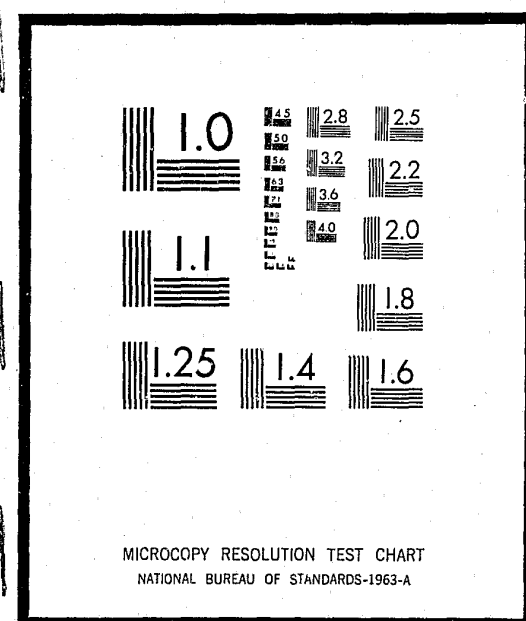


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373-2851

JUVENILE DIVERSION: KEY ISSUES

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This project was supported by Grant #75 NI-99-0081 awarded by the Law Enforcement Assistance Administration, U.S. Department of Justice, under the Omnibus Crime Control and Safe Streets Act of 1968, as awarded. Points of view or opinions stated in this document are those of the authors and do not necessarily represent the official position or policies of the U.S. Department of Justice.

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ABSTRACT

"Diversion" is characterized by definitional and conceptual confusion. An attempt is made to clarify the concepts of: prevention, diversion, alternatives to incarceration, screening, referral, removal, minimization of penetration, process and programs. A crucial issue is the need to develop some kind of coherent framework out of, or in spite of, disparate, overlapping conceptual schemes.

The denotative (explicit) definition is utilized by the theorists while the connotative (subjective) definition is followed by the practitioners. This results in theorists viewing diversion as a "turning aside from further processing" while practitioners emphasize the "minimization of penetration". A discussion of labeling theory highlights this difference of usage.

Diversion is discussed as a decision making process by the juvenile justice system personnel. Dispositional options are reclassified vis a vis diversion options. The complex issue of implementing research relative to diversion process/programs is examined. The problem of the relationship of diversion programs to legal authority is stressed. The impact of diversion is also discussed with an emphasis upon the potential enlargement of the juvenile justice net and the further stigmatization of diverted youth.

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A. Conceptual and Definitional Problems

At the recent National Institute on Crime and Delinquency (NICD) in Minneapolis, a juvenile justice expert introduced his speech on diversion with the preface, "since everybody knows what diversion is, there is no need to define it." The speaker then proceeded to lament the fact that "postincarcerative diversion" has been sadly neglected by both academicians and practitioners. His analytic confusion underscores the ambiguity surrounding the concept of diversion. Consequently, a primary issue is his inadequate conceptualization of diversion.

Preliminary groundwork should distinguish diversion from "prevention" and alternatives to incarceration." Prevention refers to actions taken by law enforcement agencies and/or other agencies; e.g., schools, YMCA, etc., under the auspices of aiding a youth in avoiding initial, coercive contact with the law.

"Alternatives to incarceration" refers to actions taken by law enforcement agencies; e.g., probation, community treatment, etc., ordered by the juvenile court after formal adjudication. Generally, referrals to non-incarcerative alternatives occur after a juvenile has been adjudicated delinquent by the court.

Diversion occurs after a youth's initial contact with an agent of the law (provided that the contact gives law enforcement personnel the opportunity to impose legally sanctioned, coercive control over a youth's actions) and prior to formal adjudication. Diversion involves a cessation (at least temporarily) of formal processing in favor of an informal disposition.

At this point, the conceptual waters become extremely murky. There are a number of distinct activities which occur subsequent to initial contact and prior to formal adjudication. Various thinkers have used their analytic knives to cut these distinct activities into disparate conceptual schemes.

The three dominant frameworks will be outlined. An adequate conceptualization of diversion involves a choice, refinement, or integration of the following systems.

The first group of writers has made a critical distinction between "screening" and "diversion." Essentially, this distinction asserts that while screening provides no referral to a community treatment or prevention program, no service or treatment, and no follow-up, diversion implies all three actions.¹ Thus, Elliot sees diversion as "a process of referring youth to an existing community treatment program or prevention program in lieu of further juvenile justice system processing at any point between apprehension and adjudication."²

Similarly, but with reference to adults, the National Advisory Commission on Criminal Justice Standards and Goals³ refers to diversion as "halting or suspending before conviction formal criminal proceedings against a person on the condition or assumption that he will do something in return." On the other hand, screening "involves the cessation of formal criminal proceedings and removal of the individual from the criminal justice system."⁴

These authors contend that diversion includes "doing something" with or to "diverted offenders." This may involve a "positive problem-solving experience"⁵, the "maximization of service to youth and their families"⁶, or "the imposition of some form of constraint upon the suspect."⁷ This is consistent with Elliott's contentions: "The objectives of diversion are not only to avoid the negative labeling associated with processing in the juvenile justice system, an objective readily achieved through screening, but simultaneously to provide youth with a set of positive experiences, new opportunities, and effective resolutions of specific problems or needs."⁸ This mandate for diversion is premised on "the fact that many youth apprehended by the police have serious medical, mental or social difficulties and are already alienated and disenfranchised from conventional social roles.

