon the practicalities of overcrowded facilities, virtually

10. Statistics provided by the clerk's office, Dade County Circuit Court, Criminal Division. It would appear that, relative to the statistics available from other large metropolitan areas, the percentage of non-guilty pleas in Dade County is extremely low. It has been estimated, for example, that in New York City, 98% of criminal cases are disposed of by guilty pleas. Testimony of Director Larson of the Duval County Public Safety Dept., Subcommittee on Criminal Justice, Florida State Senate, Tallahassee, March 7, 1973.

all youthful first offenders charged with non-violent offenses are released either on bond or in custody during the period between arrest and trial, a period which may easily extend in duration to several months. These releases are without supervision and, therefore, the community, as a corollary, is without protection. Those community resources and services, the inaccessibility of which may well have contributed to the criminal act to begin with, are no more available to the defendant during the period between arrest and trial than they were prior to the alleged criminal act.

Because of the absence of supervision and of any use of community resources during the period between arrest and trial, the pretrial period also fails to utilize the psychological incentive potentially available in the defendant's realization that a criminal charge, with the accompanying possibility of conviction and incarceration, has been lodged against him. The experience of the District of Columbia and New York City Pretrial Intervention Projects has been that the threat of a pending prosecution and incarceration may well be more of a deterrent than the outcome of the prosecution itself.

Third, the substantial majority of youthful first offenders charged with misdemeanors and third degree felonies are placed on probation if convicted, and in a great many such cases, the probation is non-reporting.[11] Probation caseloads are presently extremely large, and it follows that during the probation period, supervision and rehabilitation, through the offer and use of community resources, may well be only minimal for the lesser offender. Also, once the offender has been placed on probation, any rehabilitative incentive available in the threat of a pending prosecution is lost. It is the objective of the pretrial intervention project to utilize this incentive while making available to participants intensive supervision coupled with a coordinated use of community resources and rehabilitative facilities.

The pretrial intervention strategy makes possible supervision and services during a period otherwise lacking such safeguards and considerations, and simultaneously defers the filing and prosecution of the case while an evaluation is made as to whether utilization of the re-

11. The trend to probation in Florida is illustrated by the following chart which illustrates disposition of all felony charges in the Florida Criminal Courts during the period between 1965 and 1971. Obviously, the percentage of non-violent first offenders receiving probation is much higher, estimated to be in the vicinity of 95%. The chart and statistics appear in FLORIDA PAROLE & PROBATION COMM., 31ST ANN. REP. 1971.

	Imprisonment		Probation	
Year	Number	Percent	Number	Percent
1965-66	3,010	62.5%	1,803	37.5%
1966-67	3,208	53.7%	2,761	46.3%
1967-68	3,288	53.2%	2,893	46.8%
1968-69	3,453	50.8%	3,333	49.2%
1969-70	3,584	43.8%	4,589	56.2%
1970-71	4,684	36.6%	8,122	63.4%

sources of the courts will be required, or whether formalized diversion, without prosecution, and without stigmatization of a criminal conviction, will suffice. In a badly overcrowded court system, at a time when the alternative of incarceration is coming to be regarded as increasingly ineffective and little utilized for non-violent first offenders, and when probation caseloads are so excessive as to make meaningful supervision impossible, an intervention strategy which maximizes supervision and rehabilitative services to those offenders for whom the criminal courts or probation system presently have no response is both realistic and appropriate.

II. THE DADE COUNTY PRETRIAL INTERVENTION PROJECT

A. *Antecendents*

Although pretrial diversion of narcotic addicts was formalized in 1966 in the Federal Narcotics Addict Rehabilitation Act,[12] and addict and alcoholic diversion provisions have been in existence in several states,[13] the initial diversion program oriented toward the general offender population was Operation Crossroads, a Washington, D.C. experimental program which commenced in January of 1968. Shortly thereafter, the VERA Foundation, in New York, initiated the New York Court Employment Project.

Based upon the reception accorded these two pilot programs, in addition to the Dade County project, diversion programs now are operational in Philadelphia, Boston, San Francisco, Minneapolis, Newark, Jersey City, Cleveland and Atlanta.

B. *Eligibility Criteria*

To be eligible for participation in the Dade County Pretrial Intervention Project, an individual must meet the following criteria: (1) The defendant must have no prior criminal conviction; (2) the defendant, either male or female, must be between the ages of 17 and 25; (3) the defendant must be charged with a non-violent offense; (4) the victim and arresting officer must be consulted in writing and must concur in program participation; and, (5) the defendant must be a Dade County domiciliary.

---

12. 28 U.S.C. §§ 2901-06 (1970).

13. Addict diversion programs currently exist in Connecticut, Illinois and Massachusetts. Note, *Addict Diversion: An Alternative Approach for the Criminal Justice System*, 60 GEO. L.J. 667, 676-80 (1972). *See also* Robertson, *Pretrial Diversion of Drug Offenders: A Statutory Approach*, 52 BOSTON U.L. REV. 335 (1972); Neisser, *Diversion of Alcoholics from the Criminal Process: The Intoxication Provision of the Connecticut Penal Code*, 45 CONN. B.J. 289 (1971).

C. *Structure and Methods*

The Dade County Pretrial Intervention Project, which began operation on January 17, 1972, is funded by the Florida Bureau of Criminal Justice Planning and Assistance, using monies made available by the Law Enforcement Assistance Administration (LEAA). The grant application was prepared by the Office of the State Attorney and submitted by the Dade County Board of Commissioners.

The primary objective of the Project is to provide, for a three to six month period immediately following arrest, intensive counseling and manpower services, as well as referrals to community agencies where warranted. The staff consists of professional and paraprofessional counselors, a psychologist and a manpower and vocational guidance aide. The counselors attempt to establish and maintain close contact with the participants by means of home visits, visits to the job or training location at which the participant may have been placed, and to the Project's office. Contact with participants is made by the counselors as often as is necessary with a minimum of two contacts per week. A counselor's caseload is not to exceed twenty participants and group counseling sessions are held at least one evening per week.

On a daily basis, the Project director attends the bail bond hearing held in the Committing Magistrate Section of the County Court of Dade County. After reviewing these jail interview sheets, those first offenders who appear to be eligible for Project participation are listed on a daily memo which is circulated to those assistant state attorneys in the pretrial unit who review the defendant's case, along with the recommendation and proposed rehabilitation plan of the Project director. This rehabilitative plan is formulated by the director and staff following an in-depth interview of the defendant and his family and an identification of those areas in which Project services seem required. If approved, the arresting officer and victim in the case are contacted and the program and the proposed rehabilitation plan in the particular case are explained to them. Assuming their consent, the filing of charges is withheld for a three to six month period to permit Project participation. Periodic progress reports are submitted to the Project director. At the conclusion of three months, a final evaluation is submitted on the basis of which one of four possible courses of action may be followed:

1. In the event of successful participation, a No Information of the charge may be recommended by the State Attorney's Office with the result of preserving for this group participants a record devoid of a criminal conviction due to the dismissal of charges;
2. The case may be filed, in the event participation is not deemed to have been satisfactory;

3. The case may be filed with a report of satisfactory performance to the trial assistant in the event filing is deemed necessary, with the satisfactory performance to serve as a determinant in sentencing; or
4. Project participation may be extended for an additional period.

