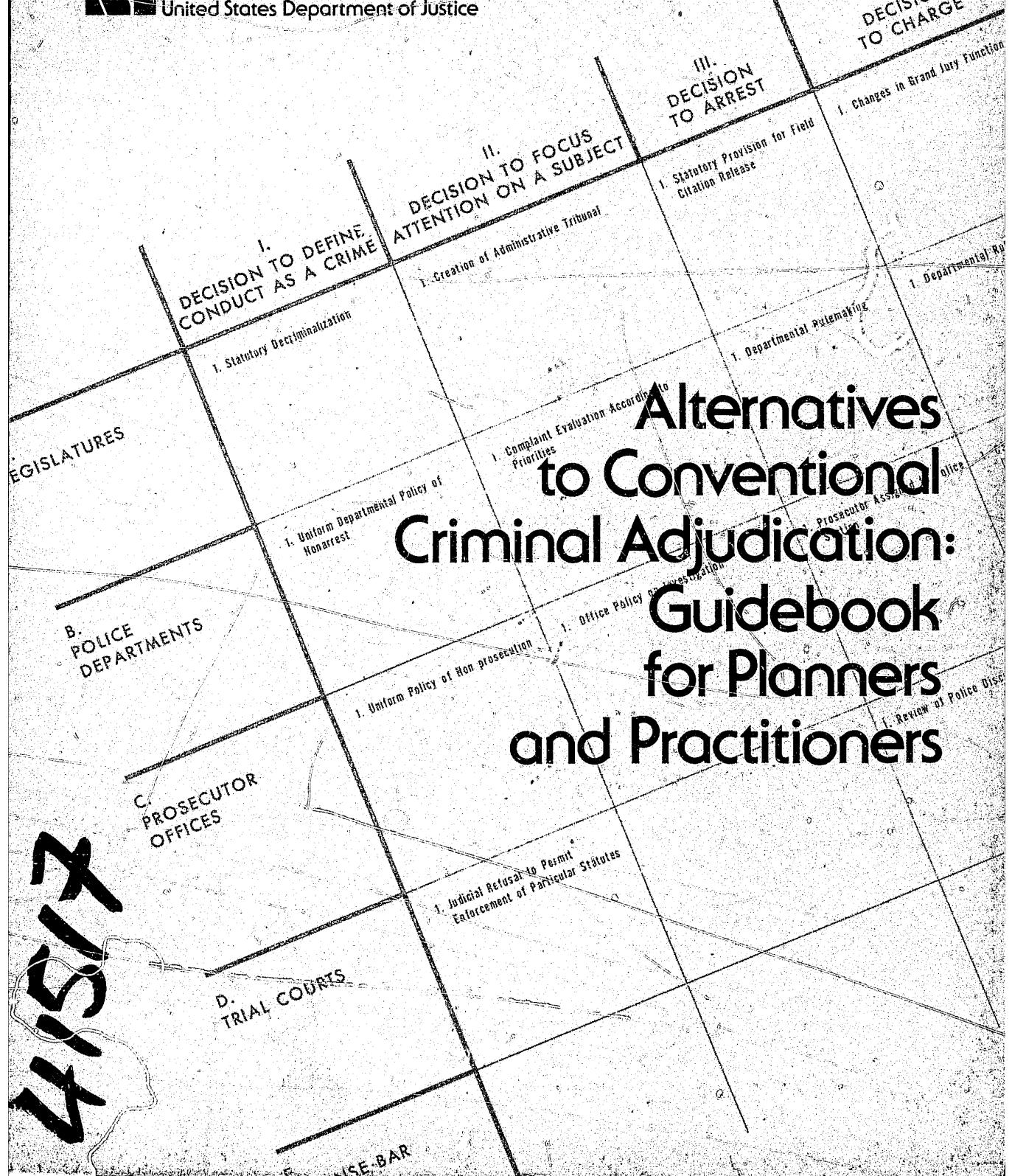




National Institute of Law Enforcement and Criminal Justice
Law Enforcement Assistance Administration
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ALTERNATIVES TO CONVENTIONAL CRIMINAL ADJUDICATION: GUIDEBOOK FOR PLANNERS AND PRACTITIONERS

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ABSTRACT

The primary objectives of this study were to identify and examine the current range of alternatives to conventional adjudication; to determine the impact of these alternatives on the activities of criminal justice agencies; and to present an overview of organizational, legal and evaluative issues and concerns relative to the adoption and implementation of an alternative.

The researchers collected and analyzed a large amount of written documentation and evaluative reports on alternative projects throughout the country and in addition, visited over twenty cities to examine their alternative procedures. The results of this research effort are contained in two documents, *The New Justice and Alternatives to Conventional Adjudication—A Guidebook for Planners and Practitioners*.

The objective of the *Guidebook* is to describe a variety of alternative procedures and programs from which prosecutors' offices, courts, other criminal justice agencies and communities may select those most responsive to their own problems or operating needs. The *Guidebook* is especially designed for those persons involved with the planning and implementation of alternatives. Issues relative to the establishment and applicability of alternative models in various types of jurisdictions are discussed. The *Guidebook* points out concerns that should be addressed and discusses some of the common pitfalls encountered by alternative programs.

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**PART 1
OVERVIEW**

CHAPTER I. INTRODUCTION

"When I was Governor of Georgia, we stopped treating alcoholism as a crime to provide increased medical help to alcoholics and to free our police and courts to concentrate on violent crimes."¹ In these few words President Carter described an alternative to the ineffective "revolving door" criminal trial of the public inebriate. Therapeutic help for alcoholics is one of many alternatives described in this report. Over three-fourths of this guidebook offers practical alternatives for the processing of many types of lesser offenders and offenses. This extensive survey of practical and promising innovations is fitted within a broader perspective or an overview of alternatives, which deals with the reasons for their trial and adoption across the nation. Coupled with the overview is a summary of the planning tasks which lie ahead for those who wish to consider alternatives to conventional adjudication—new or different ways of handling less serious offenses and offenders. The emphasis in this guidebook is upon those alternatives which are related to or are likely to have a major impact upon the courts and the adjudicatory process. These alternatives need to be distinguished from those designed primarily to affect the correctional system or process. Many alternatives to conventional adjudication have generated initial enthusiasm and acceptance by criminal justice innovators, participants, and the general public. Presented here is evidence of vast social experimentation, with special emphasis upon the needs and interests of the planner and implementer.²

¹ Speech by Governor Carter, October 15, 1976, Cobo Hall, Detroit, Michigan.

² The more historical and theoretical aspects of the alternatives movement are discussed in a companion monograph. David E. Aaronson, Bert Hoff, Peter Jaszi, Nicholas N. Kittrie and David Saari, *The New Justice—Alternatives to Conventional Criminal Adjudication*, Institute for Advanced Studies in Justice, The American University Law School, November, 1977. (Forthcoming by the U.S. Government Printing Office.)

A. The Importance of the Alternatives Movement For Planners and Practitioners

In 1976, the Chief Justice of the United States, Warren E. Burger, defined a national need:

... what we seek is the most satisfactory, the speediest and the least expensive means of meeting the legitimate needs of the people in resolving disputes . . .

First: Ways must be found to resolve minor disputes more fairly and more swiftly than any present judicial mechanisms make possible . . .³

The dissatisfaction with the administration of justice, especially in less serious criminal cases, as expressed by Chief Justice Burger, reflects a dominant national theme. A central thesis of the alternatives movement is that our criminal courts, patterned on an adversary model for the resolution of social conflicts, are an imperfect—and often inappropriate—societal response to the processing of many offenders, especially those charged with minor criminal offenses or offenses involving no substantial factual disputes. In many lesser criminal cases the process of conventional adjudication may be too time-consuming, too expensive, somewhat irrelevant to, or even inconsistent with, achieving effective dispositions. Recently, the overwhelming workload placed upon criminal courts by increasingly efficient law enforcement creates a new impetus for the adjudicatory alternatives movement. Alternatives seek immediate relief for the overburdened criminal justice system: through simpler, less expensive, more effective and fairer dispositions.

Adjudicatory alternatives—consisting of varied policies, programs, processes, and institutions—must be distinguished from "correctional" alternatives. While these two movements share common features,

³ Warren E. Burger, Chief Justice of the United States, *Agenda for 2000 A.D.—A Need for Systematic Anticipation*, Keynote Address at Pound Conference, St. Paul, Minnesota in 20 *Federal Rules Decisions* 93 (June, 1976).

correctional alternatives are concerned with the correctional dispositions of offenders after adjudication. Correctional alternatives are therefore concerned with the substance of the criminal sanction, and with the application of retribution, incapacitation, rehabilitation, and deterrence. On the other hand, adjudicatory alternatives have a totally different thrust, seeking more effective ways or procedures for ascertaining responsibility or innocence and for imposing sanctions upon those charged with crime. Although adjudicatory alternatives often aim for more humanitarian or individualistic disposition of offenders, the adjudicatory alternatives can serve also those seeking a more efficient and speedy determination of guilt or innocence.

What are the criminal justice problems in response to which "alternatives" have emerged? These include the best publicized and most widely-cited shortcomings of the traditional criminal court functioning: delay, overcrowding, high cost, offender recidivism, and public alienation. Rather than attempt to address these problems directly, however, alternatives often attack the sources of dysfunction which underlie them:

- Inappropriate subject matter jurisdiction of the courts (and thus of the institutions which funnel cases to the courts);
- Ineffectiveness of dispositions in terms of their impact on individual offenders, on victims, and on society at large; and
- Disparities in the treatment of individual offenders and victims—ranging from the obviously inhumane to the unjustifiably lenient.

Every core problem of criminal justice system functioning can be categorized under one of these general headings; every "alternative to conventional adjudication" is responsive to the problems making up one or more of these natural groupings. It is not always easy to determine what problems a given alternative is *intended* to address. It is still more difficult to determine the problems on which the effects of a given alternative are *actually* felt. Yet this guidebook attempts to classify particular alternatives according to the aims they are employed to achieve. Readers will undoubtedly discover new utilities for many of the alternatives described; nevertheless, even a preliminary discussion of alternatives as reforms responsive to particular system deficiencies may serve as a starting point for more thoughtful and creative resort by criminal justice workers' to alternatives as problem-solving tools.

In responding to system deficiencies, alternatives to conventional adjudication reveal differing strategies for change:

- Some alternatives attempt to modify the way in which an offender passes through the current criminal adjudication system;
- Other alternatives seek different methods for processing cases currently handled by the criminal courts;
- Others seek to remove certain categories of offenses or offenders from the sanctioning process altogether, without providing a new forum or conflict-resolution mechanism to take the place of the old.

These three categories represent general trends in the alternatives movement. The first consists of alternatives which stress system reform or "diversion" from the criminal justice system; the second represents the rise of "popular," "community" and "administrative" models of the criminal process; and, the third involves measures of "decriminalization." Often one or more alternatives from each category will suggest themselves as ways of addressing a particular problem. Thus, for example, if the objective is to reduce caseloads by curtailing criminal court jurisdiction over the disposition of cases involving petty offenses, a variety of options exists: some offenses (such as public drunkenness) can be either "decriminalized" or "diverted"; others, such as minor traffic infractions, will be appropriate for non-judicial, "administrative" adjudication; and still others, such as minor gambling offenses, could be either "decriminalized" or transferred into the jurisdiction of a non-judicial, "popular" adjudicative forum. An attack of any type of petty offenses believed inappropriate for criminal jurisdiction, then, will allow choices not only among particular alternatives, but among broad categories as well. Attempts to deal with more general problems of inappropriate subject matter jurisdiction over petty offenses will likewise involve building a strategy of change by selecting alternatives from several categories.