Screening these youth out of the justice system may avoid the reinforcement and escalation of these difficulties, but it does little to resolve them."⁹

This conceptualization is close to what Vorenberg and Vorenberg¹⁰ see as the "new" call for diversion. In the same vein, Nimmer distinguishes between "traditional diversion" and "new diversion." The latter refers to "programs that use new funding or facilities to establish diversion (such programs are generally established by statute or federal grant and provide clients with close supervision and intensive services)."¹¹

Although these writers collectively view "diversion" as synonymous with the proliferation of "new diversion programs," there is some dissension as to what constitutes a diversion program. For some, diversion means referral to programs outside the justice system. Sarri likens diversion to "those activities by public officials such as police, intake and probation officers, and so forth that result in direct referral of the juvenile to agencies and persons who are capable of handling the problem outside the jurisdiction of the juvenile justice system."¹² Elliot, who concurs with Sarri, states, "Diversion represents a referral to a community-based program or agency which is independent of the justice system."¹³ The National Advisory Commission, on the other hand, includes programs "run by agencies of the criminal justice system."¹⁴

In sum, this position maintains that diversion encompasses a break with previous practices; e.g., screening, sentence leniency. Diversion is characterized by doing something "positive" with or to the "offender." With reference to juveniles, "doing something" typically involves a form of counseling or treatment. Such "help" is dispensed by a "diversion program" to which a juvenile is diverted. There is disagreement as to whether diversion programs are only those which are "independent of the justice system."

An alternative classification is proposed by Klein, who distinguishes between diversion and referral. Employing a broader notion of diversion than we have chosen, Klein sees diversion as "any process employed by components of the criminal justice system (police, prosecutors, courts, corrections) to turn suspects and/or offenders away from the formal system or to a 'lower' level of the system."¹⁵

Referral, on the other hand, is viewed as "any process by which a diverting agent initiates the connection of the diverted suspect or offender to another agent or agency, usually within the offender's community."¹⁶ Klein suggests there may be either diversion without referral or diversion with referral.

This framework conflicts with the previous position. What Klein calls diversion is very similar to what Elliot, et al., have called screening. These terms are not synonymous, however, for screening means "removal of the individual from the criminal justice system;" diversion, according to Klein, incorporates turning suspects "to a lower level of the system."

Conversely, Klein's "referral" is nearly synonymous with Elliot, et al.'s diversion. Both terms connect the suspect with some other agency. Referral to "outside" agencies as well as to programs run by agents of the justice system are implied by Klein's terminology. As noted before, there is dissension in the first group as to whether programs which are not independent of the justice system are diversion programs.

A third alternative has been presented by Cressey and McDermott, who discriminate between "true diversion" and "minimization of penetration." True diversion occurs if "the juvenile is safely out of the official realm of the juvenile justice system and he is immune from incurring the delinquent label or any of its variations--predelinquent, delinquent tendencies, bad guy, hard core, unreachable." "Minimization of penetration" refers to

"diversion occurring within the juvenile justice system from court to another official or semi-official program." They ask that the concept of diversion be "broadened" in order to incorporate minimization of penetration within its purview.¹⁷

The dimension along which Cressey and McDermott seem to be ordering their categories is the degree of legal authority that the justice system maintains over the "diverted" juvenile. In true diversion, the system's authority over the juvenile is completely relinquished. Where minimization of penetration occurs, legal authority over the juvenile may be attenuated but some form of legal control or coercion is maintained.

Cressey and McDermott's analytic system overlaps with those considered earlier. True diversion includes Elliot, et al.'s screening and Klein's diversion. It also involves Elliot's diversion and part of Klein's referral. Minimization of penetration includes part of the National Advisory Commission's reference to diversion programs (i.e., those run by agencies of the criminal justice system) and the remainder of Klein's notion of referral (i.e., "programs run by agents of the justice system.")

Perhaps the crucial issue is to develop some kind of coherent framework out of or in spite of these disparate, overlapping conceptual schemes. This will involve either a choice, refinement, or integration of the preceding systems. The need for conceptual clarity is obvious: any discussion, say, of legal issues or a survey of research findings on diversion is dependent upon what we call diversion. Conceptual frameworks are elaborate mechanisms for naming phenomena and consequently can be useful visual aids. The problem here is to either devise the visual aid (i.e., conceptual scheme) which all "viewers" of the diversion panorama can employ, or to clearly differentiate one's own conceptual apparatus from earlier frameworks so that others recognize the uniqueness of the visual aid and thereby can focus in on the discussion.

Only by one of these alternatives can we be certain that we are all seeing and discussing the same phenomena.

Addendum

The distinction between process and programs will be a useful beginning for developing a conceptual scheme. Primarily, diversion is a process of decision-making. The choice facing decision-makers is whether or not to "divert" a juvenile. It can be convincingly argued that once a decision is made and implemented, e.g., the juvenile is sent to a Youth Service Bureau, diversion is consummated. However, programs and their methodologies are important to the decision-making process. For example, intake officers of particular courts may have an affinity for Gestalt therapy. A referral program which employs Gestalt therapy as its primary mode of treatment will probably receive a larger number of "diverted juveniles" than another referral program utilizing behavior modification. This distinction between the diversion process and program is a central theme of this chapter.