D. *Results: January 17, 1972-January 18, 1974*

The Pretrial Intervention Project began operation on January 17, 1972. During the two year period through January 18, 1974, the structure, staffing and procedures for the Project were established, participant intake and servicing commenced and participant numbers have increased at at rate in excess of that anticipated.

During the period, a total of 1,416 cases were identified as potentially eligible for Project participation. Of these, the Project ultimately found 560 to be unacceptable. Reasons for rejection were failure to respond to the initial letter mailed to potential participants, failure to pass screening, for which defendants were not serviced. Persons screened failed to pass either because of lack of interest in the Project, lack of need for Project services, or due to the facts revealed in the pre-intake investigation of the potential participants. 797 cases were actually accepted for participation and have been offered Project services. Thirty-four more, during the initial twelve months of operation, were randomly assigned to a control group created in order to aid in Project evaluation. Another twenty-five potential participants were on pending status as this report was prepared.

The 797 actual participants were divided into the following groups:

Group I: Participants whose cases are not filed during Project participation, to last a period of three to six months. Successful participation in Group I results in dismissal of charges.

Group II: Participants whose cases have been filed and who are not eligible for participation in Group I, due, for example, to lack of consent by arresting officer, but who are serviced by the Project in the same maner as Group I participants. Successful completion in Group II results in a withholding of adjudication and a period of probation not to exceed two years.

Group III: Participants whose cases have been judicially disposed of, but who voluntarily express a desire to continue Project participation and who are accepted for continued participation.

The following table lists the number of participants or former par-

ticipants in each of the above groups, as well as unaccepted non-participants as of January 19, 1974.

A. Participants:

Group I
- Active 179
- Closed by Successful Project Completion & Case Dismissal 349
- Closed by Unsuccessful participation & reversion to normal channels 61

Group II
- Active 23
- Closed with Successful Project Completion Report to Prosecutor 88
- Closed w/o Successful Project Completion Report to Prosecutor 68

Group III
- Active 4
- Closed 25

Total Participants (Jan., 1972–Jan., 1974) 797

B. Non-Participants:
- Control Group 34
- Pending 25
- Not Accepted 560

Total (Jan., 1972–Jan., 1974) 619

The rates of new case intake and of case disposition during the eight three-month quarters of Project operation are illustrated in the following Tables:

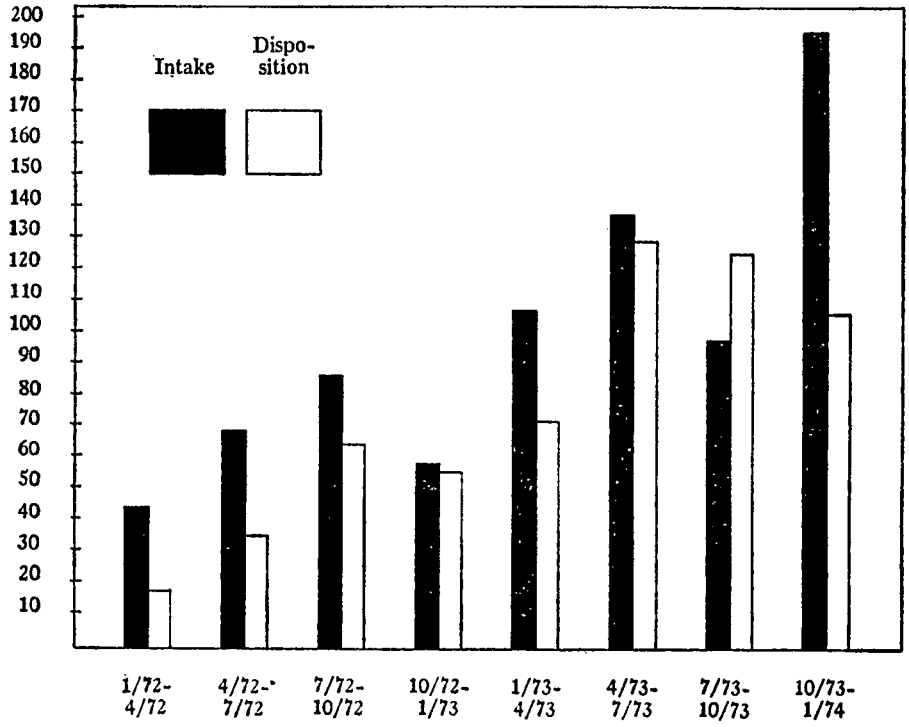
1. NEW CASE INTAKE PER QUARTER: JANUARY 18, 1972–JANUARY 18, 1974

Group	1/18/72-4/18/72	4/18/72-7/18/72	7/18/72-10/18/72	10/18/72-1/18/73	1/18/73-4/18/73	4/18/73-7/18/73	7/18/73-10/18/73	10/18/73-1/18/74	Total
I	20	41	57	41	95	94	80	169	598
II	20	24	19	12	19	39	15	21	169
III	3	3	9	3	2	4	1	5	30
Total	43	68	85	56	116	137	97	195	797

2. CASE DISPOSITION PER QUARTER: JANUARY 18, 1972–JANUARY 18, 1974

Group	1/72-4/72	4/72-7/72	7/72-10/72	10/72-1/73	1/73-4/73	4/73-7/73	7/73-10/73	10/73-1/74	Total
I—Successful	0	8	32	31	37	85	94	62	349
Unsuccessful	5	3	5	6	9	11	8	14	61
II—Successful	4	10	10	10	16	17	9	12	88
Unsuccessful	5	10	12	5	9	14	11	2	68
III—Successful	2	3	5	3	1	2	4	5	25
Unsuccessful	0	0	0	0	0	0	0	0	0
Total	16	34	64	55	72	129	126	95	591

3. COMPARATIVE TOTAL CASE INTAKE AND CASE DISPOSITION PER QUARTER: JANUARY 18, 1972–JANUARY 18, 1974



1. EMPLOYMENT AND EDUCATION

As noted previously, a principal objective of the Dade County Pretrial Intervention Project, as well as of pretrial diversion programs in general, is the reduction of unemployment and underemployment and the provision of incentives toward vocational training or continued educational advancement.

In order to evaluate Project activity in these areas, computer analysis, conducted by the Data Processing Center of Miami-Dade Junior College, compared questionnaires administered to successful Project participants upon acceptance for participation and at a follow-up interview three to six months subsequent to Project completion. The following table presents some principal findings:

	Pre-acceptance	3–6 Months Post Completion
Enrolled in School	30%	42%
Employed	45%	50%
Unskilled	16%	8%
Semi-skilled	24%	33%
Skilled	5%	9%
Employed Full Time	32%	58%
Report Liking Job	30%	50%
Held Present Employment at least Three Months	18%	58%

2. COUNSELING

In addition to the placement of Project participants in productive endeavors, all are under the intensive supervision of staff counselors who meet with participants at least twice weekly, including one weekly group counseling session conducted at the Project field office. Additionally, special vocational, family, and psychological counseling is provided by the program consultants in those cases where referrals appear to be warranted.