Our suggested categorizations of alternatives may be of value to users of the guidebook in anticipating problems likely to be encountered with regard to either implementation or impact. Difficulties experienced in funding or staffing one "programmatic" alternative, for example, may recur in others; and, the difficulties in evaluating one "non-programmatic" alternative may be similarly shared by

others. More generally, all alternatives embracing the "diversionary" approach to reform, the "administrative" or "popular" forums approach, or the "decriminalization" approach, appear to share important characteristics of which local planners should be aware.

"Diversionary" alternatives are characterized by a relatively high degree of reliance on the discretion of individual decision-makers. In determining who will be conventionally processed and who diverted to a newly created alternative, a discretionary decision-maker—whether police officer, prosecutor, judge, or treatment program official—may require appropriate guidelines and other limits on unchecked discretion.⁴ The quality of these discretionary decisions will also dictate whether any diversionary alternative operates fairly—and is so perceived by defendants and by the public at large. Much can and should be done in the design and regulation of diversionary alternatives to help assure that discretion is exercised responsibly, creatively, and consistently. Ultimately, however, success will turn on the qualities of the persons and staffs in which discretionary decision-making powers are vested.

When successful, diversionary alternatives may achieve more effective and better-individualized handling of offenders than the conventional system, but at the cost of foregoing the formality and visibility at which the existing system has conventionally aimed. What this cost may mean for the general deterrence of crime, or for the educative functions of criminal justice, can not be easily assessed at this early stage, but its potential significance should not be ignored. In choosing between the conventional system and a diversionary alternative as a mode of dealing with a particular kind of offense conduct, much will turn on the answers which local realities supply to two questions: 1) Is the conduct in question such as to require reinforcement of the public's understanding of its illegality or anti-social character? and 2) Does the conventional system of criminal adjudication show realistic promise of accomplishing such reinforcement? A diversionary alternative will be most appropriate when the answer to one, or both, is in the negative.

⁴ A recent case decided by the Supreme Court of New Jersey provides an illuminating discussion of problems of exercises of and available checks on discretion, involving admission to pretrial intervention programs established by court rule. *State v. Leonidis*, 71 N.J. 85, 363 A.2d 321 (1976).

Alternatives involving new "popular" or "administrative" forums for finding facts and devising dispositions suffer from the disadvantage of extreme novelty; unless carefully designed and introduced, they are likely to be perceived as more extreme departures from the conventional than they are. Their acceptability would hinge upon careful attention to fairness and due process, as well as to the selection of subject matters appropriate for the new forums.

If new "popular," "community," and "administrative" forums are better able than conventional adjudication to provide less formal, more flexible and more individualized dispositions which respond to the underlying problem(s) that generated the conflict, such alternative forums should command greater respect and compliance than conventional dispositions. But the effects of de-officialization and decentralization of the dispensation of justice on general public perceptions of the authority of law remain to be determined.

The same features which constitute the immediate drawbacks of alternatives involving "popular" and "administrative" forums, however, also embody their greatest promise. The absence of confining, authoritative models—and the prospect of creating institutions which will be perceived as something more than a mere patch on the existing system—should stimulate rather than retard innovation.

"Decriminalization" involves the fewest problems of funding, organization, and day-to-day management. This is not to say, however, that these are the easiest alternatives to implement. In fact, the political sensitivity of decriminalization itself, and of many of the offenses (particularly "crimes without victims" or "crimes without complainants") for which this approach is more seriously proposed, creates resistance to change which has no parallel elsewhere in the field of alternatives. Criminal justice planners or practitioners cannot weigh "decriminalization" alternatives largely on their own merits and demerits; they must assess, in addition, the state of public opinion. This applies not only to planning for decriminalization through legislative action; it is also true, although arguably somewhat less important, in weighing action by law enforcement administrators to achieve *de facto* decriminalization.

Of all categories of alternatives, the "decriminalization" group offers the fewest real challenges to the authority and integrity of the conventional criminal courts and ancillary criminal justice agen-

cies. Although subtracting from their jurisdiction, it does not create competing tracks or institutions against which conventional institutions may be unfavorably compared. Unfortunately, the potential "reach" of decriminalization—in terms of offense and offender groups—is severely limited. Continuing innovation in alternatives should include exploration of the potential for decriminalization, but the approach should never be considered as more than a part of a total strategy of reform.

Any attempt to consider the issues raised by distinct categories of alternatives is, of course, partially unrealistic. Some of the most important questions bearing on the implementation and impact of alternatives involve the interrelationships between these categories. Thus, for example, it will always be important, in weighing the desirability of diverting some classes of petty offenses, to ask not only whether decriminalization of those same offenses would not be more effective, but also whether it would be more appropriate and more equitable. Conversely, the conclusion that a particular class of offenses is inappropriately included in criminal court jurisdiction is not sufficient for accepting a proposal to decriminalize; in addition, it must also be concluded that the needs of society, and of offenders themselves, will not be better served by an "active" alternative which creates a diversionary track or a new popular or administrative dispositional forum.

B. The Guidebook's Approach and Usefulness To Planners and Practitioners

Ultimately, the determination of the future of the alternatives movement will be made at the local level, on the basis of local experience. It is the purpose of this guidebook to assist in channeling local efforts—and it is to describe particular alternatives to conventional adjudication⁵ rather than to advocate a particular brand of changed policy, program, process, or institution.

⁵ In practice, conventional criminal adjudication includes both traditional system operations as well as generally accepted accommodations which have been adopted by the majority of jurisdictions in order to keep their local criminal justice systems running smoothly. Since, in many cases, these accommodations represent alternatives which have, in fact, become generally accepted and conventionally used, they are not discussed in the *Guidebook*.

More than simply offering potential solutions to one of this nation's most significant problems, this guidebook moves the reader from concept to action by suggesting practical steps to take in the planning of alternatives to conventional criminal adjudication. However, this report is part of the knowledge explosion, and, as such, it competes for attention along with television, newspapers, books, magazines, and scores of other reports. What, in a professional sense, justifies reading this report? There are several reasons.

The guidebook is a report to planners and practitioners of an eighteen month survey of alternatives to conventional criminal adjudication. It seeks to provide a conceptual framework that should serve to be a useful tool for the better planning, utilization, and evaluation of new alternatives. This report presents the first comprehensive effort to classify the types of adjudicatory alternatives that have been advocated and introduced in recent decades. It is a product of a review of existing reports and evaluations, a telephone and mail survey seeking materials and site visits to twenty local communities to explore identified alternatives firsthand in further depth. The classification matrix is explained below and, within this typology, more than 70 different models of alternatives are defined. Sometimes new terminology is presented. Illustrations and implications are discussed (Chapter IX-XVI). The range of alternatives is in Chapter III. Impacts on the role and operations of existing criminal justice agencies is in Chapter IV. An overview of organizational (Chapter V), legal (Chapter VI), and evaluative (Chapter VII) issues and concerns is presented.

The guidebook furnishes the criminal justice planner and practitioner four principal services. The *Guidebook* offers:

- New and useful ideas for planning;
- Comparisons of ideas placing them into a new context;
- A realistic view of alternatives based upon empirical study; and,
- A reference tool for long term future use.

Let us now examine these features of the guidebook.

1. *The guidebook offers new and useful ideas.* What interest does a survey of "alternatives" have for the criminal justice planner or practitioner? The answer is both simple and important. In giving consideration to any innovation in case-processing, other modes of accomplishing the same aims must be examined. Not only is it appropriate to consider—

for example—the contrasting approaches to the handling of minor marijuana possession represented by decriminalization, on the one hand, and special pretrial intervention programming, on the other; to thoroughly assess the merits of either, a consideration of the other is essential.

The guidebook should expand both one's consciousness and inventory of useful ideas about subjects such as decriminalization, diversion, and screening of criminal cases.⁶ It presents dozens of program ideas which can be combined in myriad ways to produce novel program designs. For those who innovate, the guidebook is a resource tool for day-to-day planning activities.⁷ For liberal or conservative approaches, there are programs and processes to consider.

2. The guidebook puts ideas together. America's criminal justice system is vast, complex, and very confusing even to those who labor within it each day. It is not an easy task to put similar ideas together. Consider employment and expenditure facts such as these:⁸

EXPENDITURE AND EMPLOYMENT DATA—UNITED STATES—FY 1973-74

Level of Government	Amount (Millions of \$)		Number of Employees	
	1971	1974	1971	1974
Federal	1,449	2,603	77,523	93,755
State	2,921	4,546	205,859	216,603
Local	6,663	9,130	578,394	664,862
Totals	11,033	16,279	861,776	975,220

⁶ The reader desiring references to other materials dealing with these topics may find the following especially worthwhile: Nicholas N. Kittrie, *The Right to Be Different: Deviance and Enforced Therapy* (New York: Penguin Books, 1973). Norval Morris and Gordon Hawkins, *The Honest Politician's Guide to Crime Control* (Chicago: University of Chicago Press, 1969), pp. 2-28; Sanford H. Kadish, "The Crisis of Overcriminalization," *The Annals of The American Academy of Political and Social Science* 374 (November 1967), pp. 158-170; Herbert L. Packer, *The Limits of the Criminal Sanction* (Stanford: Stanford University Press, 1968); Raymond T. Nimmer, *Diversion, The Search for Alternative Forms of Prosecution* (Chicago: American Bar Foundation, 1974); National Advisory Commission on Criminal Justice Standards and Goals, *Courts* (1973), pp. 17-41; and Joan Jacoby, *Pre-Trial Screening in Perspective* (Washington, D.C.: U.S. Department of Justice, 1976). See also Appendix D for suggested further reading.

⁷ Everett M. Rogers, *Communication of Innovations* (New York: Free Press, 1971), pp. 183-185.

⁸ U.S. National Criminal Justice Information and Statistics Service, *Expenditure and Employment Data*, 1974, p. 2.

These figures tell us that in 1974 there were 975,220 persons who worked in the "criminal justice system" where public expense for a year totals \$16.3 billion. With fifty states, 3,000 counties, and thousands of cities involved, it is no easy matter to communicate needs and problems of such a diverse audience. To help develop a common understanding of the national overview of criminal justice the guidebook develops a matrix or grid as a tool for thinking about programs. (See Tables I and II for matrix design.) More importantly, the matrix is a tool for integrating ideas and programs into a coherent perspective. The matrix is made up of vertical columns and horizontal rows; it includes eight vertical columns—the eight major decisions made in the criminal justice systems.

The eight vertical columns are:

Decisions in Criminal Justice System

1. Decision to define conduct as crime
2. Decision to focus attention on a subject
3. Decision to arrest

4. Decision to charge

5. Decision to release defendant pending trial or disposition

6. Decision on pretrial motions and applications

7. Decision to try or to accept plea

8. Decision to sentence

Each of these decisions is carefully defined in this guidebook. Examples of programs aimed at one of these decision areas in case processing are entered along a row composed of the decisions which could be made by the criminal justice actors:

Actors in Criminal Justice System

1. Legislatures
2. Police departments
3. Prosecutor offices
4. Trial courts
5. Defense bar

6. Public noncriminal justice and private agencies
7. Citizen volunteers
8. Probation and parole officers
9. Appellate courts

One way to use the guidebook, other than to follow the outline, is to locate particular actor and decision rows in the matrix in Part Three of this guidebook. Each alternative is classified and discussed according to the criminal justice official most involved and the stage of the case at which implementation is most likely to occur. At the point on the matrix where an actor row and a decision column intersect, that actor is the main source of the alternative and can devise, authorize, or operate the alternative listed. The horizontal rows of the matrix are organized to follow the likelihood of involvement: (1) Legislatures are always involved; (2) Police are almost always involved; (3) Prosecutors, (4) Trial Courts, and (5) Defense Bar are, in descending order of influence, usually involved; (6) Public and Private Agencies; (7) Citizens/Volunteers, (8) Probation and Parole Officers, and (9) Appellate Courts are occasionally or intermittently involved, with no particular ranking with respect to their involvement. The vertical columns of the matrix focus upon those steps in the criminal process where alternatives can be implemented.