B. Diversion: Denotation, Connotation, and Affectation

More than most words, "diversion" has different meanings for different people. In this section the task will be to trace the genesis of these different meanings. The spotlight will focus on the disparity between theoreticians and practitioners. It is argued that this disparity of meaning is "not just semantics" but has a substantial impact upon the subjective experience of "diverted" youth. Implicitly, the discussion underlines the critical importance of implementing concepts.

"Diversion," like many words, has denotations and connotations. Denotation is the "explicit meaning of a word." Connotation refers to the "configuration of associative implications constituting the general sense of an

abstract expression beyond its explicit sense." Generally, theoreticians have referred to diversion in its denotative mode, while practitioners refer to diversion in its connotative mode. What are these modes and how do they differ?

Theoreticians, especially those on the President's Crime Commission, were concerned with and promulgated the denotation of diversion: "a turning aside." As conceived by theoreticians, diversion was a response to the failure of the criminal and juvenile justice systems. This failure was framed in terms of the labeling perspective, which provided the theoretical backdrop and support for diversion.

The labeling perspective has its roots in the social ontology of George Mead. Mead suggested that man is active, and in a very real sense he actively creates the objects which constitute his social environment. He writes, "Objects are in a genuine sense constituted within the social process of experience, by the communication and mutual adjustment of behavior among the individual organisms which are involved in that process and which carry it on."¹⁸

Labeling theorists have used Mead's ontology in their discussions of deviance. This application led advocates to reject the notion that deviance is an independent, "social fact."¹⁹ Rather, deviance, like other social objects, is created by men. Becker states, "Social groups create deviance by making the rules whose infraction constitutes deviance, and by applying those rules to particular people and labeling them as outsiders...[D]eviance is not a quality of the act the person commits, but rather a consequence of the application by others of rules and sanctions to an offender."²⁰

Drawing on substantial empirical evidence labeling theorists²¹ dramatized the critical role played by the social audience. These studies poignantly illustrated the large amount of "unofficial delinquency." Because

the vast bulk of delinquency never comes to official attention, theorists argued, rule-breaking behavior, as such, does not lead to formal processing. Consequently, rule violation in itself is not the crucial variable; the social audience is. In this context, Erickson writes, "Deviance is not a property inherent in certain forms of behavior; it is a property conferred upon those forms by the audiences which directly or indirectly witness them. Sociologically, then, the critical variable is the social audience...since it is the audience which eventually decides whether or not any given action or actions will become a visible case of deviation."²²

The process by which the social audience selects out some rule violators was tagged the "community screen." This is akin to a filtering process by which certain individuals are selected out and labeled deviant. It is with reference to this process that Schur claims "deviance is in large part an ascribed status."²³

Labeling advocates contend that the most significant social audience is the official agencies of social control, i.e., the personnel of the criminal and juvenile justice systems. It is argued that these agents, having the recognized authority, power, and procedures to deal with deviants also, by those very means, have the capacity to create deviance. Further, given the social power accorded these agents, their designations or labels of deviance are likely to exercise a profound effect on those so defined.

These theorists are concerned about the effect labeling has on the subsequent development of those defined as deviant. Tannenbaum's well-known "dramatization of evil" attempts to portray how official intervention often generates further deviance.²⁴ Lemert's distinction between primary and secondary deviance is a profound concept: "[D]eviations remain primary deviations or symptomatic and situational as long as they are rationalized or otherwise dealt with as functions of a socially acceptable role....When a

person begins to employ his deviant behavior or a role based upon it as a means of defense, attack, or adjustment to the overt and covert problems created by the consequent societal reaction to him, his deviation is secondary."²⁵ Labeling theorists see official reaction to role-violating behavior as a critical link in the chain of future deviance.

In sum, the labeling school views deviance as a social creation; deviants are selected through a filtering process, and the deviant label tends to push people into a deviant career with social control agents inadvertently encouraging and promoting deviance.

It is often said that every public policy designed to control crime implicitly rests on a theory of crime causation. The statement can be reversed: every theory of crime causation implies a policy for the control of crime. The general strategy for crime control implicit in labeling theory is the "non-interventionist" strategy. This strategy was formulated most explicitly by Schur, who writes, "the basic injunction for public policy becomes: leave the kids along whenever possible."²⁶

Schur's injunction was foreshadowed by Lemart's paper (1967) for the President's Crime Commission, in which he called for a policy of judicious non-intervention. He argues, "If there is a defensible philosophy for the juvenile court it is one of judicious non-intervention. It is properly an agency of last resort for children, holding to a doctrine analogous to that of appeal courts which require that all other remedies be exhausted before a case will be considered. This means that problems accepted for action by the juvenile court will be demonstrably serious by testable evidence ordinarily distinguished by a history of repeated failures at solutions by parents, relatives, schools, and community agencies."²⁷

As seen by theoreticians, diversion is a logical derivative of these general policies. Diversion was advocated as a means for "turning aside"

juveniles from the formal processing of the juvenile court. In theoretical terms, diversion would prevent "secondary deviation." Youth Service Bureaus were called for in the hope that the availability of alternatives would lead to greater rates of diversion. The President's Commission states that the use of community agencies "avoids the stigma of being processed by an official agency regarded by the public as an aim of crime control." It also suggested, "Referrals by police, school officials, and other community agencies should be on a voluntary basis."²⁸

In sum, the theoreticians denoted something very explicit with reference to diversion: the turning aside of youth from formal processing. This mandate was premised on theoretical perspectives and empirical evidence on hidden delinquency. Youth Service Bureaus were part of the diversion strategy. Participation in community agencies was to be voluntary and their utilization, it was hoped, would reduce the stigma associated with formal processing.