As a means of evaluating the effect of Project participation generally, and the counseling component in particular, the Sixteen Personality Factor Questionnaire Form E (16 PF) has been administered to all Project participants upon acceptance for participation, and at a follow-up interview three to six months subsequent to participation. Those participants who have successfully completed the Project, reveal mean changes of greater than .5 points in the following eight directions of those sixteen characteristics measured by the Test, as tabulated by the Data Processing Center of Miami-Dade Community College:

1. More enthusiastic (less taciturn): average change 1.38
2. More spontaneous (less threat sensitive): average change 1.01
3. More controlled (less impulsive): average change .89
4. More concrete thinking (less abstract thinking): average change .67
5. More sensitive (less tough-minded): average change .67
6. More self-sufficient (less group-dependent): average change .52
7. More self-assured (less apprehensive): average change .67
8. More emotionally stable (less emotionally unstable): average change .55

It would be hoped that these positive developmental trends, when tested by further follow-up research, will prove to be enduring ones.

3. RECIDIVISM

An important objective of the Project is to promote a minimal recidivism rate. To assist in the evaluation of this phase of Project performance, a control group comparable in all respects to Project participants was selected pursuant to a research design prepared by Alan Rockway, Ph.D.

The following table presents the recidivism statistics as of January 19, 1973, for each of the successfully completed participant groups (I, II, and III) and for the Control Group. These figures are based upon computer verification through the National Crime Information Center. National Crime Information Center inquiries are made yearly so as to identify any recidivism by former participants which has not been re-

vealed in the follow-up questionnaires which are completed by previous participants for one year pursuant to successful completion.

RECIDIVISM OF PRETRIAL COMPLETORS AND CONTROLS

Group	Number	Frequency Rearrests	Percent Rearrests	Percent By Group Total Completors vs Controls
I	72	2	2.8	
II	35	0	0	1.6
III	13	0	0	
Control	34	7	20.6	20.6*

* Chi square test corrected $X^2 = 14.00$ Significant $p, < .001$.

Of the total 120 successful Project participants as of January 19, 1973 (Groups I, II and III), only two were rearrested, yielding a recidivism rate of 1.6% among successfully completed participants. This compares favorably to the control group of 34 individuals (based on 12 cases with complete, initial and follow-up interviews and tests and an additional 22 cases on which only recidivism data was obtained). Of the 34 controls studied for recidivism, seven were rearrested as of January 19, 1973, yielding a recidivism rate of 20.6%.

A chi square test incorporating the Yates correction factor was applied to these recidivism figures. This test yields a computed value of X^2 of 14.00 (p, .001) and indicates that the difference between recidivism rates of completors vs. controls is highly significant. Therefore it is apparent that these observed differences in recidivism were due to services rendered to the successful completors and not merely to chance. Further research will be required to determine which specific Project services were most effective in promoting these differences.

An additional comparison of recidivism data was performed in which recidivism of successful completors was compared to both that of controls and those who failed to successfully complete the Project and were returned to the normal criminal justice channels for disposition. This comparison is presented in the table below and is necessary to evaluate total Project effectiveness in terms of total experimental cases (successes and failures) vs. the controls in the area of recidivism.

RECIDIVISM OF PRETRIAL EXPERIMENTALS VS. CONTROLS

Group	Description	Number	Frequency Rearrests	Percent Rearrests	Percent by Group Totals Rearrests
I	I S.C.*	72	2	2.8	
II	II S.C.	35	0	0	Total
III	III S.C.	13	0	0	Experimentals 8.8
IV	I Failures	19	8	42.0	
V	II Failures	32	5	16.0	Total
Control	Control	34	7	20.6	Controls 20.6**

* S.C. = Successful Completors

** Chi square test corrected $X^2 = 3.03$ Significant $p, < .05$.

Of the total 171 experimental cases (120 successful; 51 unsuccessful completors) in groups I, II, III, IV and V, only 15 were rearrested yielding a total Project recidivism rate (experimental group) of 8.8%. This again compares favorably to the control group recidivism rate of 20.6%.

A similar chi square test applied to these total figures yields a computed value of X^2 of 3.03 ($p, < .05$) and indicates that the difference between recidivism rates of all Project participants (both successes and failures) and the controls is significant.

These statistics, although heartening, should be viewed with caution in view of the short period of time elapsed between Project completion and recidivism inquiry. Future inquiries are anticipated more frequently and will undoubtedly provide a better picture of long term Project effectiveness on recidivism.

III. Pretrial Intervention: A Cost-Benefit Analysis

An important test of the efficacy of formalized pretrial intervention is that of economy. To be viable, such programs should be no more costly to the criminal justice system than would be the disposition of cases by the traditional means of prosecution followed by incarceration or probation.

Intervention programs are for the most part limited to first offenders while, of course, probation and prison cannot and do not select their intake. For this reason, comparison of these three approaches to rehabilitation in terms of recidivism are misleading at best. However, it is submitted that the three treatments can be evaluated in terms of costs of processing through the criminal justice system and in terms of earnings, or loss thereof, of the arrested offender. The following costs must be considered in comparing the three approaches:

Incarceration	Probation	Pretrial Intervention Program
Criminal act	Criminal act	Criminal act
Arrest	Arrest	Arrest
Court costs	Court costs	Program costs
Prison costs	Probation costs	
Loss of earnings		

Since the costs of crimes and of subsequent arrests and booking may be assumed to be constant, the following analysis will not include these factors. Nor will it include the factor of loss of earnings (and possible welfare costs to society of supporting a family that has been deprived of its breadwinner) of the incarcerated offender since it is beyond the scope of this paper to estimate the relative earnings of an offender on probation or in a pretrial intervention program. Since both probation and pretrial intervention require an offender to work, and in fact place him in employment, it may be assumed that both of these ap-

proaches result in a social benefit that is absent when the offender is incarcerated.

This paper, then, will confine itself to a discussion of the economic costs of resources used in the criminal justice system and estimate the marginal costs to society for police, courts and personnel. For the purpose of estimating the marginal cost of judicial proceedings, only costs of labor will be included. This method of estimating the court costs will be a simple summation of the personnel involved in a court event and their respective annual salaries divided by the number of cases handled by these personnel in a year.

Since successful completion of pretrial intervention program participation results in a decision by the state attorney not to prosecute the offender, the following events are eliminated:

(1) clerical preparation of the case by the state attorney's office;
(2) filing of the case by the criminal court clerk;
(3) arraignment and motions;
(4) defense and prosecution costs;
(5) witness and police officer appearance for depositions and trial (and resulting loss of earnings and inconvenience);
(6) court costs;
(7) costs of incarceration or probation.

It should be noted that all of these costs are incurred when a case is processed normally, with probation or incarceration the outcome. The benefits derived by eliminating these costs and by diverting a case into pretrial intervention will herein be referred to as the diversion benefit.