In preparing this guidebook, the principal objective has been to present a range of practical potential tools by which local criminal justice and service agencies may more effectively handle their caseload. The "alternatives" are therefore discussed in terms of their operational aspects and should be considered as options which can be chosen to substitute for existing or conventional practices which have developed as a legitimate part of the adversarial process. The need for a comparative assessment of the options available in planning for and implementing change is an underlying assumption of this guidebook. As a reference work, the guidebook helps planners and practitioners search out models of change suited to needs and constraints characteristic of their own jurisdictions.

The focus of the guidebook is upon the pre-sentencing stages of the criminal process, although a broad spectrum of policies, programs, and procedures instituted at other stages is taken into account. The adjudicatory framework in which these various alternatives are discussed includes not only the formal system of case processing, which culminates in a final binding settlement of the dispute, but also the

interim official decision which is made by the many participants in the criminal justice system (i.e., police, prosecutors, judges, trial court personnel) during the life of a typical criminal case. Thus, the guidebook includes as a part of the adjudication process those occurrences which take place before the first court appearance which may directly affect caseload even though, traditionally, a criminal case is often defined as beginning with the first appearance of a defendant in the court of record. While earlier activities such as public education or crime prevention may have important indirect effects on caseload, the study is limited to those steps in the process where alternatives can have a readily discernible effect.

3. *The guidebook is based upon a study of real facts.* As indicated before, site visits were made to twenty communities to explore alternative programs. Over 300 examples were identified and eventually these were reduced to about 150 programs and processes. At least that many groups were contacted by the project staff to learn more about the program. This empirical foundation creates a realistic guidebook.

4. *The guidebook is a reference tool for planners.* There is now a planning community in each state developed in the last few years under stimulus from block grants by the federal government to states to fight crime. The state planning agency or SPA, as it is commonly called, and regional planning agencies devote their energies toward improvement of the criminal justice system. The guidebook is one of the first tools for planning alternatives developed in the field. While it differs from a flow chart of the criminal justice system,⁹ its purpose is identical, to assist in thinking of relationships which are not perceived by normal analytical tools derived from law, sociology, political science, anthropology, psychology, or other fields. One could read the guidebook and thereafter refer to it in much the same way that a dictionary is used. Just as the English dictionary does not offer a value judgment that the English language is the best, neither does the guidebook prescribe a cure for any or all illnesses in the criminal justice system. The normative component

⁹ The most famous and now widely recognized flow chart of the American criminal justice system appears in The President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* (Washington, D.C.: U.S. Government Printing Office, 1967), pp. 8-9.

of the guidebook is reduced to the lowest possible degree to allow freedom to consider many alternatives which are acceptable to a locality.

C. The Alternatives Movement: A Bellweather of New Trends in American Justice

The trends in procedural and institutional change described in this guidebook have, in fact, a real and considerable momentum. The experience of the next several years may determine whether the "alternative movement" represents a significant event in the history of American justice reform, or no more than another false start. Alternatives to conventional criminal adjudication forecast new trends in American justice; they tell us about present and future assumptions and aspirations in American criminal justice.

1. *Decreasing system penetration.* There is a growing acceptance of a view that the more an offender becomes enmeshed in the criminal process and the criminal label, the more difficult it is for him later to be retrieved for a life of lawfulness. On one hand, it is better to sacrifice formality and dispose of less serious offenders expeditiously and at the earliest stage possible. More speedy, less burdensome, and less expensive procedures—so as to reduce trauma and permanent labeling—could be developed and utilized. However, depending on the potential reach of alternatives in terms of types of offenders and seriousness of offenses, such procedures conflict with the values reflected in the formality and visibility of trial or other courtroom dispositions designed to serve the purposes of public education and general deterrence and the symbolic value of an official finding of offender accountability.

2. *Stress on community reintegration.* The therapeutic response to the crime problem has not disappeared. It is significantly blunted or deflected in the design and implementation of alternatives. More practical and relatively modest rehabilitative goals for offender treatment exist through newly christened "alternatives." In therapeutic alternative programming, the focus of treatment is no longer the "cure" of the offender; instead it has become offender "accommodation" toward an emphasis on functional solutions (jobs) in a community context. The goal is reintegration after social disruption.

3. *Accent on composing differences.* Alternatives are the rise of a potentially important new approach

to societal management of deviant conduct. Many of the alternatives discussed in the guidebook do not approach the issue of adjudication in terms of what disposition an accused or convicted offender *deserves* by reason of his or her guilt. Primary concern is addressed to the question of what disposition will work to promote legitimate societal ends. Crisis intervention, arbitration and mediation of disputes involving alleged criminal conduct, community court adjudication, some structured plea bargaining and contract sentencing are among the alternatives in which this new approach may be seen to operate. Each is a specific conflict resolution system which emphasizes the *composition* of past differences, and the imposition on the disputants of prospectively effective terms and conditions governing their future relations.

4. *Increasing control of useful discretion.* Alternatives show acceptance of the place of official discretion in criminal case processing. Alternatives are midway between the school of thought which tends to admit but limit the extent of discretionary power and the other school which tends to minimize the real importance of discretion while defending its theoretical legitimacy. Alternatives take a middle course, by simultaneously surfacing, regulating, and legitimizing discretionary powers. If the alternatives movement takes firm hold, future debates over the acceptance of the place of official discretion in criminal case processing will become increasingly sterile. Rather, persons will be required to think with new understanding of what distinguishes "useful" discretionary powers from "destructive" powers, and to build new processes accordingly. This trend will increase concern over the disturbing tendency (already exhibited by a number of alternatives) of expanding control over the lives of individuals out of humanitarian and rehabilitative motives without proper attention to substantive and procedural due process and the values underlying constitutional equal protection.

5. *Rebirth of local options in social control.* Alternatives are evidence of the trend of decentralization of criminal and quasi-criminal adjudication. In recent decades, the general tendency in criminal court reform, and court reform generally, has been toward the increased concentration of judicial power in a few persons and in few places—and in increasingly fewer, less popular, and more professional institutions. Unification, centralization, and consolidation are key ideas. The rise of alternatives, however,

suggest that the era of centralization may be at an end and that this tendency may even be subject to selective reversal in years to come. Local police departments, prosecutors' offices, social service agencies, community organizations, and courts of limited or special jurisdiction are among the main-

stays of alternatives planning and implementation. And inherent in the concept of alternatives is the notion of "local option"—what works for one community need not work for another. A rebirth of home rule concepts is arising in the growth of alternatives.

CHAPTER II. ALTERNATIVES IN PERSPECTIVE

The concept of utilizing alternatives to the conventional adjudication process is not new to either the criminal or civil process. Its roots have been traced far back in ancient philosophy, and its operation was evident as early as Hammurabi's Code. In the United States, the formal recognition of their utility in the criminal justice process was demonstrated during the early years of this century with the establishment of juvenile courts to remove youthful offenders from the adult criminal process and handle them more appropriately and effectively through a separate dispositional mechanism. During the same period, a parallel development occurred in the civil case process with the establishment of the first small claims courts to handle petty cases inexpensively and expeditiously through a mechanism which was intended to be more responsive and fairer to the claimants.

In the first instance, the alternatives focused upon a specific class of offender; in the second, a particular class of case. In both, however, the alternatives represented a public response to a general concern that certain types of disputes could be more effectively handled outside the traditional court disposition process. This concern was complemented with a belief that the traditional court process could also operate more efficiently if relieved of some of the burdens—in terms of both time and resources—which such cases imposed.

Thus the application of alternatives was designed to achieve a two-fold benefit to the community: 1) improved case processing of those matters requiring conventional adjudication, and 2) more expeditious and appropriate handling of those matters suitable for specialized process and/or treatment.

In the years since alternatives were first formally applied to the judicial process in the United States, their range of application has broadened significantly, and their potential utility is still to be realized as the problems of an increasingly urban and technological society make their impact on the judicial system. However, the application of alternatives to civil and criminal processes have not been parallel

due, in large part, to basic differences in public philosophy regarding the ways in which criminal and civil cases should be handled and the greater reluctance to utilize substitutes for conventional adjudicatory processes in criminal disputes. While the out-of-court settlement of civil disputes is generally considered a legitimate technique for handling matters in which the parties agree to negotiate, similar efforts in the criminal arena, such as plea bargaining, are yet in experimental phases and have a substantial body of critics as well as supporters.

These differing attitudes toward civil and criminal dispute settlement may, in fact, mirror basic differences in public attitudes toward the civil and criminal process. In the former, two parties are involved who appear to share basic equality, although they may not be equally matched in all respects; in the latter, a single party is arrayed against the power of the state. Although pretrial settlement is well accepted for civil cases, reluctance is widely demonstrated in utilizing such processes for criminal cases, particularly in the absence of a traditional court framework for final dispositional review.

These differing public attitudes toward the civil and criminal processes are reflected in the basic objectives which guide public officials in determining the appropriateness of alternatives and the criteria established to test their desirability and effectiveness. Although Constitutional, judicial, and legislative protections are guaranteed to all defendants, they become of prime importance when criminal cases are being considered and create different expectations about the operations of the judicial process in such cases and the role alternatives should play. Thus, in considering alternatives for criminal cases, it becomes of prime importance to preserve essential due process safeguards.

For these reasons, the application and acceptance of alternatives has had far greater scope in civil cases, and it is only within the last decade that an increasing interest has been demonstrated in utilizing such processes in the handling of criminal cases. In large part, this interest is a response to the crisis

created by the congestion of our criminal courts and the recognition that the quest for fairness to both the community and the offender will not necessarily be served by allowing conventional adjudication to take its course. In fact, as stated previously, some classes of cases and/or offenders can be more appropriately—and fairly—handled through agencies and processes apart from the traditional court-room milieu.

If fundamental policy goals such as speedy, efficient, and equal justice are to become a reality, then improved methods for dealing with criminal defendants is imperative. The use of alternatives to conventional criminal adjudication can be one method of preserving these fundamental rights of both the community and the individual. In determining the feasibility of utilizing particular alternatives and in the subsequent evaluation of their opera-

tion, these ultimate policy goals can serve as standards against which measurement of the program and its value can be made.

Within the framework of ensuring constitutional and legal rights, alternatives can have a broad range of objectives. They can focus upon basic change in system processing; they can provide for administrative efficiency; they can call for the establishment of new institutions; they can call for new public policies, such as the decriminalization of certain offenses; they can call for a more enlightened approach to deviant behavior, such as through drug abuse programs. In all cases, however, they should serve to separate out specialized cases from conventional adjudicatory processes by providing substitute channels which can be utilized at specifically determined stages of the judicial process.

PART 2
PLANNING FOR ALTERNATIVES

CHAPTER III. PRELIMINARY CONSIDERATIONS

A. The Range of Alternatives

Alternatives effect change in a criminal justice system. Determining what type of change best accomplishes intended goals is a first consideration in planning for alternatives. There are basically four types of alternatives:

- *Policy Alternatives*—These are declarations by legislatures, courts, and, occasionally, other criminal justice agencies, that previously considered criminal behavior is no longer to be criminal or that significantly alter the response to criminal behavior. These include, for example, the Oregon legislative revision of the laws proscribing marijuana possession and the decision of the U.S. Court of Appeals for the District of Columbia that chronic alcoholics could not be convicted of public drunkenness.
- *Process Alternatives*—These are major changes in police/prosecutor/court operational guides, rules, or statutes. Examples of process alternatives are formalization of police and prosecutor charging policies and placement of prosecutors in station houses to assist police. The 1974 U.S. Speedy Trial Act and citation release are also examples of a process alternative. Abolition of plea bargaining (recommended by the National Advisory Commission, and recently implemented state-wide in Alaska) is a further example.
- *Program Alternatives*—These programs that offer services to offenders such as employment opportunity, education or training, and psychiatric and medical care. These include a broad range of more formal public or private diversion and pretrial intervention programs closely linked to the police, prosecutor, and court.
- *Institutional Alternatives*—These are new institutions patterned principally upon existing government agencies including special prosecutors' offices, pretrial release agencies, bail agencies and courts. The New York narcotics

courts, the Jamaican gun courts, and the Chicago women's court are illustrations of institutional alternatives.