In implementing diversion, practitioners have imputed to it a new "configuration of associative implications." Consequently what diversion connotes for practitioners is often in conflict with what diversion denotes for theoreticians. Specifically, practitioners have come to see diversion as a disposition which allows them to maintain some amount of social control over a juvenile. Teilmann, et al., in a study of police diversion report: "In summary, it can be said that although there is a desire in some departments to divert juveniles from the justice system, the more common feeling is that referral should be used as an alternative to counsel and release."²⁹ Similarly, Lincoln, in her study of a pilot diversion project, concludes: "It is of great interest that officers as frequently referred juveniles who would have been released outright as they referred offenders who would have

been treated severely and sent to court. Ostensibly, referral was designed to substitute for court treatment, but it is often a substitute for release. ...[Some] officers used referral...as a form of social control."³⁰

The meaning of diversion as an alternative to system involvement has been replaced by diversion as an alternative to simple release. Ironically, one ramification is that while one of the commonly cited reasons for diversion is to reduce the overload and purview of the juvenile justice system, diversion may, in fact, be extending the system even further than has previously been the case. The argument that diversion may actually function to extend the system is supported by the recent NEP on Youth Service Bureaus. It appears that most YSB's operate in close conjunction with the juvenile justice system and by means of reports, conferences, etc., facilitate renewed processing of the cases in question. It is through such cooperation that more youth are coming under the purview of the justice system in the name of diversion.

A second discrepancy is the practitioners' preoccupation with programs as opposed to process. This emphasis stems, in part, from their inability to conceive of delinquency as a process.³¹ Rather, they tend to view delinquency from a treatment perspective as an "independent social fact" requiring programmatic intervention. This leads to a proliferation of programs employing a variety of treatment methodologies. As a result, diversion, for many practitioners inherently means they are concerned with the "appropriate" treatment methodologies rather than with the actual process.

In sum, through implementation and its attendant perils, diversion has assumed new meanings manifested in an increase of social control and a concern with programs and proper modes of treatment.

A neglected aspect of diversion is the subjective experience of those who are diverted. Descriptive data of "what it's like to be diverted" or

"what it means to be diverted as opposed to being processed by the juvenile court" simply does not exist. Because diversion is grounded in a theoretical perspective recognizing the critical importance of a person's subjective assessments of situations, this omission must be remedied.* Three crucial variables affecting the subjective experience of diverted youth can be enumerated. First, it is likely that a juvenile's perception of diversion will be profoundly colored by the perceived degree of voluntariness accompanying the youth's "agreement" to be "diverted." Secondly, the youth's experience will probably vary with the perceived extent of legal authority the justice system maintains over the juvenile. Finally, the youth's assessment of diversion will be affected by whether he has been sent to a referral program or simply released.

* A major task of our research effort will be directed toward the collection and evaluation of divertees' comments on diversion.

C. Diversion: A Decision-Making Process

A fundamental aspect of diversion is decision-making. The premises on which decisions are made and the way in which they are consummated constitute one of the most significant issues in the diversion area. This section examines some of the more pertinent problems implied by the decision to divert.

All decision-making in the criminal justice system is characterized by considerable discretion. This situation is exacerbated in the juvenile justice system with its individualized treatment orientation and social agency atmosphere. The rationales for the use of discretion are: (1) Limited resources; the justice system does not have the resources necessary for processing all law violators.* (2) Ambiguity in juvenile codes; the inability to precisely describe every act prohibited by these codes engenders "creative interpretation" and discretion.+ (3) Individualized justice; the argument that justice requires that the individual circumstances of a case be assessed.++

Diversion decisions are also largely discretionary. The decision to divert involves a choice among alternatives. Davis states, "A public officer

* For an account of plea bargaining, see Alexander Smith and Harriet Pollock, Crime and Justice in a Mass Society (Lexington: Xerox College Publishing, 1972), p. 153; for an account of police discretion, see Wayne LaFave, Arrest (Boston: Little, Brown and Company, 1965), p. 102.

+ For a cogent discussion, see Kenneth Davis, Discretionary Justice (Urbana: University of Illinois Press, 1971), pp. 15 - 16.

++ For a general discussion, see Kenneth Davis, Discretionary Justice (Urbana: University of Illinois Press, 1971), p. 17; for an explanation of plea bargaining in terms of individualizing justice, see Donald Newman, Conviction (Boston: Little, Brown and Company, 1966), p. 77.

has discretion whenever the effective limits on his power leave him here to make a choice among possible courses of action or inaction."³² Reiss says, "Where an agent is free to choose among alternatives in making a decision, we shall speak of his exercising a choice. When that choice is not open to review, either de jure or de facto, we shall speak of the choice as discretionary."³³ The alternatives confronting decision makers, usually police or intake officers, include, but are not limited to: counsel, warn and release, informal probation, referral to agencies outside the justice apparatus, referral to agencies inside the justice system, and filing a petition. These alternatives may be reclassified: (a) diversion out of the system, (this includes counsel, warn, and release), and referral to agencies outside the system; (b) diversion within the system which consists of informal probation and referral to agencies inside the system; (c) referral for formal processing, which is synonymous with the filing of a petition. This reclassification is the basis for the analysis of the decision-making processes of justice personnel.