As mentioned previously, although the increased earnings benefit will not be dealt with, the project employment staff develops and maintains contacts with training programs, with area employers (both public and private), and with the public employment service. The benefits derived from providing job information and placement assistance to participants, thereby reducing the number and length of unsuccessful job searches and thus increasing earnings over a given period of time, are evident. The counseling of participants serves to increase motivation, resulting in fewer job changes and shorter periods between jobs. If individuals are placed in training programs or in employment providing on-the-job training, skills and productivity may increase, providing still further benefits.

The budgetary costs of the Pretrial Intervention Project staff during 1972-74 were as follows:

Personnel	$171,915
Contractual services	36,750
Travel mileage	9,100
Equipment	2,900
Operating expenses	16,450
Total	$237,115

Based upon the total 595 cases closed as a result of Project participation, the average cost per case[14] is:

$$\frac{\$237,115}{595} = \$398.50$$

A. *Benefits from Case Diversion to Pretrial Intervention*

The following analyses assume that recidivism rates among former pretrial intervention participants will be no higher than those of offenders whose cases have resulted in incarceration or probation. In fact, although it is too early to conclusively evaluate the Dade County Program on these terms, the experience of similar programs in New York and Washington has been that recidivism rates have in fact been lower than among probation or jail cases. Obviously, the benefit gained from the demand for court and corrections resources where pretrial intervention is used could be rapidly reversed if this type of program led to increased recidivism.

1. COURT COSTS THROUGH CASE DISPOSITION

The following calculations are designed to estimate the cost of the average case to the criminal justice system. Since cases filed in the criminal court are disposed of in three principal ways, to-wit: jury trial, non-jury trial and guilty plea, the average case is a composite of these three means of disposition. Obviously a jury trial is more costly than a non-jury trial (involving, for example, increased court time due to the necessity of selecting jurors, loss of earnings to jurors, etc.), which in turn is more costly than a guilty plea. The following table presents the means of case disposition from July 1, 1971 to June 30, 1972, in the Dade County criminal courts:

Means of Case Disposal	Number of Cases[15]	Percent
Guilty plea	7,360	83%
Non-jury trial	1,290	15%
Jury trial	214	2%
	8,864	100%

The following table presents the various elements, and their costs per year, that comprise the costs of cases in the criminal justice system:

14. It should be noted that not measured in this calculation is the benefit to those cases serviced who do not ultimately merit case dismissal, but who do receive benefits from project participation and services.

15. The estimates of total cases and clerk's office expenses were provided by the criminal court clerk's office. The estimates of prosecution and defense costs were provided by the offices of the state attorney and public defender respectively. The other estimates of incidental expenses were obtained from the Dade County Budget Department.

Expense Item[16]	Amount Per Year
Judges' salaries	$ 142,500
Judges' bailiffs & secretaries	70,000
Clerk's office	204,800
Witness fees	300,000
Prosecution	1,200,000
Public defender	500,000
Court reporters	775,000
	$3,192,300

Dividing this total by the total number of criminal court cases per year, we obtain the cost of processing of an average case through the criminal courts:

$$\frac{3,192,300}{8,864} = \$360$$

Added to this figure must be the cost of police witnesses in an individual case. This has been estimated[17] at $44.46 per case. Added to $360, this results in an expense of $404.46 per case.

2. POST-DISPOSITION COSTS

In addition to the benefits to the criminal justice system incurred by circumventing costs of case processing in the courts, the benefits incurred by case dismissal, following a participant's successful completion of the program, as compared to the costs of incarceration or probation, must also be included.

As mentioned earlier, 63.4% of criminal cases in 1971 resulted in probation and 36.6% in incarceration. Since these figures include all offenders, and since pretrial intervention is limited to first offenders, who comprise approximately one-third of all offenders, these percentages should be adjusted to reflect these facts. Therefore, it will be assumed that $.366 \times 1/3$ of total first offenders are incarcerated and the remainder received probation. Thus 12% of first offenders would be incarcerated and 88% would receive probation.

The assumption is herein made that the average length of a first

16. Not included in the estimate is the indirect private and social costs of lack of earnings and productivity of a witness who must leave his job to appear in court.

17. The estimate of police costs are based on estimates provided by the Dade County Public Safety Department. Also, this assumes that the average case bound over to the criminal court will involve two public safety officers and a minimum court time of six hours each. Approximately half of the officers appear in court while on duty, therefore, hourly rates should be figured at time and one half for at least one of the officers involved using the middle range of $4.94 per hour for police officer classification. Thus, the calculation here is $(\$4.94 + \frac{\$4.94}{2}) \times 6$ hours $= \$44.46$ per case. It should be noted that an extremely important social benefit of freeing police officers from in-court, on-duty time is the fact that they are then available for crime detection and prevention functions that would otherwise be unavailable.

offender's incarceration is six months and the average length of a first offender's probation is two years.[18]

The 1971 Report of the Florida Probation and Parole Commission estimated the marginal cost of supervising an additional probationer at $242 per year and the marginal cost of incarceration of an additional inmate at $2,219 per year.

Assuming that 12% of the 349 offenders whose cases were dismissed following successful participation in the Pretrial Intervention Project would otherwise have been incarcerated for six months and 88% placed on probation for two years, the following costs may be estimated:

	Number of Cases	Cost per Case	Total Cost
Incarceration	42	$1,108	$ 46,536
Probation	307	$ 484	$148,588
	349		$195,124

These figures must be discounted and the rate of discount will be selected at 10%: The calculations assume a six month incarceration and two years of probation:

$$\text{Incarceration: Present Value} = \frac{1{,}108}{(1.10)} = \$997$$

$$\text{Probation: Present Value} = \frac{484}{(1.10)^2} = \$400$$

3. TOTAL COSTS: PRE- AND POST-DISPOSITIONAL

The total costs of processing and disposition of the 349 cases who successfully completed the Pretrial Intervention Project may thus be expressed as follows:

$$\text{Pre-disposition costs per case} + \text{Post-disposition costs per case} = \text{Total benefits}$$

Or:

Pretrial intervention case:	$0 + \$398.50 = \$ 398.50$ per case
Probation case:	$\$404 + \$400.00 = \$ 804.00$ per case
Incarceration case:	$\$404 + \$997.00 = \$1{,}401.00$ per case

Again assuming an 88%-12% ratio of probation to incarceration cases, we may calculate total benefits as follows:

Probation cases	$= 804 \times 307 = \$246{,}828$
Incarceration cases	$= 1{,}401 \times 42 = 58{,}842$
Total	$305,670

18. This estimate is necessarily extremely subjective, being based on the author's experience and that of attorneys in the Dade County criminal courts.