A planner can use any of the alternative changes mentioned above or any combination thereof. The choice would depend upon the goals desired and the political, organizational, and legal variables operating in the system in which the planner hopes to effect change.

It should be evident that the range of alternatives is sufficiently broad that a specific alternative could be implemented at every stage of a criminal case, and by any of the major criminal adjudication agencies. Table 1 lists public agencies in the criminal justice system, states some of the major formal conventional tasks of that agency, and refers to some of the alternatives which can be utilized or implemented by each agency. This simplified table is useful to obtain an overview of the Alternatives Matrix, which is described in detail in Chapter VIII.

A more complete answer to the question of who uses what alternatives is provided in Part 3, which discusses the practical application of alternatives and describes various alternatives within the spectrum of criminal justice adjudication decision-making.

B. Understanding the Authority Structure

Recognizing that any reform must ultimately depend upon the local political situation, local resources, and local personalities, the emphasis here is on local planning. Careful preparation must be the watchword. Time to work out details involving all the people who will be part of the community scene must be provided.

There are a number of questions which should be considered by activists and planners in the criminal justice arena prior to the planning and design state of alternatives development. Who should plan for a particular reform of the criminal justice system?

TABLE I
Simplification and Overview of the Alternatives Matrix

PUBLIC AGENCY	Major Conventional Task	Process, Program, Policy, or Institutional Alternatives
POLICE	Arrest	Citation release, Family crisis unit, Referral to arbitration or social service agency (Program, Process)
	Charge Formulation	Station house prosecutor guidance (Process)
PROSECUTOR	Screening	Formalize by rule, standardize evaluation (Process)
	Charge Formulation	Formal rules to avoid over-charge (Process)
	Plea Bargaining	Improved supervision of process, standardize, formalize (Process)
	Trial of Case	Early prosecutor intervention, prosecutor rulemaking (Process)
TRIAL COURT	Pretrial Release Decision	Bail reform, pretrial release agency (Process, Institutional)
	Guilt Determination	All types of diversion projects that make fact finding irrelevant (Program)
	Sentencing	Victim restitution, victim involvement in setting punishment (Process, Program)
LEGISLATURE	Law making	Special courts for narcotic cases (Institutional)
		Decriminalization (Policy)

- Should the plan be a combination of Federal, state, and local authorities, or should it be a combination of state and local planners whose ultimate recourse for technical assistance and money would be the Federal government?
- Should criminal justice planning be conducted solely on the local level with the state and Federal authorities available to provide technical assistance, money, and assist in meeting crisis situations?
- What combination of police, prosecutors, court officials, and correction officials should be involved in the planning process?

- Should the ex-offender be given a voice in planning a reform of the criminal justice system?
- Should the citizenry at large or the victims have a voice in the criminal justice reform planning?

There are no single answers to any of the questions. All the above groups, however, should be involved in planning; their degree of involvement will depend on contemporary local conditions. The availability of Federal seed money has changed drastically the speed of the criminal justice reform. Experience suggests that community leaders, both state and local, who participate in planning and who

are solidly behind a program, will actively offer long-term support.

Many criminal justice programs throughout the country, when faced with the dilemma of continuing after Federal money runs out, have found it impossible to integrate their programs into the local prosecutor, court, probation, or corrections systems, with the result that the program lapses. Lapse could mean permanent death. Who should fund and who should run new justice programs? Many problems could be avoided if provision were made, in beginning a project, to involve those who will be eventual key figures in securing permanent institutionalization of the program. These key persons must support the program from its inception.

Potential opposition to alternatives must be considered because of the problems created by such groups or individuals. The creation, adoption, and implementation of new programs must have the explicit or implied approval of a community's authority structure. For the criminal justice agenda, it consists of three essential subdivisions: *the local criminal justice bureaucracy* (the police, courts, prosecution, defense, and correctional agencies and personnel); *the local government* that periodically influences criminal justice policies (local elected officials, locally based interest groups); and *state and federal actors and institutions* that regularly or periodically are affiliated with criminal justice policy-making (governors, crime commissions, appeals courts, state bar associations, LEAA). Thus, while most new alternatives are locally based, they depend on a number of intergovernmental actors and processes. These major subdivisions are described below.

• *Local Criminal Justice Bureaucracy:* Each major component of the local criminal justice system makes major policy decisions without consulting the other respective units. This is the first fact of life for planning. Also related to the local criminal justice bureaucracy is the discretionary power exercised by professionals within police, court, and other agencies. While much has been written on patrol officers' on-the-beat discretion, recent studies also have traced the wide range of discretion exercised by assistant district attorneys in performing their daily tasks. The discretion of these professionals must be considered in the design of alternatives. Although alternatives may channel or restrict this discretion to offer better protection to the individual, professional discretion is a vital part of the operation of the criminal justice system. Thus, both intra-agency and inter-agency factors associated with the

local criminal justice bureaucracy must be weighed by individuals developing new alternatives.

• *Local Government:* The local government structure periodically will influence policy choices in criminal justice. Centralized political systems (Chicago, for example) are more likely to be innovative in developing material responses to pressing problems, such as getting money for the poor or fluoridating the water. On the other hand, decentralized systems (Los Angeles, for example) will usually show a high degree of responsiveness and sensitivity to citizen interests. Knowledge of these characteristics is important to individuals interested in developing new criminal justice alternatives. Each alternative will require a distinct set of support agents from the local political arena. For example, a court employment program will require the cooperation of local business organizations to provide potential jobs for defendants and a university or other group to train staff for the project.

• *Intergovernmental Relations (State and Federal Actors):* Many new alternatives are significantly influenced by actors outside the local political-administrative arena. Alternatives to the criminal processing of whole categories of individuals have grown out of state and Federal appellate court decisions. For example, the provision for therapeutic treatment of public drunks in the District of Columbia was initiated by a U.S. Court of Appeals decision that ruled public drunkenness of chronic alcoholics a problem that must be dealt with outside of the criminal courts. As was true of this decision, court cases often are initiated by groups that have been unsuccessful in achieving policy changes through other means. Programs evolving from court decisions, however, must rely on legislative or administrative bodies for implementation. The solicitation of local governmental support would be delayed but not circumvented through the approach of court action.

C. Recurring Weaknesses in Alternatives Planning

A decade of experimentation with various types of alternatives, and a relatively recent period of attention to the dynamics of success or failure of alternative strategies in achieving intended goals, have identified the following four recurring weaknesses in alternatives planning which seriously handicap a pro-

gram's potential for positive criminal justice system change:

- The impact of alternatives on the entire criminal justice system is not clearly understood, and often no effort is made, when initiating alternatives, to examine such impacts.
- Organizational strategies in planning alternatives are not given sufficient attention in an environment which is extraordinarily complex.
- Legal issues frequently are not given adequate attention—for example, in pretrial intervention programs involving a formal suspension of criminal charges. Significant legal issues must be considered by those initiating alternatives.

- Evaluation needs of programs which offer alternatives to criminal trial court processing of offenders are neither understood nor adequately addressed, with the result that information on program operation and impact has limited value for implementation or for application in other jurisdictions.

The four major deficiencies in alternatives planning—system-wide impacts, legal, organizational strategies, and evaluation—are singly, or in concert, enough to scuttle the most well-intentioned program. The importance of each major danger zone, if recognized in planning, will enhance the potential success of an alternative program or project. The next four chapters of Part Two will address these areas.

CHAPTER IV. THE IMPACT OF ALTERNATIVES ON THE ROLES AND OPERATIONS OF EXISTING AGENCIES

Once the planner has an understanding of the range of possible alternatives and has given thought to the criminal justice system problems or needs which may be addressed by the adoption of an alternative strategy, the next task is to have an understanding of the potential impact of various alternatives on existing criminal justice agencies. This provides an essential foundation for realistic implementation planning.

Weighing the impact of possible alternatives on the various criminal justice agencies is especially important when it is recognized that implementation of alternatives may increase justice system complexity and proliferate responsibility and authority. Changes in the interaction patterns among agencies may be substantial. Decisions may become more complex and information requirements may increase. A comprehensive planning approach would avoid some of these problems and minimize others.

A. The Police

While many alternatives will have little or no direct effect on the police role, others, such as decriminalization, may decrease the types of behavior with which police ordinarily deal or substitute a different task (for example, taking publicly intoxicated persons to a detox unit rather than making an arrest). Most alternatives that take place after or at the time of the decision to charge will not involve the police, but may have an impact on the police department as a whole. For example, alternatives that decrease the amount of police time in court may improve departmental morale and free the police for other tasks (depending on whether court time is paid on an overtime basis or not). Arbitration, citizen complaint centers, and omnibus pretrial hearings may also impact on police time.

Some alternatives will have a substantial direct impact on the police role and on actions of the individual officer (for example, public drunkenness

pick-up and delivery to detox involve the police performing the key intake function for mental health agencies). Some restrict individual police discretion (departmental policy, rulemaking, and court review); other alternatives, such as citation release and referrals to social services or arbitration, may expand the exercise of police discretion. The impact of such alternatives would vary greatly depending on the design of the procedures and to what extent they are utilized.

For example, decriminalization or diversion to detoxification facilities for persons intoxicated in public can be designed to involve police or non-police pick-up agents or both. The location of the detoxification center, in terms of police transportation time, can have a major influence on the level of police pick-ups. The involvement of the police department in early stages of the planning will result in attention paid to the design of forms to minimize police paperwork and the planning for adequate pick-up and transportation services, which may involve specialized squads, such as a special van or beat patrol officers, in skid row areas. Early cooperation in the planning between the police and mental health agencies can have many benefits, such as the addition of medical and mental health information on alcoholism and handling public drunks to police training programs.

B. The Courts

The impact of an alternative on the local courts will vary greatly depending on the characteristics of the particular court. Four characteristics of local courts display wide variation and must be considered among the key factors in determining the impact of alternatives on the local trial court. They are the jurisdiction of the court, the size of the court, differences between urban and rural courts, and the degree of unification of the state court system. Each of these factors is briefly discussed. The current role

and status of key actors, whether the court is currently well or poorly managed, the predominant mode of processing cases, and the court's relationship to the local political situation as well as to the state courts will also affect the impact of alternatives on the local trial court.

1. *Jurisdiction.* Some alternatives may involve changes in courts of limited or special jurisdiction. They may also change the jurisdiction of general courts, which would affect the volume as well as the scope of input to the court. Such changes may affect the operation of the court. For example, if traffic cases are handled by an administrative tribunal, all parts of the court dealing with those cases would be eliminated.

2. *Size.* The size of a court significantly affects the impact of alternatives. One of the key characteristics of a large court is the complexity of its management, including the number of persons involved in the implementation of an alternative. Change is more difficult, where the coordination of many persons are essential to the day-to-day operation of the alternative. A large court has a greater volume of cases than can be affected by the implementation of an alternative. The volume of cases, however, must be related to the availability of judicial time. In terms of impact of a diversion program on judicial time, a large court, with a favorable case load per judge, may have less need to implement an alternative than a smaller court with a less favorable case load ratio. Inadequate attention has been given to the processing patterns of cases likely to be diverted. For example, if cases that are typically plea bargained are diverted in deferred prosecution programs involving a court hearing, judicial time required may increase.