Although discretion is primary in decisions to divert the decisions are not necessarily arbitrary or patternless. Nor does the degree of discretion perceived by officials remain constant in all cases. For example, where serious crimes; e.g., homicide, rape, etc., or repeating offenders are involved, suspects are referred for formal processing as a matter of course. The great bulk of cases, however, are of a less serious nature. Black and Reiss estimate that only five percent of police encounters with juveniles involve felonies. Sixty percent of the cases involve nothing more than juvenile rowdiness or mischievous behavior.³⁴

Researchers, focusing on the large number of "non-serious" cases, have attempted to induce the extralegal factors and processes which influence officials' decisions. Some of these research findings will be presented.

Two considerations, however, are necessary. First, few researchers have specifically addressed the decision to divert, no researchers have employed the categories for classifying decisions used in this report. For the most part, where decisions to arrest have been studied, the classification scheme is simply "arrest" or "no arrest." The rationale for including findings of these studies is that some of the same factors and processes affecting decisions to arrest also influence decisions to divert. The second consideration is that intake offices of the juvenile court have been neglected by researchers.

Many observers have noted that arrest rates vary considerably among different police departments. This variation remains when differentials in the crime rate are held constant. The question, "What is it about the organization of police departments that engenders high or low arrest rates?" was asked. Wilson discovered that professionalism is an important factor in determining whether a police department had a high or low arrest rate. professional organization is "governed by values derived from general, impersonal rules which bind all members of the organization and whose relevance is independent of circumstances of time, place, or personality."³⁵ A police department with a high degree of professionalism tends to arrest a larger proportion of youthful suspects than a department with a low degree of professionalism. Wilson accounted for this disparity by postulating that officers in the professional departments tend to "treat juveniles according to rule without regard to person," while officers in the fraternal police department tended to "treat juveniles primarily on the basis of personal judgment and only secondarily by applying formal rules."³⁶

Sundeen conducted a similar study. He noted that in Los Angeles County diversion rates of police departments varied from two to eighty-two percent. Curious about this anomaly, he studied police juvenile officers, employing a

measure of professionalism similar to Wilson. He concluded, "police characteristics alone (professionalism and community attachment) do not explain police diversion of juveniles."³⁷

Given their training and education one would presume that professionalism also influences intake officers' decisions. The impact of professionalism, however, is probably mitigated by the treatment ideology which encourages dispositions based on the individual cases.

Another crucial factor in decision outcomes is the relationship between "diverting" organizations and "receiving" organizations. Unfortunately, little systematic research has concentrated on this relationship's impact upon diversion. Available evidence suggests that referrals are greater when the relationship between diverting officers and program personnel are "friendly." Cressey and McDermott, for example, in one county found that the close, informal working relationship between intake officers and personnel of a referral program led to a large number of referrals to that agency.³⁸ Teilmann, with reference to police, discovered that "optimism is associated with in-house programs (those programs conducted under the auspices of the police department) and pessimism with outside referral programs."³⁹ Rates of referral tended to be larger for in-house programs. While it is hardly surprising to find that referral will be greater where inter-organizational relationships are more amiable, it raises serious questions about the extent of legal authority maintained over youth. This question will be broached more systematically in the next section.

The dispositional decisions of police and intake officers usually occur subsequent to interaction with the juvenile. Assessment of that interaction is often crucial in determining which disposition is chosen. A number of studies on police illustrate the importance of police-juvenile interaction.

Piliavin and Briar argue that a juvenile's attitude and misdemeanor are important factors in police decisions. "Both the decisions in the field-- whether or not to bring the boy in--and the decision made at the station-- which disposition to invoke--were based largely on cues which emerged from the interaction between the officers and the youth, cues from which the officer inferred the youth's character. These cues included the youth's group of affiliations, age, race, grooming, dress and demeanor."⁴⁰

Black and Reiss were curious about the fact that black juveniles were arrested more often than white juveniles, holding offense constant. They report the differential rate of arrest is the result of complainants' preferences: "Police sanctioning of juveniles strongly reflects the manifest preferences of citizen complaints in field encounters."⁴¹

Ferdinand and Luchterhard, noting the arrest differential between blacks and whites, attribute it to "social distance." They hypothesize the greater police officers' familiarity with the juvenile, the less harsh the disposition. "It may be that because the police are often from the same neighborhoods and quite familiar with many white adolescents they ultimately must arrest, they are in a reasonably good position to assess the youth's overall prospects in the community, and to adjust their decisions accordingly." But since Easton police are almost entirely white, they cannot have the same kind of broad familiarity with black delinquents and cannot bring the same informal understanding of their situation to their cases. Hence, as far as black delinquents are concerned, the police are forced to make dispositions on the basis of more superficial criteria."⁴² It is reasonable to assume that the same kinds of interactional dimensions affecting police dispositions influence the decisions of intake officers. Unfortunately, there is no systematic data to substantiate that assumption.

A final consideration is the personal contingencies affecting an officer's choice of dispositions. Cressey and McDermott propose that intake officers' decisions are guided by a personal sense of justice. Other determinants include the officer's own ideas about crime causation and his philosophy of corrections. His knowledge of available community resources, relationship with other personnel inside and outside his department, and the size of his caseload all affect the degree and direction in which juveniles are diverted.