4. SUMMARY

The above estimates of the costs of the handling of 349 cases by the method of diversion to a Pretrial Intervention Project and by the traditional means of probation and incarceration may be summarized as follows:

Pretrial intervention costs (349 cases)	$139,076
Probation/incarceration costs (349 cases)	$305,670

It is thus less costly to divert a case to the Dade County Pretrial Intervention Project than to process it in the traditional manner with disposition either by probation or incarceration. The following presents the cost-benefit ratio of this diversion aspect of the Pretrial Intervention Project:

Total costs of program	$139,076
Total diversion benefit	$305,670
Benefit-cost ratio	2.19

Although the diversion benefit of the Project in itself is economically efficient relative to alternative methods of case processing, it must again be emphasized that a cost-benefit analysis of such a Project is not complete without a consideration of the earnings benefit, resulting from the increased productivity of participants, and the recidivism benefit. A recent FBI survey of offenders released in 1968 found that 60% to 75% were rearrested within five years.[19] If the recidivism rate of pretrial intervention participants, during enrollment and over a period of time after leaving the Project, is lower than it would have been had they not participated in the Project, it can be said that society has additionally benefited.[20]

On the basis of the foregoing analysis, however, it may be said that if the recidivism and earnings benefits accruing from pretrial intervention strategy are the same or greater than accruing from incarceration or probation, that being due to benefits from the diversion of the case from the criminal court processing and disposition, then the Dade County Project represents an efficient allocation of resources within Dade County's criminal justice system.

IV. FROM INNOVATION TO INSTITUTION: EMERGING ISSUES IN DIVERSION PROGRAMS

As diversion programs proliferate and expand, along with their increased institutionalization in our criminal justice systems, there will come the recognition that such programs present problems, both legal and administrative, which must be dealt with, presumably in the near future. To date that unique feature of the diversion program, its com-

19. F.B.I. UNIFORM CRIME REP. 37 (1968).
20. See text at page 25 *et. seq.*

patibility with the goals of both prosecutor and defense attorney, has kept to a minimum legal attacks on program methods and procedure. Yet this compatibility should not obscure other incipient issues, some of which are presented below.

A. *The Issue of Prosecutorial Discretion: Is it an Abuse of the Prosecutor's Discretion to Withhold the Filing of an Information Pending Participation in a Pretrial Diversion Program?*

An initial issue which must be recognized prior to instituting an intervention program is whether the prosecutor has the right to choose not to prosecute a particular defendant based upon his or her participation in such a program. The question is a particularly salient one in a program such as exists in Dade County due to the practice there employed of withholding the filing of an information when a program participant is selected, thus eliminating judicial involvement in the diversion process. In Florida and in other jurisdictions where the issue has been raised in other contexts, existing case law seems clearly to uphold prosecutorial discretion in decisions relating to initiation of prosecutions, and a decision to withhold the filing of an information pending participation in an intervention program would appear to represent a valid exercise of prosecutorial discretion.

The Florida Statutes applicable to the duties of the state attorney do not deal specifically with the duty of the prosecutor to file or withhold filing of an information. The applicable statutes are section 27.02 of the Florida Statutes (1973), which states that "[t]he State Attorney shall appear in the circuit court within his judicial circuit, and prosecute or defend on behalf of the state all suits, applications or motions, civil or criminal, in which the state is a party," and section 32.18(1) of the Florida Statutes (1973), which states "[a]ll offenses triable in the criminal courts of record shall be prosecuted upon information under oath, to be filed by the county solicitor." The latter section is made applicable to the state attorney by article 5, section 9B of the Florida Constitution which directs that "the [Dade County] State Attorney and his Assistant State Attorneys, under his direction, shall perform all of the duties and functions of office heretofore performed by the County Solicitor."

In Florida, and in all other jurisdictions where issue of prosecutorial discretion has been considered by the courts, the general principle has been stated as follows:

> A duty rests upon a district or prosecuting attorney to prosecute the violators of the criminal laws of the state whom he knows or has reason to believe to be guilty of such violations. *However, this duty is not absolute, but qualified, requiring of him only the exercise of a sound discretion, which permits him to refrain from prosecuting, or having commenced a prosecution, to enter a nolle prosequi, whenever he, in good faith and without corrupt motives or influences, thinks that a prosecu-*

> *tion would not serve the best interests of the state,* or that, under the circumstances, a conviction could not be had, or that the guilt of the accused is doubtful or not capable of adequate proof.[21]

This principle was stated and followed in a 1951 Florida Attorney General's Opinion wherein the question was posed: "What limitations are there on the discretion of the County Solicitor in deciding not to file an information, which will make his decision a criminal offense?" In that instance, the County Solicitor refused to file a manslaughter information against a defendant who had been bound over by a Justice of the Peace. The opinion states that:

> If, after the county solicitor investigates the facts in a bindover case or in a case in which he initiates an independent investigation, he concludes in good faith that the evidence does not warrant the filing of an information, his failure to file an information is not a crime, regardless of whether or not his decision accords with what someone else might think, and even though it might appear to someone else that the county solicitor is neglecting his duty by not prosecuting.
>
> I find no statute making it a crime for a county solicitor to neglect his duty. The result is that the common law governs. At common law, an officer is not criminally liable for failure to perform his discretionary duty unless that failure is a willful and corrupt failure . . . .[22]

The case law in Florida follows the reasoning of the Attorney General Opinion.[23] Moreover the cases in other jurisdictions, with near unanimity, support the discretion of the prosecutor not to file an information where this discretion is exercised in good faith. The law is clear that

---

21. 42 AM. JUR. *Prosecuting Attorneys* 17 (Supp. 1950) (emphasis added).

22. FLA. ATT'Y GEN. OP. 051-125 (1951) (unpublished). The opinion cites as precedents Sullivan v. Letherman, 48 So. 2d 836 (Fla. 1950); La Tour v. Stone, 139 Fla. 681, 190 So. 704 (1939); State *ex rel.* Tatham v. Coleman, 122 Fla. 819, 166 So. 221 (1936); *Ex Parte* Amos, 94 Fla. 1023, 114 So. 760 (1927); *Ex parte* Amos, 93 Fla. 5, 112 So. 289 (1927); 67 C.J.S. *Officers* § 133(b) (1950). Also cited is Attorney General v. Pelletier, 240 Mass. 264, 134 N.E. 407 (1922), which upheld a prosecutor's refusal to file an information. The opinion concludes:

> I agree with the Massachusetts court's reasoning on this point. Therefore, I think that if a county solicitor is requested by relatives of the deceased not to prosecute manslaughter charges arising out of an automobile collision, he will be guilty of no crime if he complies with such request without any corrupt, evil or improper motive and in the honest belief that the request outweighs other considerations which might appear to demand prosecution . . . Section 925.01, F.S., merely makes it a misdemeanor for an officer to wilfully fail, refuse and omit to perform any duty required of him by the Criminal Procedure Law (Chs. 901-25, F.S.), or to wilfully violate any of the provisions thereof. I find nothing in the Criminal Procedure Law regulating or in any way pertaining to the duty of a prosecuting attorney to file information. Therefore, I am of the opinion that the failure of a county solicitor to file an information cannot under any circumstances constitute a violation of § 925.01.