3. *Urban vs. rural.* A consideration of alternatives' impact on urban and rural courts involves, to some extent, size. Other factors, however, are equally important. In a rural jurisdiction the influence of the judge over the other criminal justice agencies is much greater. If there is a single judge, he often plays a key role in the policies followed by the police and the prosecutor in processing cases. Consequently, alternatives involving judicial review of prior procedures may be largely irrelevant in a rural setting. The judge may also have a greater effect on behavior patterns within the community because of his sentencing patterns. For example, extremely harsh sentences for marijuana possession seem to have influenced the incidence of this offense in a rural district surveyed in Maryland.

Another difference between rural and urban environments is the greater informality with which cases are processed in a rural setting. This informality allows for the greater influence of the trial court on the police and prosecutor. This is also significant from the viewpoint of the offender, who in the rural setting is more likely to be treated on an informal basis rather than be processed through a more formal complex system.

Therefore, in a rural environment, some alternatives would have the effect of formalizing diversionary practices that already exist. Actions will be more standardized; the treatment of strangers will be more equitable. It may be less possible to show favoritism. In contrast, given the nature of courts in an urban setting, many alternatives would have exactly the opposite effect. More options would be available and more flexibility would exist in the handling of offenders.

4. *Degree of unification of state court system.* The impact of alternatives on the trial court may vary with the degree of unification of the state court system. There are many states in which the proliferation of courts of special and limited jurisdiction has precipitated a problem of confused and overlapping jurisdiction. In these states, the addition of courts of special jurisdiction may add to the confusion that already exists. In states where a relatively simplified system of jurisdictional division exists, however, courts of special jurisdiction may allow the court system to be more responsive to special segments of offender population (for example, narcotics courts). Where the court system is highly unified and a degree of control over the local courts is centralized in the state supreme court, trial courts tend to be more responsive to court rules and directives from the state supreme court.

C. The Prosecutor

Many alternatives affect the prosecutor indirectly; for example, those that occur prior to prosecutor involvement or at the decision to sentence. Alternatives involving decriminalization or changes in police practices will affect the volume of cases, the offense involved, and/or the quality of the cases referred to the prosecutor's office.

Alternatives in which the prosecutor is directly involved may relieve the volume of cases or upgrade the quality of cases. A citizens' complaint center

may involve an additional role for the prosecutor's office, depending on the extent of counseling, mediation, and/or referral to outside services.

Other alternatives that will decrease case volume or ungrade the case quality are alternatives that effectively screen clients or that involve intervention by the prosecutor. The assignment of a prosecutor to the police station, rulemaking, and centralization of case evaluation may serve this function.

Alternatives such as pretrial intervention place the prosecutor in a role which is quasi-judicial. The significance of this role depends on which alternative is involved. In many Narcotics Pretrial Diversion Programs, a plea of guilty is entered. The charges are then dismissed upon successful completion of the program, and the plea may be changed to not guilty if the case is terminated. Such a program involves a shift in control of the dispositional phase from the trial judge to the prosecutor.

Prosecutor pretrial intervention and referral to arbitration both focus on solving the underlying problem and, in some cases, determining the appropriate treatment for the defendant rather than on determining the truth. These alternatives not only reinforce the quasi-judicial role of the prosecutor, but they also may give the role an increased social service orientation involving greater contact with community treatment resources and personnel.

In addition, alternatives such as pretrial intervention and referral to arbitration increase the number of options available to the prosecutor. Prosecutorial powers may be enlarged in the sense that cases that otherwise would be referred to the court are disposed of through the exercise of prosecutorial discretion. On the other hand, rulemaking, centralization of plea bargaining, and enhanced court review involve restrictions on the discretionary powers of individual prosecutors.

D. Defense Counsel

The principal issue for defense counsel is whether the implementation of alternatives will increase the need for their services. Many legal issues involved in alternatives point to an increased need. As the American Bar Association *Standards* for defense suggest, there is already a shortage of defense counsel in many jurisdictions. Other alternatives will reduce the need for defense counsel, such as non-adversarial dispute settlement methods.

An example is the 4-A Arbitration Program in Philadelphia. This program handles hearings conducted by trained arbitrators. Such a program may eliminate the need for defense attorneys. A citizen dispute settlement program operated by the prosecutor's office, and other alternatives early in the criminal process, may, as a practical matter, eliminate the role of defense attorneys because of lack of availability. Whether this elimination of the need for defense counsel is a desirable development has generated controversy.

Deferred prosecution projects involve the defense counsel in a different role than traditional criminal processing. It will enhance defense counsel's role as a "social service advisor" as well as legal advocate. Counsel then must be aware of the available alternatives to be able to advise his client. Counsel could participate in a special diversion hearing as well as in a termination hearing for deferred prosecution programs. The time required here would be less than that for trial, but may be the same or more than the time required for plea bargaining. Deferred prosecution, therefore, can expand the need for defense counsel.

Alternatives that involve defense counsel in new social service roles are pretrial intervention and planning for sentence by defense counsel. The Public Defender Alternatives Project in Portland, Oregon, and the Offender Rehabilitation Division of the Public Defense Service in Washington, D.C., are two such programs. In both programs, the public defender's office takes on the responsibility of providing social services and preparing presentence reports for the defendants. In Washington, D.C., the case is referred to a special division that uses social workers; in Portland, there is a heavy reliance on volunteers. In both programs, the defense attorney bases his recommendation to the judge on the work done by the public defender's office.

E. Probation

There are many alternatives that may have a substantial impact upon the number of cases and/or the type of offender assigned to probation. Alternatives that involve screening out and diverting defendants to other public or private agencies will decrease the number of persons assigned to probation. The extent of this decrease, however, will depend on who is diverted. In Denver, for example, the juvenile diversion process, which diverts youth

to a wide variety of social service agencies, involves some youths who were previously "lectured and released." A substantial number, however, ordinarily would have been assigned to probation.

Intervention programs involving other agencies in which certification for probable cause is required would decrease referrals to probation, unless these options were used as alternatives to institutionalization. The Alternative Community Service Program in Portland, Oregon, for example, places individuals in public agencies or private non-profit organizations. Because the probation department administers the program, the responsibilities of the office are increased although individual probation officers have reduced caseloads.

Some alternatives may have the opposite effect; they may increase probation caseload. A common approach to alleviating court and prosecutor workload is to assign individuals to informal probation. The impact of these programs depends on whether participants would have been assigned to probation as a sentence or disposition. If many would have been released or institutionalized, then the use of informal probation would increase the caseload.

Another potential impact of alternatives is to change the type of offender assigned to probation. If a large number of first-time or non-serious offenders are diverted to intervention programs, the type of offender assigned to probation may be more difficult to work with. On the other hand, the use of informal probation may increase the number of first-time or non-serious offenders assigned to probation.

F. Correctional Institutions and Parole

Many alternatives divert people from the criminal justice system prior to sentencing. The impact of

this on correctional institutions will depend on who is diverted. Most people who are diverted now would not have been institutionalized. For example, alternative dispute settlement methods between family and neighborhood disputes do not involve correctional authorities.

Intervention programs are usually for less serious offenses, particularly non-violent offenses. If the use of alternatives grows to include large numbers of serious offenders, then there may be an impact on the prisons. Institutionalized offenders would be more "hard-core" and prone to violence. Prisons would become more difficult to manage. The need for prison reform would become even more acute but reform would probably be less likely to occur. Funds available for prison reform would probably decrease. Alternatives and community corrections would be more likely to win in the competition for scarce resources. There might be even less concern for the prison population since only the worst offenders would be institutionalized.

Criminal justice and community planners clearly need to consider these possible consequences and not neglect prison reform in planning alternatives to adjudication programs.

Because many alternatives divert people from the criminal justice system prior to sentencing, the potential exists for decreasing the number of paroled persons. Frequently, however, these alternatives involve cases that would have been dismissed or would have been sentenced to probation. Considering the small percentage of people entering the justice system who are institutionalized, and the growing trend towards community-based corrections, the impact of alternatives on parole appears negligible.

CHAPTER V. ORGANIZATIONAL ISSUES IN ALTERNATIVES PLANNING

A. Designing a Feasible Alternative

1. *Selecting the right change strategy.* In assessing which type of alternative to implement, a planner must consider who has the authority to authorize or operate an alternative. The planning must also consider who is influential in triggering or controlling the change process. For example, if the district attorney's office is powerful in a city, they should be included in planning diversion programs, even if diversion occurs prior to their involvement. Several options, discussed below, are available in considering the appropriate vehicle for authorizing an alternative: enabling legislation, court rule, administrative ruling and letters of cooperation.

An initial option to consider in deciding the best route to take is the desirability of obtaining enabling legislation. This would give the program a more permanent status, but would do little to alter whatever resistance would be offered by criminal justice officials who resent restrictions on prosecutors' or judges' discretion. The advantages of legislative authority for programs include: 1) increased visibility, 2) specific criteria that guard against uneven use of an alternative, and 3) establishment of a formal program which is more easily evaluated. A more appropriate route may be to enlist the support of the criminal justice officials for the project, and to obtain permanent status *after* it is operational. Survival might not be as well ensured, but this may become a more important issue once effectiveness is demonstrated. Obtaining enabling legislation also does not ensure funding or resource availability.

A second option to consider is the desirability of obtaining a court rule. A court rule has advantages similar to enabling legislation including the likelihood of permanent funding status. Court rules are often more quickly obtained than legislation, more "legally" developed, and, since spawned by the legal system, are based on a policy subsystem that may differ from the interests reflected in a legislative enactment.

A third option to consider is the desirability of an administrative ruling by the police department or the prosecutor's office. This kind of decision is made to change the way regular business is transacted. Rulemaking also can affect desired changes within the criminal justice system and is therefore, relevant to implementation. The decision to consider rulemaking depends on the size and structure of the police department or prosecutor's office and on the position of the chief of police or district attorney. It tends not to be effective in small rural agencies. In a large urban agency, effectiveness of rulemaking depends on the power of the agency head and on his ability to distribute information and to enforce the rules.

For alternatives involving community service agencies, the operating authority usually is granted in letters of cooperation between the community agencies and the criminal justice agency involved. For example, Partners, a juvenile diversion program operated by a private agency in Denver, Colorado, coordinates its activities with the police, the prosecutor, and the court. Written agreements specify procedures. In this case, written agreements are desirable and perhaps essential for effective operation. The authority for non-criminal justice agencies to operate alternatives should be clearly established prior to implementation.

Another major consideration is who has the power to promote change within the criminal justice process. This decision may coincide with that of who has the authority to authorize and implement change. For example, a community group may choose the police department for referral to a diversion program because of its community contacts and its close relationship with the mayor. The latter may help the project obtain support from the city government.

A planner must consider potential sources of support outside the criminal justice system as well as who has the power to implement change within the system. All levels of government, community groups, and non-criminal justice agencies should be

considered. Support may be drawn from the state or Federal government as well as from local government.

The support of non-criminal justice agencies may be important especially because of the services they provide. These may alleviate pressures within the criminal justice system to provide similar services and thus encourage key officials to support the proposed change. Community groups also may be important in supporting change because of their access to elected officials. Elected officials should be responsive to community pressure; and, community groups may offer greater continuity in efforts to promote change than the justice agencies themselves. Also, criminal justice agencies may lose jurisdiction when the case is "closed," although the need for services often continues. Without the continued support of non-criminal justice agencies, continuity in service delivery may be interrupted at a point when services are most needed.

Enlisting support for alternatives is critical for effective implementation. Before deciding which alternative to implement and where it should be housed, sources of potential financial support should be identified.