In conclusion, a central problem in the area of diversion is to construct a systematic statement, relating all of the various influences considered above, into a coherent discussion.

D. Diversion Patterns

An indirect path to the decisional process is implicit in asking, "who is diverted?" It appears that decisions to divert are not random; the business of analysis is to determine why or how the decisions are patterned as they are. But the first problem is inducing the operative patterns. The patterns one discovers are necessarily dependent upon the question one asks. An important question is, "who is diverted?" The answer should be interpreted from a socio-legal framework.

It may be said that diversion is a "new" dispositional alternative falling between "screening" and "referral" for formal processing. A key question is, what proportion of youths now diverted would have been "screened out" from the system if the diversion alternative were not available? Similarly, what proportion of youths now diverted would have been referred for formal processing were the diversion alternative not available?

Other legal considerations are "offense categories and previous records." By classifying youths along these dimensions we can ascertain two additional

patterns. It is likely that diverted youth are suspected of less serious offenses and probably have less extensive records than juveniles who are referred for formal processing.

The sociologist is interested in patterns having to do with age, race, sex, and socio-economic status. Important patterns emerge when the question, "who is diverted?" is answered in terms of these categories.

It is necessary to establish a socio-legal profile of diverted youth. From this profile we will be able to deduce some of the patterns manifest in the decision to divert. Those patterns, in turn, will supply the material from which explanation and analysis are derived.

A final problem is to determine who should be diverted, i.e., proffer some policy recommendations with reference to diversion. This involves two inter-related issues. First, one must state what the goal of diversion should be. That is, should the goal of diversion be to maximize the number of juveniles diverted out of the system? Should the goal of diversion be to extend treatment services to as many children as possible? Or, is the goal of diversion some admixture of diverting out of the system while also extending services?

Once the goal of diversion is established the next issue is the formulation of formal guidelines which officials can employ in making their decisions to divert. These guidelines should be logically deducible from the goals of diversion.

This section has looked at the decision to divert in terms of three questions: What types of processes influence the official in his decision to divert? Who is diverted? Who should be diverted? These issues constitute the core of diversion.

E. Diversion: The Problem of Legal Authority

The recent mandate for diversion is premised on two fundamental propositions. The first proposition is theoretical and states that the justice system inadvertently encourages "secondary deviance." Lemert writes, "the interaction between child and court and unanticipated consequences of the processing of a child in many instances contributes to or exacerbates the problem of delinquency."⁴³ This proposition led to demands for "judicious non-intervention"⁴⁴ and "radical non-intervention."⁴⁵ Diversion from the juvenile court is one manifestation of these strategies.

But a more pragmatic consideration is implicit in the enthusiasm for diversion. Diversion, if implemented properly, would retain the scarce resources of the juvenile court--time, money, and professional personnel--for the most "serious" cases, i.e., those juveniles who were most in need of treatment. Youth who "required" minimal forms of treatment and who had previously been sent to the juvenile court to obtain them, would now be referred to social service agencies where the necessary treatment would be available. Diverting "marginal" youngsters from the juvenile court would give juvenile court personnel the opportunity to "work with" those who were in "desperate need" of treatment.

In different ways, both of these rationales inferred a reduction in the amount of legal authority the justice system would maintain over juveniles. Theoretically, the encroachment of legal authority over youth was deemed stigmatizing and was presumed to generate further deviation. Pragmatically maintaining legal authority over large numbers of juveniles is expensive and, in cost-benefit terms, thought to be an unwise expenditure of limited funds. Diversion should substantially reduce the amount of legal authority maintained over juveniles. A critical issue is the extent

of control law enforcement agencies and their personnel exercise over diversion processes, programs, and diverted youth.

The problem of legal authority in diversion has not been neglected in the literature. Klein has addressed this issue in reference to "resource location" and the "locus of control." With regard to police, resources for diversion programs may be "in-house"--located within the department, or "outside"--situated in the larger community. In-house programs employ either specialized staff, e.g., social workers or police who function as counselors to deliver services, counseling, and supervision to "diverted" youngsters. "Outside" programs receive referrals from police. In many instances, staff in outside programs are paid by and accountable to their own agencies. In some cases, staff accountability to police is increased through a "purchase-of-services arrangement whereby agency fees for counseling of diverted offenders are controlled by the police."⁴⁶

Raising the question of the locus of control over referral programs, Klein notes a tension between police and community agencies. He writes, "many police in diversion programs seek as much control over the counseling operation as possible. Failing this, they want to be in a position to 'blow the whistle' on ineffective counseling by withdrawing support, funds, or client population." On the other hand, "many community agencies are nervous about police or justice system control. They fear regimentation, a narrow focus on recidivism rather than more general personal adjustment, and stigmatization of their own programs by association with law enforcement agencies."⁴⁷

Klein's comments, though useful, are limited to the control that law enforcement agencies exercise over diversion programs. Concern has also been expressed about the amount of control these agencies have over the

diversion process. In their research on intake officers, Cressey and McDermott discovered many variations in how the decision to divert was consummated. In many situations, the decision to divert was made by the intake officer using the vaguest sorts of criteria. In other cases the decision to divert was made, in part, by a staff member of a diversion program who "visited" a juvenile detention unit in search of "qualified clientele." This type of decision was possible, it seems, because such a program had close relations with juvenile detention.