23. Prevatt v. State, 135 Fla. 226, 184 So. 860 (1938); Anderson v. State, 134 Fla. 290, 183 So. 735 (1938); Di Bona v. State, 121 So. 2d 192 (Fla. 2d Dist. 1960).

the office of the prosecutor "is vested with a vast quantum of discretion which is necessary for the vindication of the public interest."[24]

In several cases a prosecutor's decision not to file a particular information has been attacked on equal protection grounds and this attack has been consistently dismissed on the ground that equal protection does not require identity of treatment.[25]

B. *Participant Selection Issues: Who is Selected and What is Required of the Eligible Defendant?*

As mentioned earlier, selectivity in the choice of diversion subjects represents an important factor in program acceptance and institutionalization in terms of political saleability, in the provision of personalized and intensive services, as well as in the demonstration of acceptable results. Most diversion programs are limited to young first offenders charged with particular offenses. The Dade County program, for example, is limited to first offenders between the ages of seventeen and twenty-five who are charged with non-violent crimes.

It is clear that "[e]qual protection does not require that all persons be dealt with identically, but it does require that a distinction made have

---

24. Granger v. Peyton, 379 F.2d 709 (4th Cir. 1967); Bauers v. Heisel, 361 F.2d 581, 590 (3d Cir. 1966), *cert. denied*, 386 U.S. 1021 (1967). In United States v. Shaw, 226 A.2d 366, 368 (D.C. Ct. App. 1967), the court stated: "On the District Attorney rests the responsibility to determine whether to prosecute, when to prosecute and on what charges to prosecute." This broad discretion is emphasized in numerous cases; and the courts consistently refuse to order the prosecutor to initiate prosecutions on the ground that the initiation of a prosecution is a discretionary act and, as such, one that may not be compelled by mandamus. Powell v. Katzenbach, 359 F.2d 234 (D.C. Cir. 1965), *cert. denied*, 384 U.S. 906 (1966); Brack v. Wells, 184 Md. 86, 40 A.2d 319 (Ct. App. 1944); Leone v. Fanelli, 87 N.Y.S.2d 850 (Sup. Ct. 1949); Murphy v. Sumners, 54 Tex. Crim. 369, 112 S.W. 1070 (Ct. App. 1908). "It is clear that in his functions as a prosecutor he has great discretion in determining whether or not to prosecute. There is no obligation or duty upon a district attorney to prosecute all complaints that may be filed with him." State *ex rel.* Kurkierewicz v. Cannon, 42 Wis. 2d 368, 378, 166 N.W.2d 255, 260 (1969). As is pointed out in State v. Reed, 127 Vt. 532, 253 A.2d 227 (1969), the prosecutor's discretion not to prosecute is routinely exercised in decisions to grant immunity to one accused of the commission of a crime. *See also* 27 C.J.S. *District & Prosecuting Attorneys* § 10 (1959); Note, *Prosecutor's Discretion*, 103 U. Pa. L. Rev. 1057 (1955). Further, in State v. LeVien, 44 N.J. 323, 209 A.2d 97 (1965), the court stated that the prosecutor's discretion not to file prevailed over even a defendant's demand to have proceedings instituted against himself.

25. *See* Washington v. United States, 401 F.2d 915, 925 (D.C. Cir. 1968), where the court stated: "[W]hether or not the prosecutor's discretion in law enforcement is coextensive with the legislature's in law enactment, it is by its very nature exceedingly broad." In Newman v. United States, 382 F.2d 479 (D.C. Cir. 1967), Justice Burger, then sitting on the District of Columbia Court of Appeals, wrote that

> [t]wo persons may have committed what is precisely the same legal offense but the prosecutor is not compelled by law, duty or tradition to treat them the same as to charges. On the contrary, he is expected to exercise discretion and common sense to the end that if, for example, one is a young first offender and the other older, with a criminal record, or one played a lesser and the other a dominant role, one the instigator and the other a follower, the prosecutor can and should take such factors into account; no court has any jurisdiction to inquire into or review his decision.

Id. at 481-82 (footnote omitted).

some relevance to the purpose for which the classification is made."[26] Thus, it would appear incumbent upon diversion programs that their acceptance criteria, in order to afford equal protection, be relevant to the rehabilitative objectives of the programs.

It would clearly appear that exclusion based upon sex would be violative of the defendant's right to equal protection of the laws. No existing intervention program is limited to participants of a particular sex, although the prototype Project Crossroads[27] was initially limited to males, apparently without legal challenge. Restrictions limited to residents would seem justifiable only where lack of residency precludes a defendant from being physically present to receive Project services, and exclusion based upon mere non-residency without a showing of rationality might well be deemed unconstitutional.[28]

While most programs impose age restrictions, it would appear that rational arguments may be advanced to support such an admission criteria. In addition to the fact that an inverse correlation exists between the age of offenders seventeen and above and the incidence of criminal activity,[29] the administration of a diversion program and its choice of methodology is simplified where participant population is homogeneous. Further, a convincing argument may be advanced for the proposition that youth, malleability and rehabilitative potential are greater among younger offenders than among their older counterparts. The fact that age limitations result in a demonstrable concentration of resources in the area wherein need is most acute would in probability sustain such criteria against attack on equal protection grounds.

The general restriction concerning prior records of conviction and violent crimes may also be defended as constitutionally reasonable for

---

26. Baxstrom v. Herold, 383 U.S. 107, 111 (1966). *See also* Walters v. City of St. Louis, 347 U.S. 231 (1954).

27. *See* section II *supra.*

28. Shapiro v. Thompson, 394 U.S. 618, 638 (1969), stated that under traditional equal protection tests, a classification of welfare applicants according to whether they have lived in a state for one year was irrational and unconsitutional. The Court went on to note, however, that the traditional tests were not applicable since a fundamental right (*i.e.*, interstate movement) was involved; the test to be applied was one of compelling state interest. *Id.* at 638.

29. The 1971 F.B.I. UNIFORM CRIME REPORTS (1971), reveal that of those persons arrested for crimes in 1971, 53.6% were under 25 years of age and 39.7% under 21. When those arrests are subdivided into crimes against property, which is the principal category of diversion cases, and crimes against the person, the statistics reveal that 80.2% of those arrested for crimes against property are under 25 and 68% are under 21. The figures for crimes against the person are 59.3% under 25 and 40.1% under 21 years of age.

The relationship of youth to crime appears to be even more pronounced in Dade County: Of 6,704 arrested persons classified by the Dade County Department of Corrections and Rehabilitation in 1971, 34.7% were between the ages of 17 and 21 and a total of 59.6% were between 17 and 25 years of age. REPORT OF DADE CORRECTIONS AND REHABILITATION CLASSIFICATION SECTION, Oct. 1, 1971-Sept. 30, 1972. The Dade County survey did not include offenders under the age of 17, unlike the F.B.I. figures, since these younger offenders are processed by the Department of Youth Services. Obviously their inclusion would augment the percentages considerably. As previously mentioned, the Dade County Pretrial Intervention Program age criterion is seventeen to twenty-five.

much the same reasons as in the case of age restrictions: intervention programs, it should be remembered, utilize the incentive of a dismissal of pending charges and preservation of an unblemished record; such incentives are of minimal value when offered to an offender who has previously been convicted of one or more offenses and whose record is already stigmatized. Also, violent crime is often characterized by motivational factors outside the scope of the services made available by most diversion programs.[30]

In addition to relatively restricted admission criteria, most programs are characterized by a requirement that potential participants execute either a waiver of demand for speedy trial or a written plea of guilty or both.