2. Selecting a funding source. The Federal government is at present the most important source of funding for experimental projects. Criminal justice agencies rely heavily on the Law Enforcement Assistance Administration (LEAA) for fiscal support of local innovations. This reliance probably will continue for the funding of alternatives, especially since the alternatives frequently involve change and innovation rather than a continuation of local practices and current policies.

Funding from the Department of Labor and other Federal agencies is also used to support alternatives, along with funding from foundations. The Community Based Corrections Program in Des Moines, Iowa, is an example of a project drawing financial support from multiple resources but primarily from the Federal level.

Financial support from a Federal or national source is excellent for initial project funding—that is, for one to three years. Other sources of financial support must be found, however, to ensure the project's survival beyond the initial experimental period.

For long-range support, alternatives must depend on state and local sources for funding. Once the Federal funding period is over, the state probably will be the most important source for continued

financing. Local sources such as city and county governments may also be available to provide funds. Metropolitan governments may not at present possess funding capability, but such governments may serve to coordinate other funding sources (especially in cities where metropolitan criminal justice planning agencies have been used for the implementation of Federal programs).

To ensure survival, alternatives must obtain long-range financial support. If little or no state or local funding is projected for an alternative when the initial Federal funding period ends, policymakers must plan accordingly. Community groups may be able to supply financial support. There are many diverse sources of local funding available, but they must be located. If planners feel that there will simply not be adequate financial support available when Federal funding ends, the alternative might be redesigned to require less direct financial assistance. Relying more heavily on existing social services in the community, on volunteers, or on law and college students are just some examples of ways to stretch finances.

Another approach would be to design the alternative as part of an existing agency rather than as a separate entity. Such an approach would increase the likelihood of agency support once Federal support is over. If the alternative is fairly expensive, it may be unlikely that the separate entity can generate sufficient funding after Federal funding ends. If an alternative project is part of an agency, however, external as well as agency funding usually can be more readily obtained.

Legislation of alternatives at the state level, with provision for funding support, is probably the most effective way to bring about long-term criminal justice change. Federal support is ideal for experimental programs, but state and/or local support is necessary for long-term change. Legislative action has an added advantage of including the specification of guidelines to be followed statewide. Consequently, various methods of implementing a particular concept of alternative can be compared.

In sum, Federal funding sources may be ideal for testing new programs. State and local funding is preferable for a long-term change, and should be sought at the outset if the duration of the project is known. Federal funding only delays the necessity of obtaining state or local funding for several years. State and local funding may allow for more flexibility in program development, although there may be a trend of state funding of diversion programs accord-

ing to exact specifications. If coordination with other agencies in obtaining funds continues to be an important issue, project management may be more effective if handled by two persons, instead of one project director—one in charge of internal and one in charge of external operations. This is a pattern followed by some alternative projects.

3. Laying the groundwork for institutionalization. Planners should consider in advance whether or not it is intended that an experimental project will become institutionalized if successful, and how this will be achieved. Institutionalization is merely changing an experimental or demonstrative project with a limited time frame to a long-term, permanent program. Funding continuation is the most salient aspect, but continuation of political, community, and criminal justice agency support are more closely intertwined after the Federal funding period is over. Selling a project with a large Federal grant is far easier than enlisting local support to continue the project after the grant is expired. Planners must, therefore, plan for continuation prior to the demonstration of a project's effectiveness.

Continuation plans for alternatives must include how to make the project an accepted, integral part of the criminal justice system. The agency or agencies involved must accept an alternative as part of day-to-day operations. This seems to be one of the problems in the long-term acceptance of family crisis units in police departments. The unit typically is viewed as a separate entity that takes time away from regular police duties.

Another aspect of continuation planning is obtaining continued political and community support. Continued support is essential and frequently overlooked. If the project were sponsored by a mayor who has since been defeated, other political support must be found. Perhaps the project will need media support to counter any negative feelings against the project in the community.

The consequences of the institutionalization of an alternative may be far-reaching, especially for alternatives that initially are separate programs. One potential consequence is that alternative programs may become part of the bureaucratic maze. There will be more concern with the organization; clients may become cogs in an "alternative wheel." If this happens, institutionalization of alternatives may backfire, with alternatives acquiring characteristics of the criminal justice system they were created to avoid.

Another potential consequence of institutionalizing an alternative is that long-needed reforms of the criminal justice system may be ignored. Will the prison reform movement suffer? Will there be less effort expended to revise sentencing codes and decriminalize certain behavior? Diversion programs frequently serve as means of "getting around" the present laws. Planners must consider whether alternative programs merely represent a patchwork solution to problems of the present system.

4. Other program design considerations. Another design consideration is whether to use a policy board, such as a board of directors or a community advisory board. Such a board may not be an effective management tool, but it may expedite good community relations. Frequently a policy board adds credibility to a project director's choices in developing the program. Based on visits to two projects having some difficulty with their advisory boards, the size of the board is an important consideration. If it is too large—such as more than fifteen members—it may become unwieldy. Also, vested interests of board members should be evaluated prior to their appointment. The merits of a "working" advisory board, as contrasted with a board that is primarily ceremonial, should be carefully considered in its design.

The development of an appropriate staffing pattern for an alternative project may be critical to project success. A variety of staffing patterns have been used successfully by different projects. A critical issue in staffing is the appropriate use of para-professional employees, especially persons with background and experiences somewhat similar to the clients served. Para-professional employees have proven a valuable addition to a variety of programs. The hiring of such employees is often facilitated by the use of a contracting arrangement between a criminal justice agency and an independent agency, avoiding the need to apply civil service hiring regulations. In addition, there may be greater flexibility in terms and conditions of hiring staff, resulting in savings to the project.

A difficult issue is determining the appropriate mix among and between para-professional and professional employees in staffing a particular project. The objectives of the program and available resources importantly affect the choice. In programs which provide services to participants, several directors of projects visited in this study indicated that a balance between para-professional and professional employees is a desirable goal. In making hiring deci-

sions, it is not always desirable that para-professional staff members have similar characteristics to clients. For example, in Mobile Assistance Patrol, a San Francisco program to provide an alternative to arrest, para-professional employees are used to pick-up and deliver public inebriates to mental health facilities. The project director hired approximately one-half recovered alcoholics and one-half non-alcoholics with experience in dealing with community alcohol treatment agencies and in handling public inebriates. The approach permitted hiring qualified women employees and contributed to reduced staff turnover.

Different projects have different problems to consider in planning a staffing pattern. It may be advisable to consult similar projects for their staffing experiences. A listing of selected alternatives projects is provided in Part Four of this guidebook.

B. Determining the Focus of the Alternative Program

Planners must also decide at what point in the criminal process alternative activities should be "plugged into" the system; that is, who should make referrals to the program. The decision of which alternative to implement has already been made. Assume that an alternative dispute settlement or problem solving technique has been chosen. It may be a diversion program involving pretrial intervention, a citizen complaint center, or arbitration. The decision, then, is whether the police, the prosecutor, the defense attorney or the court should control intake to the program.

Who should refer people to programs will depend on the type of alternative involved as well as on the characteristics of the local agencies. If there are numerous local agencies, perhaps the option of developing a special umbrella social service agency should be employed, a method used in Des Moines, Iowa. Other communities are also using this approach, at least for pretrial release and diversion decisions. One problem, however, has been that one person in an umbrella service agency finds it difficult to make several release and diversion decisions which are essentially different in nature, just as are the criteria on which they are based. There is additional difficulty if a decision must be made for several diversion programs, each with their own criteria.

Where should alternatives be administratively housed? Should alternatives be part of the agency

involved or should they be separate? The question of whether an alternative should be housed in a government agency, or in a private organization or community agency, has important implications for the operation of the alternative.

If an alternative is implemented as part of an existing agency, the primary advantage is that it has an immediate degree of criminal justice system credibility. It has good potential coordination with its parent agency and easier access to other governmental agencies. Thus the problem of establishing links with the criminal justice system and other agencies should be largely eliminated. Funding may also be more easily obtained.

The disadvantages of housing an alternative within an existing agency relate primarily to reduced flexibility in its program operation. If a project is under a state budget, and the personnel are under the civil service, the project has little or no control over budget and personnel policies. If the project is required to be physically housed in a large multipurpose courthouse or office building, informal contact with street persons facilitated by a "store-front" type location may be reduced. Increased credibility with clients can result from an independently run and separately housed program that is strategically located in an area readily accessible to program participants. In a public inebriate diversion program in St. Louis, the detoxification center was required to move from an inner-city location near the skid-row public inebriate population to a state mental hospital located a substantial distance from the skid-row area when Federal funding ended and state and local funding commenced. The transportation time greatly increased for police officers, who have the responsibility for pick-up and delivery of the public inebriates.

C. Selling the Alternatives Model

1. *Factors influencing program acceptance.* Some alternative projects have been adopted more readily than others. Factors influencing program acceptance are characteristics of the alternative itself and characteristics of the agencies involved. The following characteristics of a change have been identified as contributing to the likelihood of acceptance of a proposed change by the community authority structure:

- *Relative advantage.* The change should be seen as advantageous. Either the agency's opera-

tions will be improved or the cost will be decreased.

- **Potential impact.** A change is more easily adopted if it offers the potential for having a substantial impact on the problem at hand.
- **Likelihood of success.** If an alternative, based on the experience in other communities, has a high probability of success, it will be more readily adopted.
- **Compatibility.** A change that is compatible with existing values and roles is more readily accepted.
- **Communicability and complexity.** Complexity affects how easily a change can be communicated, understood, and used.
- **Cost.** Cost is listed separately from relative advantage because of the limited funds available to the criminal justice system to effect change. Changes involving little cost will be much more readily adopted.
- **"Trial-ability" or divisibility.** "Trial-ability" may be an important characteristic regardless of cost. If an alternative can be implemented in small segments or stages, it can be tested as it is implemented.
- **Reversibility.** Reversibility is especially important if the alternative involves a large-scale change to an agency. If the results are unsatisfactory, can this change be reversed? If not, are further alterations available that may improve the results?
- **Observability.** If the results of an alternative are visible, it is more likely to be adopted.

Several characteristics of the criminal justice system have an impact on the adoption of new concepts. One characteristic is the inherent conservatism of criminal justice officials. Many criminal justice officials (or agencies) would prefer to do things the way they have been done in the past and hold onto traditional values.

Another factor affecting change rate is the lack of autonomy of criminal justice agencies. These agencies not only participate in the process through which offenders flow, but they operate in a context that includes clients, public opinion, community pressures, and governmental authority. Justice agencies cannot weigh the advantage of alternatives based on internal criteria alone. The potential impact of alternatives within the entire context of an

agency must be considered. Each justice agency is dependent on other organizations for support. Budgetary and financial resources are received from a government funding source. Program support may also be supplied by community agencies. These agencies must be considered before changes are made.

2. **Transfer strategies.** Change within the criminal justice system is a complex and difficult process. Factors that limit the transferability of alternatives from one jurisdiction to another include differences, such as: the population to be served, the demography of the area, the court structure, the statutory framework, and the strength of the district attorney and the judiciary. If these factors and the change process itself are taken into consideration by planners, the introduction of alternatives should be expedited.

Transfer strategies are relevant both to those promoting change and to those seeking change. The following strategies are described in the *Criminal Justice System* report of the National Advisory Commission:

- **The Use of Consultants.** Consultants are a means of obtaining suggestions on agency organization and operation.
- **Small Group Seminars.** Seminars can focus the interest of representatives of one or more agencies on a specific problem area. Experts in the problem area are included.
- **Demonstration Project Visits.** Agency personnel can visit other projects that are functioning as demonstration models. Projects designated as "exemplary projects" by LEAA can fulfill this role.
- **Pilot Team Approach.** The pilot team consists of experts in various criminal justice fields providing technical assistance and support to justice agencies. To date, such teams have been Federally funded, although local policymakers may want to consider this approach.
- **Written Documents.** Material documenting the advantages, disadvantages, successes, and failures of alternatives used in other communities should be sought. The "prescriptive packages" prepared by LEAA were designed to fulfill this function. Each package contains a description of the local operating experience, evaluation findings, and model program guidelines.