In addition to programs and process, the extent of legal authority over the "diverted" juvenile is crucial. This question was broached directly by Cressey and McDermott. They distinguished between "true diversion" and "minimization of penetration." True diversion occurs where legal authority over the juvenile terminates, the juvenile being "technically free to tell the diverter to go to hell." Minimization of penetration occurs where legal authority, though attenuated, can be re-activated if the conditions of "diversion" are violated.⁴⁸

F. The Impact of Diversion: Enlarging the Net, Stigmatization, and Decriminalization

Many have expressed concern that diversion, rather than decreasing the juvenile justice system's scope of control, may actually function to increase it. "Enlarging the net" refers to the processes by which the jurisdiction, both formal and informal, of the justice system increases. It is feared that diversion may not be functioning to divert those who would have otherwise been processed, but rather refer youth to diversion programs who would have otherwise been "released." Norval Norris has similar concerns. "I must express a qualification to too ready an acceptance of the beneficence of these movements toward reducing the reach of the

criminal law and abating imprisonment by the means of diversion from the criminal justice system. It seems to me that these processes will be accompanied by an increase in the number of citizens who are brought under social control."⁵¹ A major issue, then, is to determine whether or not diversion is functioning to increase the system's scope of control, by drawing into the justice system those who previously would have been released.

The stigma associated with referral programs is another major issue. Lincoln proposed that "treatment via the referral programs may be felt by juveniles as stigmatizing rather than as an escape from the stigmatization of court handling."⁵² Stigma associated with referral programs may arise in two distinct ways. First, referral programs may reduce the "normalization" responses by officials. When officials view rule violations as "normal" they tend to ignore the act and leave its perpetrator alone. If increased numbers of juveniles come under jurisdiction because diversion has become an alternative form of social control, normalization responses will be reduced and the amount of stigma will be increased.

Stigma may arise in a second fashion. It is likely that participation in referral programs presumes guilt.⁵³ If community, social control agents, and even the youth see program participation as evidence of guilt, stigma becomes attached to the programs themselves much like stigma is now associated with juvenile court. If theorists are correct, referral may engender labeling and labeling may generate secondary deviance. Participation in legal and paralegal programs may produce higher rates of subsequent deviance.

The problem of stigma may be compounded by referral programs if participation is premised on "keeping out of trouble" or "enthusiastic cooperation" with program activities. Youth who fail to meet these conditions are terminated from the programs and are referred to juvenile court for

further processing. In these instances, they are not only labeled delinquent by the court, but also tagged as a "failure" because they were dropped from the diversion program. This increased stigma may lead to even higher rates of secondary deviance than those who had "merely" been officially processed, other things being held constant. It would appear where referral programs become in any way a part of the justice apparatus the problem of stigma remains pertinent.

We have pointed out that diversion is part of a larger strategy designed to decrease the justice system's jurisdictional scope. This larger strategy includes the notion of decriminalization. Decriminalization refers to decreasing the system's jurisdiction by repealing criminal and juvenile statutes. One manifestation of this movement is the current call for the repeal of status offenses. Those who advocate decriminalization suggest that the most effective means of reducing the justice system's scope of control is to decrease its jurisdictional boundaries. As these boundaries are determined, in large part by statute, repealing statutes will necessarily lead to such a reduction.

Although decriminalization may be the most technically efficient means of narrowing scope, many argue that it is not politically feasible. Apparently, some form of political inertia is associated with extant statutes. In response to this infeasibility, diversion has been seen as a compromise and a stepping stone. Advocates contend that diversion is better than nothing and it constitutes a first step toward decriminalization. Both of these rationales are questionable. Having dealt with the first argument, we now proceed to analyze the second.

"Serious" cases represent a substantial risk to the program's success and a potential threat to the program's existence should the "serious"

offender "fail" in some spectacular manner, e.g., commit another serious offense. Because diversion programs are concerned about their survival and because they desire to be "successful," they choose low-risk cases, amenable to "treatment."

Referral programs are organizations. Organizations once established tend to persist even after their original purpose has been fulfilled. Therefore, it is likely that referral programs will persist. Two processes are responsible for this result. First, the new organization develops ties with other organizations. These other organizations begin to depend on the services and functions performed by the new organization. This interdependence tends to engender organizational persistence. Secondly, those in the new organization develop a vested interest in its maintenance. Desiring money, security, and/or preservation of status, organizational members tend to resist attempts to remove the organization.

This line of reasoning raises an interesting possibility; those who are dependent upon referral programs and the very staff of those programs may be those who most vehemently oppose the decriminalization of status offenses because status offenders constitute the basic resources of referral organizations. The decriminalization of status offenses will reduce those resources and threaten the existence of the organization. This argument raises serious questions about the "gradualistic" approach to decriminalization. It may be that diversion will act as a stumbling block rather than a stepping stone to decriminalization.

G. Issues in Diversion Research

The evaluation of diversion processes and referral programs can produce the kind of knowledge required to promote informed policy. Informed

policy, of course, depends on scientific research, which is why it is unfortunate that much research in the area of criminal justice in general, and diversion in particular, ignore major difficulties in the research process. This neglect can lead to serious questioning of research findings. In this section we will raise some of the issues confronting those who conduct research in the diversion area.