In Florida, section 918.015 of the Florida Statutes (1973), guarantees a defendant the right to a speedy trial and pursuant to Rule 3.191 of the Florida Rules of Criminal Procedure, this right obliges the state to bring a defendant to trial within 90 days from the time such person is taken into custody if charged with a misdemeanor, and within 180 days if the charge is a felony. The defendant may, however, by his action or inaction, waive this right to speedy trial[31] and such a waiver is, of course, necessary as a prerequisite to participation in a program which will effect a withholding of prosecution for a period which will often exceed the time limitations. When a participant is unsuccessfully terminated from the program after having participated, it is necessary that an executed waiver be filed to assure that the case may be prosecuted. Insofar as a potential participant's waiver of speedy trial demand is voluntary and intelligent, the requirement would not seem objectionable. Although the Dade County Program diverts a participant prior to the filing of an information,[32] the fact that the decision of whether to waive the right to speedy trial in favor of Program participation may well be the most important decision the arrested defendant may make, would seem to bring the act within the definition of a "critical stage" of the criminal proceeding at which the right to counsel exists.[33]

30. *See e.g.*, Dowd v. Stuckey, 222 Ind. 100, 51 N.E.2d 947 (1943). In Minnesota *ex rel.* Pearson v. Probate Court, 309 U.S. 270 (1940), the United States Supreme Court stated:

> As we have often said, the legislature is free to recognize degrees of harm, and it may confine its restrictions to those classes of cases where the need is deemed to be clearest. If the law "presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied."

Id. at 275, *citing*, West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937); Semler v. Oregon State Board of Dental Examiners, 294 U.S. 608 (1935); Miller v. Wilson, 236 U.S. 373 (1915); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911).

31. *See* State *ex rel.* Leon v. Baker, 238 So. 2d 281 (Fla. 1970); Wills & Caruana, *Criminal Law and Procedure, Tenth Survey of Florida Law*, 26 U. MIAMI L. REV. 289, 360 (1972).

32. It is clear that the right to counsel exists in those diversion programs wherein the speedy trial waiver is requested subsequent to the filing of formal charges. *Cf.* Coleman v. Alabama, 399 U.S. 1 (1969); Powell v. Alabama, 287 U.S. 45 (1932). In holding that no right to counsel exists in a pre-indictment lineup, the case of Kerby v. Illinois, 406 U.S. 682 (1972) raises the possibility that no constitutionally protected right to counsel exists, however, where the waiver is executed prior to indictment or information.

33. *See* Mempa v. Rhay, 389 U.S. 128 (1967); United States v. Wade, 388 U.S. 218

More controversial, however, is the practice of a number of diversion programs of requiring a plea of guilt from the potential participant as a prerequisite to acceptance, which is tantamount to waivers of the rights against self-incrimination as well as to the right to trial by jury and the right to confront witnesses. It is clear that such rights may be waived voluntarily and intelligently, yet the coercion implicit in a denial of diversion where the plea is not entered may well render the resulting waiver of rights being designated involuntary and unconstitutional.[34] The Dade County program, along with the majority of intervention programs, does not require that the defendant either explicitly or implicitly enter an admission of guilt.

Closely related to the practice of the Dade County Program of eliciting the consent of victims prior to accepting a defendant for diversion is the practice of many intervention programs, including Dade County, of requiring restitution for monetary damages suffered in the commission of the acts allegedly committed by the defendant. In that the diverted defendant has not been tried or found guilty of the offense, the practice may be attacked as a coerced waiver of the right against self-incrimination and the rights to trial by jury and confrontation of witnesses, as in the case of the requirement of a plea of guilty considered above. Additionally, in that many potential diversion participants are unable to make financial restitution due to indigency, and are presumably denied participation or unsuccessfully terminated, this practice may well violate the equal protection clause of the fourteenth amendment.[35]

C. *Issues Raised by Unsuccessful Termination: For What Reasons and by Whom?*

All existing diversion programs provide for the unsuccessful termination of participants for such reasons as renewed contact with law enforcement, failure to attend counseling sessions on a regular basis or failure to remain continually employed or in school attendance. It is obvious that these and other violations of program regulation call for subjective decision on the part of program staff and that the reversion of the former participant into the criminal process is an event which is of critical significance to the defendant and his case. In fact, however, no existing diversion programs afford administrative or judicial due process as

(1967). *See also* Brown v. State, 246 So. 2d 151 (Fla. 3d Dist. 1971) and Harrison v. Wainwright, 243 So. 2d 427 (Fla. 1st Dist. 1971), dealing with right to counsel prior to the filing of improper waiver of rights.

34. *See* Miranda v. Arizona, 384 U.S. 436 (1966); Johnson v. Zerbst, 304 U.S. 458 (1938). *But see* North Carolina v. Alford, 400 U.S. 25 (1970), which suggests that a plea of guilty entered as a means of avoiding unpleasant alternatives is not per se an involuntary waiver of constitutional rights.

35. *See* Tate v. Short, 401 U.S. 395 (1971), which prohibits, as unconstitutional, the imprisonment of an indigent solely because he is too poor to pay traffic fines. *Cf.* Williams v. Illinois, 399 U.S. 235 (1970).

prerequisite to program termination despite the fact that existing case law would seem to require such safeguards.

Mempa v. Rhay[36] held that a probation revocation hearing constituted a critical stage in a criminal case warranting due process safeguards, and in *Morrissey v. Brewer*[37] and *Gagnon v. Scarpelli*,[38] a due process hearing was required prior to the revocation of parole and probation respectively. The reasoning in the *Gagnon* case is particularly cogent in that pretrial diversion is in many respects analagous to probation and in that termination or revocation may in either case result in the defendant's loss of liberty:

> [A]n exclusive focus on the benevolent attitudes of those who administer the probation/parole system when it is working successfully obscures the modification in attitude which is likely to take place once the officer has decided to recommend revocation. Even though the officer is not by this recommendation converted into a prosecutor committed to convict, his role as counsellor to the probationer or parolee is then surely compromised.[39]

Just as the revoking probation officer is held incapable of fairly determining the issues involved in a probation revocation, so too would it seem that the diversion program staff member is likewise ill-equipped to objectively deal with the equities of termination from the intervention program. The majority opinion in *Gagnon* adopted for probation revocation hearings the "minimum requirements" mandated for parole revocation in *Morrissey v. Brewer*[40] and it would seem that the same requirements might well be constitutionally demanded of diversion programs. The requirements are:

> (a) written notice of the claimed violations of [probation or] parole; (b) disclosure to the [probationer or] parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses . . .; (e) a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking [probation or] parole.[41]