CHAPTER VI. LEGAL CONSIDERATIONS IN ALTERNATIVES PLANNING

The Alternatives Study in its unpublished *Research Report* to LEAA identifies and analyzes a host of legal issues exemplified in three categories of alternatives: pretrial intervention projects, bail reform and supervised pretrial release programs, and agency rule-making. In this guidebook, it was assumed that a summary of general principles of law—none of which are conceptually difficult to understand in the abstract—and illustrations of legal issues from one area, pretrial intervention, would be most useful to planners and practitioners who do not have legal training. The discussion illustrates that it is probably desirable in designing many alternatives, such as pretrial intervention programs, to use the services of an attorney for an independent review of policies and procedures in the earliest planning stages. Such a review will anticipate and attempt to minimize the likelihood of serious legal challenge to the program's operation and will also ensure that policies and procedures are fair and protect essential rights.

A. Some Guiding Principles of Law

The following list, which is by no means exhaustive, includes general principles of law which are basic and uniformly applicable to any alternative reform.

Equal Protection. As a general protection, like-situated persons ought to have like opportunities and be treated in like fashion. For alternatives programs, the implication is that like-situated people ought to be given the same access to benefits and new opportunities and ought not, without good reason, to be excluded unless clear distinctions can be made among them.

Due Process. Due process requires that before making decisions as to which guaranteed rights will be ensured and which will be curtailed, a defendant must be given 1) adequate notice, 2) meaningful opportunity to present a case, and 3) notification of the outcome. When implementation of these re-

quirements is impossibly burdensome, exceptions can be made. It is in the design of such exceptions and in tailoring adherence to the requirements that the services of an attorney become especially important.

Existence of the Right to Pretrial Freedom. The right to pretrial freedom has been qualified by local statute in at least two states which have enacted pretrial detention measures. The principle that a person accused of crime should be assumed to be innocent until proven guilty suggests that, basically, a defendant should have no more encroachments upon his life than a free citizen. However, in most jurisdictions, the curtailment of a defendant's freedom is carefully defined and relatively minimal. One way alternative programs have commonly responded to this requirement is by making participation voluntary.

- *Constitutional Conditions.* In the absence of a good reason, one cannot make the price of a benefit conditioned on the necessity not to exercise a Constitutionally guaranteed right. For example, one cannot require a defendant to surrender his right to a speedy trial without proper safeguards—(voluntary, knowing consent).

The next item is an example of the type of issue which will present the most serious policy choice for program planners in the alternatives field:

- *The Issue of Waivers.* Even if an alternative project tampers with a defendant's fundamental Constitutional rights, it is still possible to implement alternative programs by requiring the defendant to enter into a series of legitimate and permissible waivers. There is undoubtedly some outside limit on the number and kind of waivers that are allowed. It is, for instance, difficult to imagine a waiver of the right to equal protection because program participants would not be competent to waive for those people who are excluded. However, if properly

constructed, waivers for due process and speedy trial rights would be allowed. As a matter of policy, there is a serious question as to how many waivers should be built into a new program and how far a program should deviate from the core Constitutional principles. There is no single answer to any of these policy questions. Nonetheless, it is critical that each program planner consider the options. On one hand, a program planner can decide to do as much with waivers as possible on the theory that the conventional criminal justice system is fraught with so many problems that any method designed to arrive at a new justice system or justice program is legitimate. On the other hand, assuming that there are many problems in the criminal justice system but that the collective wisdom of the ages is built into our Constitutional and case law, it may not be wise to tamper too far with basic defendant rights mandated by the Constitution, the statutes, and the case law.

the traditional role of prosecutors. Two labels often attached to such programs candidly acknowledge the similarity to sentencing—pretrial probation, and pre-prosecution probation. Nevertheless, it must be emphasized that to place ultimate responsibility for separating those cases which will be prosecuted from those which will not in an official other than a prosecutor is to significantly disturb the traditional pattern of allocated authority within the criminal justice system.

Legal questions that may be raised concerning the legitimate basis for various agencies of the criminal justice system to authorize pretrial intervention programs are now briefly described.

- **Police:** Police authorized pretrial intervention may involve delaying arrest in a class or classes of cases. A U.S. Supreme Court case (*United States v. Marion*, 404 U.S. 307 (1971)) states that prejudicial delays in making arrests or filing indictments may violate Fifth or Fourteenth Amendment due process rights. Thus, any systematic police practice of delaying arrests in situations not presenting exigent circumstances could be constitutionally questioned. In addition, although the Supreme Court has stated that "pre-accusation" delay does not violate speedy trial rights, an arrest does trigger the running of the "post-accusation" phase of the proceedings. A police-run program which refers offenders after arrest does raise substantial speedy-trial problems. Individual participants could plausibly assert a violation of their individual speedy-trial rights in the event of unfavorable termination from the program and the resumption of criminal proceedings.

B. Issues Related to Pretrial Intervention

One cluster of recently organized "alternative" processing programs is that referred to as "pretrial intervention." As defined, "pretrial intervention" refers to any program which offers officially accused persons the opportunity to make a demonstration of their potential to refrain from further criminal behavior and/or successfully participate in a community program. During the demonstration period, proceedings are suspended against the accused with the prospect of a favorable termination of those proceedings.

1. *Authority to "divert" by intervention.* The operation of a pretrial intervention program involves the exercise of authority which has received, as yet, little judicial scrutiny. The authority exercised by prosecutors authorizing and operating pretrial intervention programs has generated controversy. Daniel J. Freed, among other critics of prosecutor-dominated intervention, has urged legislation vesting "ultimate control over prosecutor endorsed programs in the judiciary," as a means of providing safeguards over arbitrary or inconsistent decisions. Freed argues that the procedures used in intervention-type programs, involving prescribing controls over future conduct, are more akin to the sentencing powers and procedures of judges than to

Police intervention programs that depend on the use of delayed or repeated arrests also could be subject to court challenge as a systematic official effort to lessen the due process and/or speedy trial rights of defendants.

- **Prosecutor:** The conclusion that there exists a prosecutorial authority to conduct intervention is far from complete. To insist without argument that such a power does exist is to confuse the clear proposition that the extent of the prosecutor's discretion is great and in some respects unrestrained.

In the absence of any authorizing statute, a prosecutorial assertion of inherent authority to conduct pretrial intervention may involve a violation of the "separation of powers." Although it is open to the

legislature to withdraw the authority over sentencing, it is not similarly open to the prosecutor.

- *Trial court:* As a general proposition, it is clear that such authority cannot reside alone in the judiciary. The statutes of some typical jurisdictions authorize the judicial dismissal of an indictment, but without the prosecutor's consent the more general rule limits the power of judicial dismissal to instances in which there are specific legal grounds.

Two or more criminal justice agencies in cooperation: If the authority of any single criminal justice agency to conduct pretrial intervention unilaterally may be subject to constitutional challenge, multi-lateral authorization of non-statutory intervention programs remains a possibility. Most intervention programs now in operation are, at least as a matter of form, the product of an understanding between court and prosecutor. The limits on this approach involve the constitutional doctrine restricting delegation of governmental power. For example, the judiciary may not delegate any final decision-making authority over motions to suppress illegally obtained evidence. For a program to be based on legitimate authority, each agency involved should exercise that function which derives from its duly constituted authority. For a cooperative program to be said beyond doubt to be legitimately authorized, each agency must actually perform those non-delegable functions (or supervise their performance) in the course of the program's day-to-day operation.

2. *Principal legal issues in intervention program design.* For the purposes of the following analysis, an accused person's progress though an intervention program will be presumed to consist of five distinct phases:

- *Initial screening according to predetermined eligibility criteria.* At this stage, defendants are chosen according to certain criteria. Depending on a particular program's eligibility criteria, the administrative determination that an accused fails to meet one or more of these "objective" standards terminates further officially initiated activity.
- *Discretionary screening.* Depending on program design, this level of screening consists of making further selections from among potential candidates for intervention on such an individualized and subjective basis as predictions of the likelihood of "success." This step can be said to consist of two distinct choices: to exclude accused persons already found

nominally eligible from the candidate list, and to waive eligibility criteria and reach back into the names already discarded as nominally ineligible.

- *Induction.* Either explicitly or by implication, every accused person who participates in pre-trial intervention must be acquainted with the existence of the program and must be informed of its availability to him on specified terms and conditions. In addition, the candidate must agree to participate, although the form of his agreement may vary. The most critical aspects of induction are the nature of the contingent benefits offered to prospective inductees, the nature of the concessions exacted as a condition of entry, and the nature of the process by which the benefit/concession trade-off is determined.
- *Participation.* Depending on the particulars of the program design, the duration of the participation phase may be limited, subject to extension, or continue indefinitely. For legal purposes, the participation phase is peculiarly significant because it represents the period during which program officials have an opportunity to acquire intimate or potentially damaging information concerning the participant.
- *Termination.* This critical event may take one of three forms. Favorable termination occurs at the end of a determined period of program participation and follows a determination that the participant has conformed with predetermined conditions and is entitled to the full benefit of what was promised, such as dismissal or *nolle prosequi* of pending charges. Unfavorable termination occurs as a result of participant non-compliance at any time. The third variety of termination might be described as "mixed," occurring at the end of the fixed period of participation, and following a determination that a participant's performance has been of intermediate quality. It consists of a decision to resume criminal proceedings but to provide or urge sentence concessions in the event of conviction.

Although legal issues may arise during each of the above five phases of an accused person's progress through an intervention program, four areas of potential legal challenge will be described.

- a. *What are permissible intake criteria?* Mere "reasonableness" of criteria is not enough if the end sought is itself in question or unrelated to the

legitimate goals of pretrial intervention. Some legitimate goals include: 1) the promotion of rehabilitation, 2) the relief of delay or backlog in normal case processing, and 3) the lessening of injustice. Even where the goal of a classification is itself justifiable, administrative organizers of intervention programs must be prepared to offer sounder and more complete arguments for its "reasonableness."

Thus, for example, a limitation on eligibility to "first offenders" may be a defensible one, but the rationale for developing this type of program must show that the services offered in the program are as specialized as the target population. This requires a relevant definition of "first offenders" appropriate to the legal jurisdiction and to the pretrial program services. One must link a "first offender" to a special service. Some alcoholics and drug offenders require medical care. Some first offender prostitutes require job skills and education.

For our purposes, two questions must be posed and answered: 1) Is the present charge a reasonable indicator of the accused's potential for success in pretrial intervention and 2) Can the present charge be allowed to stand alone as an exclusionary bar?

As to the first, even a tentative answer must be no. There is no possible or proper distinction between the accused armed robber who is suspected of having been strongly motivated by need or desperation, and a person who may have been moved by a desire for luxury or a fascination with risk. Thus, the best that can be said for the charge as a diagnostic indicator is that, in certain cases, charges may fairly be afforded some weight.

A review of other commonly employed exclusionary eligibility criteria will yield similar results as those above. A few of the common criteria may be obviously permissible (e.g., the requirement that persons entering an employment program be persons with present labor market disabilities). When tested, however, criteria may not survive an exacting test.

b. *What legal standards apply to discretionary screening for intake?* Program administrators may find it better to anticipate the inevitable, and to develop methods to regulate discretion, than to have methods imposed on them. Any plan for self-regulation must also address the issues of "exceptions"—when are the rule-prescribed procedures to be set aside, what special or emergency procedures will then be employed in their place, and who will

approve such departures from normal processing modes?