Research on diversion, as in any area, is dependent on the questions asked and therefore also on the proper conceptualization of diversion. Most research has not been based on a proper conceptualization of diversion. In fact, there has been very little research on diversion, the question of conceptualization aside. What research has been done investigates programs rather than process. We have remarked earlier that diversion is a process of decision making. A crucial area of research, then, is discovering how decisions to divert are made. Such research would necessitate several studies on a variety of different levels: 1) Inter-organizational: how, for example, the inter-organizational relations between police and referral programs affects police decisions to divert juveniles; 2) Intra-organizational: look at how the organization milieu of the intake office, for example, affects intake officers' decisions to divert; 3) Interactional: how the inter-personal dynamics between officials and juveniles affect officials' decisions to divert; 4) Social-Psychological: how officers' attitudes, racial and class backgrounds affect officials' decisions. One might also study how these various levels interact and how this interaction affects decisions to divert. For example, one might look at the interaction between the organizational milieu of the intake office and the social-psychological makeup of the intake officer and discover how the "working personality" of the intake officer is generated and how it affects the officer's decisions to divert.

Most studies, however, focus on programs. This neglect of the diversion process has political overtones. Diversion is part of a larger, political issue: Crime. Given the politics, the publicity, and the general public concern over crime, it is not surprising that funded research relates diversion to crime-rates. This generally means research emphasis is on diversion programs and their impact upon recidivist rates. In our concern for programmatic effects on crime rates, we tend to ignore the core of diversion, the decision-making process. With all these pressures on researchers to evaluate programs, it is understandable that research tends to coagulate there. It is somewhat disconcerting, however, to find that this programmatic research manifests a number of fundamental flaws.

The primary measure employed for assessing the success of referral programs is recidivism. A program is deemed successful if it reduces the amount of "recidivism." There are two major issues which may be raised about this measure. First, how reliable is it? Second, how appropriate is it?

Many have noted that recidivism more often measures the behavior of officials than it measures the behavior of offenders. Where recidivism is synonymous with arrest rates, police decisions to arrest determine, to an unknown degree, the recidivism rate. It is well known that police are not aware of every crime committed, that they do not always locate the suspect of a known crime, that even when a suspect is located he or she is often not arrested, and they do make mistakes by arresting "innocent" people. It follows that arrest rates measure much more than just the extent of crime in a community. They are more useful for describing the decisions of police. This being the case, recidivism rates which are synonymous with arrest rates are unreliable. Not only are rates of

violations largely the reflection of official behavior, but the fact that those on probation and parole are subject to more restrictions in the form of probation and parole conditions serves to exacerbate the unreliability of these indicators as measures of recidivism. Perhaps one solution to reliability problems is the self-report survey of criminal behavior. Simply asking program participants if they have committed any crimes in the last three months is likely to generate more reliable measures than the aforementioned techniques. Unfortunately, self-report studies have not been widely employed in diversion programs.

Recidivism, as employed, is not a very sensitive measure in that it neglects the "improvement" or "deterioration" denoted by future criminal activity. Suppose, for example, a juvenile is arrested for burglary and "diverted" to a referral program. Upon successfully completing the referral program he is arrested and adjudicated for truancy. His re-arrest and "conviction" make him a recidivist. But looked at in another way, he has "improved;" his transgressions against the social order have become less serious. The same can be said in the opposite circumstances, where the youth has gone from truancy to burglary. In this case the juvenile's conduct has "deteriorated."

A second major issue regarding recidivism is its "appropriateness." Should recidivism be the only measure of a referral program's success? Perhaps measures of "personal adjustment" would also be warranted when diversion programs are concerned with the personal development or growth of the youth. Neglecting "adjustment" measures ignores a crucial aspect of the program.

In addition to recidivism, some other measure is required to evaluate diversion. One alternative might be called a "fairness" scale---a device

to ascertain whether decisions to divert were being made uniformly.

Another alternative could be a "coerciveness" scale. In the original formulation, the juvenile's participation in a referral program was to be voluntary. A coerciveness scale would measure how voluntary the juvenile saw his participation in a referral program.

Another problem encountered in evaluation of referral programs is the research design. Basically, this problem involves the dangers of "matching" as contrasted with the safeguards of "randomization." Because much research is separated from the actual working of the program, researchers must often utilize a weak research design. This accounts for many studies where the "matching design" has been used. The idea behind matching is to make, through the use of ex-post facto procedures, control and experimental groups as much alike as possible. This involves "matching" subjects on all relevant characteristics. Presumably, this insures that the participants in the two groups are alike except for one difference: some subjects are in an "experimental" group and receive an "experimental treatment," while others are in a control group and do not receive the experimental treatment. Any subsequent difference between the behavior of the two groups, is ostensibly "caused" by the experimental treatment, in this context, the diversion program. The problem with this design is that it is nearly impossible to match the two groups on all relevant characteristics. As a result of this asymmetry, rival hypotheses may account for the difference between the group's subsequent behavior. Zimring, in a re-analysis of the Manhattan Employment Project, found that those in the experimental group were more highly motivated than those in the control group. Zimring implies that this higher level of motivation may account, in part, for the experimental group's lower rate of recidivism.⁵⁴

The most effective way of reducing the number of rival hypotheses is to randomly assign subjects to different groups. Randomization functions to "cancel out" the differences between control and experimental groups. Any behavioral differences between the groups after the experiment, can be safely attributed to the experimental treatment, i.e., the referral program. Unfortunately randomization often conflicts with practitioners' needs; hence, the relative infrequency of such designs.

NOTES

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