V. Conclusion: Pretrial Intervention—Panacea or Placebo?

The nascent constitutional issues surrounding the diversion process represent an inevitable, and healthy, consequence of the increasing insti-

36. 389 U.S. 128 (1967); *accord,* Gargan v. State, 217 So. 2d 578 (Fla. 4th Dist. 1969).
37. 408 U.S. 471 (1972).
38. 411 U.S. 778 (1973).
39. *Id.* at 786.
40. 408 U.S. 471 (1972).
41. 411 U.S. 778, 789 (1973), *quoting* Morrissey v. Brewer, 408 U.S. 471, 489 (1972).

tutionalization of intervention programs and the growing numbers of defendants being enrolled. To date, the overall record of such programs, based upon the data they have generated, has been impressive and the mutual benefit derived from diversion programs by both prosecution and defense will insure that legal challenges will be relatively infrequent and will have the beneficial effect of reducing arbitrariness in program administration while promoting some degree of uniformity in procedure among the various programs. Whereas, to date, no such uniformity, and much such arbitrariness, has resulted from the completely uncoordinated geneses of the existing diversion programs in varied settings and with differing priorities, this trend is a welcome one.

In that diversion programs will continue to demonstrate positive cost-benefit data, and serve the interests of both prosecution and defense, by diverting cases from the system, and in that small counseling caseloads and the ability to control case intake will assure favorable rehabilitative trends among participants, it might appear likely to follow that diversion offers a palliative of enormous significance to an ailing urban criminal justice system.

The experience to date does indicate a need to continue and indeed to expand, the intervention experiment. Yet recent steps in the direction of permanence have revealed areas that should be of concern to the criminal justice community and to students of diversion programs. During 1973, the American Bar Association's Commission on Correctional Facilities and Services established a National Pretrial Intervention Service Center which was designed to serve as a clearinghouse for information relative to diversion programs and, in September of the same year, the first national conference of pretrial intervention programs was held in Atlanta, Georgia. Both of these endeavors would seem to have exposed two cardinal weaknesses in the diversion movement: first, the paucity of relevant data and research generated to date and, secondly, the total absence of uniformity among programs and their failure to date to transcend dependence upon personalities of the principal actors, project directors and prosecutors, and the peculiarities of the locality in which the programs exist.

Indeed, the weaknesses are interrelated and the lack of uniformity among the programs is the principal cause for the lack of data. Programs totally differ in crucial respects such as the following:

(1) Method of case selection: The programs are divided among those in which the prosecutor controls the decision regarding which individuals, within eligible categories of charges, are selected and those in which program staff makes that determination. Ideally all defendants within an eligible offense category should be selected, but few programs would appear to have the caseload capacity or the confidence of the prosecutor necessary to achieve this ideal. In programs vesting selection decision in the prosecutor, the weight of the evidence might become a factor in deciding whether to prosecute or divert, rather than the charac-

teristics or rehabilitative potential of the defendant. In any event, this variable renders comparison of differing programs difficult.

(2) Types of charges excluded and types of defendants eligible: It is likewise futile to compare recidivism data generated by programs restricted to first offenders with those dealing with second or third offenders, or to compare programs limited to restricted categories of offenses with those accepting participants from broader offense definitions. In that programs differ widely in these respects, what recidivism data has been generated is of little value.

(3) Diversion method and length of diversion: Most programs vest the decision to divert in the judiciary and the Dade County model, wherein the prosecutor's discretion is relied upon, represents the exception rather than the rule. Obviously, programs will differ in cost-benefit effectiveness in accordance with which method is selected. The more economical program is that in which diversion occurs at the earliest in point of time, thus minimizing the expenditure of criminal justice resources. Also, the time length of the average diversion differs in existing programs from three months to over a year, and the decision as to time period will also have cost-benefit implications.

(4) Types of services rendered: Project Crossroads in Washington, D.C., and the earlier diversion programs modeled upon it, were funded by the Labor Department and the emphasis in staff service orientation was upon employment services and vocational training. Later developing programs were funded by the Law Enforcement Assistance Administration, or other sources, with a re-emphasis upon non-manpower services, such as personal counseling. Service priorities, counselor caseload size, and frequency of counselor-participant contact represent additional variables to which no consensus exists among programs and which further render comparisons difficult.

While factors such as the foregoing limit the relevance of data produced by intervention projects, and render nearly impossible even tentative conclusions regarding the effectiveness of the intervention effort as a whole, the fact that priority decisions must be made with limited funds has further impeded the evaluation effort. Few, if any, programs have been prepared or willing to expend for research, funds which could otherwise be allocated to staff and services.

Besides the inadequacy of research to date, an additional caveat to an optimistic prognosis for the future expansion of diversion programs is the fact that, to date, such programs have not yet demonstrated a degree of permanence that transcends the personalities involved in instituting the program to begin with. In particular, the establishment of such programs has been depedent upon the receptivity of the particular prosecutor, a receptivity tempered by the reality that such an experiment might well entail political risk. As has been noted above, an important attribute of the diversion program is its compatibility with the objectives of both defense and prosecution, yet it is this compatibility

that will disquiet the prosecutor who is attuned to the signals emanating from police, victims and, generally, the more conservative elements in the criminal justice community. And, it should at all times be remembered that, irrespective of the agency nominally administering the diversion program itself, it is the prosecutor who must bear the legal and political responsibility for the dismissal of charges in the successfully terminated participant's case. It has been the unusual prosecutor who has been willing not only to entertain the prospect of cooperation with a diversion experiment, but who additionally has been willing to drop the figurative other shoe and invoke his discretion not to prosecute diversion program participants. The fact that only a small minority of large or middle sized metropolitan areas have initiated diversion programs is an indication that the receptive prosecutor has been the exception and that he will continue to be the exception in the foreseeable future. Equally important, even within jurisdictions served by the exceptional prosecutors willing to experiment with diversion, it has yet to be demonstrated that their successors in office will exhibit the same enthusiasm toward the diversion program they inherit. In view of the all important variables of prosecutor receptivity and political risk, it is at this writing far too early to look upon any existing diversion program as an institution capable of self-perpetration.

Viewed in the perspective of the criminal justice system and its resources, the preceding factors notwithstanding, the diversion experiment appears to offer a valuable and relatively effective resource. Given their capacity to control intake, intervention programs will continue to demonstrate superiority to both incarceration and probation. Yet lest we permit our enthusiasm over intervention to divert us from the pressing need to reform and revitalize the criminal justice system in general, and jail and probation in particular, it should be noted that the capacity of the intervention alternative is limited. If resort to the intervention alternative displaces emphasis from the need for reform of the traditional dispositional alternatives, the intervention experiment will rapidly fall prey to the same problems and flaws as the existing system components. Should the caseload of twenty increase to fifty, should acceptance criteria be relaxed to accomodate heavy court calendars, in short, should intervention be resorted to merely because little else has worked or is working, then what should have remained a limited resource with a limited response will join existing institutions in a morass of ineffectiveness.