- *Rulemaking.* Rulemaking is a mode of "self-regulation" at intake screening. It is characterized by the partial reduction of the decision-making process (as, for example, a standard tally sheet for assessing potential participants that is designed to produce particular attributes), along with the provisions of some additional mechanism to guarantee against the intake of non-prosecutable cases.

- *Intake hearings.* It is possible to anticipate the format of a judicially mandated intervention intake hearing procedure. One format, after eligibility standards have been established, would be a hearing in which the potential participant would argue eligibility for program entrance. The identity of the hearing officer or board would vary according to the model of pretrial intervention involved. Notice of the action and the grounds for that action would be provided, in writing, to the potential program participant.

In another possible procedural format, notice would go only to those defendants who 1) have been found eligible by screeners, and 2) have been rejected by second-level "discretionary" decision-makers. In all other respects, this procedure would resemble that just outlined except that the potential participant would, in effect, be appealing from an initial adverse decision, rather than attempting to influence the making of such a decision.

c. *What conditions may be imposed on enrollment?* The doctrine of unconstitutional conditions states that the government may not exact an unreasonable "price" for the exercise of any Constitutionally secured right—for example, the necessity of foregoing an otherwise available benefit.

If this test is not satisfied by the Constitutional waivers required at intervention enrollment, the fact that those waivers are consented to by enrollees cannot legitimize the practice of requiring them.

A program cannot, without risking violation of the "unconstitutional conditions" doctrine, require that prospective participants waive at enrollment more of their speedy-trial right than is necessary for program operation. Thus a written waiver which specifies that the enrollee agrees to "such a delay in the prosecution of my case as is necessary to permit my full participation in the program as it has been explained to me, but in no case longer than ___ months (or years)" is acceptable in form.

A waiver that purports to accomplish an unqualified surrender of speedy trial rights, without reference to the period of delay contemplated in the intervention program design, is unacceptable.

Other intervention program enrollment requirements that can be analyzed in "unconstitutional conditions" terms include the insistence of some programs that enrollees surrender temporarily some aspects of personal privacy. In some program designs, the demanded waivers against unreasonable, warrantless searches and seizures are integral; in others, they may be peripheral. Thus, for example, it would appear permissible to condition participation in an intervention program for drug-dependent defendants on the periodic submission of urine samples for analysis; the same condition, however, might well prove unacceptable as an element of the enrollment agreement in a program which limits itself to providing vocational services to unemployed or underemployed defendants.

d. *What termination procedure is mandated under the due process clause?* If a participant violates minimum program requirements, what form of termination procedure, if any, is mandated under the due process clause? Analogies to termination procedures in the probation-parole area suggest that the defendant may be entitled to certain minimum due process rights: specific written notice of the alleged grounds for termination; opportunity to prepare and present arguments refuting or mitigating the alleged grounds for termination; a neutral hearing officer or board to hear arguments and render a decision; and, a written statement of the nature and basis of any unfavorable termination reached by the hearing officer.

If these procedural minima are accepted by intervention program designers, considerable creativity and flexibility could be exercised, for example, in the choice of a hearing examiner or hearing panel. A community board with broad-based lay participation, for example, might well be constitutionally acceptable and programmatically desirable. So, too, within limits, might be a peer review committee which placed the responsibility for determining the issue of an individual participant's termination on fellow participants.

A related procedural issue is whether a participant would be entitled to outside assistance, including legal counsel, in preparing and presenting arguments at a termination hearing. If a constitutional right to representation, at least under certain circumstances, exists, this right possibly could be satisfied by providing either an appointed attorney or a third-year law student (or legal para-professional) working under professional supervision, as "counsel for purposes of termination proceedings" to indigent program participants.

In summary, legal expertise as an adjunct of the planning process can be invaluable. The role of the lawyer in the design of a pretrial intervention program should include a review of: the program's eligibility criteria and intake decision-making procedures—the special undertakings waivers, act of restitution, pleas, or admissions required as conditions of admission into the program; the provisions for maintaining confidentiality of participants' program records; and, the procedural safeguards for participants' rights.

CHAPTER VII. EVALUATION

Every new program must justify its existence to a community which includes legislators, criminal justice practitioners, participants, and other interested groups. Their primary concern will be whether or not the program is benefiting the participants—and, in turn, the community—and whether it is worth the cost and resources required. Beyond this purpose, the evaluation process will aid program staff in staying abreast of the program's operations and obtaining timely and meaningful feedback relating to the project's operation.

Evaluation, as proposed in this guidebook, should be used as a resource to assist staff and others involved with the program in maintaining project goals and responding to program needs. Evaluation methodology should not be used, however, to control a program to the extent that evaluation elements govern decision-making and resource allocation, with the result that flexibility and creativity are lost and changing or unforeseen developments cannot be dealt with effectively.

A. Evaluation: What Is It and Why Is it Important?

Evaluation, in its narrow sense, is the systematic assessment of the degree to which a program or procedure has met or is meeting its stated goal(s). For example, if the goal of a new calendaring procedure adopted by a criminal court is to reduce time before trial from an average of six months to an average of three months for felony defendants, an evaluation would assess to what degree, if any, the six-month average felony pretrial period had been reduced *as a result of the new calendaring procedure*. It is this ability to isolate the significance and impact of the new procedure or program which constitutes the value of evaluation research to decision-making at every level.

Research evaluation, entailing as it does a methodological discipline, can provide an objective answer to the question: "Does the program work?"

Equally important, by its ability to isolate the specific effects of a procedure or program, it can identify both positive and negative impacts of a program, providing a basis for modifying or expanding particular program elements which would contribute to enhanced program performance.

In addition to evaluation as a disciplined assessment, the data-gathering process has other benefits. It permits frequent, regular contact with cooperating agencies and participants, and thus maintains an important channel of communication as well as a source of information.

B. Conducting Evaluations in the Proper Context

1. *Current problems with program evaluation.* Confusion and complaints abound regarding the quality, relevance, and/or absence of evaluations of social programs, including activities in the criminal justice system. Operating staff who produce the data that is analyzed and whose performance is thereby reviewed, frequently view evaluation as a requirement imposed by the funder, having no utility. Lacking motivation, these individuals may pay token attention to data collection and evaluative processes. Frequently, techniques and procedures such as establishing control groups and conducting cost-benefit analyses are espoused and applied, without adequate understanding of limitations and necessary implementing conditions. Without the proper foundation, the evaluation loses credibility and the decision-maker may be reluctant to act on the results, especially if they run counter to his/her beliefs and policies.

Most evaluations of alternative programs are performed either because requirements have been set down by the funding organization or because the program director wants to provide positive support in the search for funds. Few evaluations assess general overall effects in the criminal justice system by the alternative program; most are conducted in

terms of cost factors or recidivism. The weakest area of the current evaluations is their lack of relevance to policymakers and their questionable accuracy. In other words, the evaluations often do not serve the needs of the program's staff or the policymakers involved.

2. Essential elements to an effective evaluation process.

a. *Utility.* Evaluations are frequently mandated by the funding organization and, if done wisely, can assist the program staff in numerous ways. The evaluation process can help the program staff develop and maintain a clear understanding of their collective purpose by measuring program operations against stated requirements for precise program goals, along specific measurement criteria determined for this purpose. The evaluation can also facilitate daily management of program in two ways: 1) providing a system for monitoring the degree of similarity between planned and actual procedures, and the compatibility of those procedures with stated goals; and 2) measuring participant performance in different areas with these results related to the program's procedure and service content.

In identifying long-term effects and pinpointing the need for major adjustments in the program, long-term results can be documented and can be used as a meaningful basis for decisions regarding refunding, expansion, or permanent institutionalization.

b. *Completeness.* If an evaluation is to be a useful tool it must be accurate and complete. Appropriate techniques for collecting adequate follow-up data must be clearly developed, with full cognizance of the compatibility of stated goals and operating procedures and environmental factors that affect the alternative program and its results.

c. *Using appropriate methodologies.* Different evaluative techniques are appropriate for developing information about various aspects of an alternative activity. One design, the exploratory non-experimental design, provides background information necessary to identify possible causes of observed effects, such as understanding the program's environment within and outside the criminal justice system, the possible effects of that environment on the program and its results, and the possible relationships between in-program and post-program results. Other methodologies can be used to determine precise measurements, such as the effect of a limited number of factors that were identified for measure-

ment prior to implementation of these designs. Experimental and quasi-experimental designs can yield precise information regarding the appropriateness of specific techniques which might be of use, for example, in managerial decisions regarding appropriate operational procedures.

Cost-benefit analysis, another design model, introduces an additional dimension to evaluation by providing a cost context. However, cost-benefit analysis can mislead policymakers with information that appears to be very exact when, in fact, considerable uncertainty exists. To avoid misdirection, cost-benefit analysis should be attempted only after other evaluative procedures have produced essential prerequisite information. Even if this precaution is observed, uncertainty will remain regarding assignment of quantitative values to essentially non-quantifiable benefits.

d. *Balanced perspective.* Evaluation requires several skills and perspectives. The evaluator must maintain objectivity, yet thoroughly understand the slight differences of the alternative program's goals, procedures, and operational conditions. Very different technical skills are required at various phases of the evaluation. Since there are a limited number of evaluators who have considerable experience, they should be utilized on panels that advise, assist, and monitor the less-experienced evaluators who spend considerable time with the alternative program. The special expertises of the panel members can be applied at critical junctures, planning and design of the evaluation, final analysis of results, and to address special problems identified by the on-site evaluator.

3. Pre-evaluation preparation. The following steps will help to ensure that goals, objectives, and information needs are clearly defined and that the subsequent evaluation is, in fact, a useful tool to all involved.

a. *Articulate program goals.* Proper goal articulation is necessary to provide a strong foundation for an evaluation. The goals of an activity should reflect some of the objectives of the policy planner and represent the intentions of the program director and staff. The evaluation must focus on these goals, attempting to measure their accomplishment. The process of articulating these goals should include:

- Setting broad goals for the program as a guide for resource allocation.
- Specifying the required types of decisions related to those goals, the timing of the decisions,

and any special conditions regarding the information to be presented.

- Establishing a broad range of sub-goals and objectives that will contribute to the attainment of the basic goals, and rank in order of relative importance, giving a numerical rating to reflect their expected contribution to the goals and objectives, and provide a rationale for each aspect of this process.
- Formulating a range of strategies and specific programs that will contribute to the objectives with specific weights for each program corresponding to its anticipated contribution to each of the individual objectives.
- Estimating the contribution of a specific strategy to each of the overall subgoals and aggregated across all of the broad goals.

Given that policymakers base many of their decisions on subjective information, these steps structure that information and facilitate the project director's understanding of what aspects of various strategies interest the policymaker.

b. *Assure that program operations and goals are compatible.* The positive influence of comprehensive goal articulation on the program and on its evaluation can be sharply diminished if the activity's structure and procedures are not carefully formulated to correspond with and contribute to those goals. Even more frequently, tension develops or increases as implementation progresses because of forced or voluntary changes in either goals or procedures without corresponding adjustment in the other. So common areas of conflict occur between:

- Goals and eligibility criteria.
- The intended purpose of a service and the style of delivery for the service.
- The goal of improving and equalizing defendant's opportunities to emerge from the criminal justice system, and procedures that undermine defendant's legal protections.

To ensure compatibility of goals and procedures, a monitoring system that records accomplishment of procedures should be set up to identify procedural failures quickly and trigger review of both the procedure and corresponding goal. The monitoring system should include the following elements:

- A clear statement of the implementation guidelines for each procedure, including a statement of the linkage between the procedure and specific objectives.
- Indicators of appropriate performance standards.

- Maximum allowed variation from the standard which, if exceeded, automatically calls for corrective measures.
- Regularly scheduled review or analysis of procedural performance data by designated staff members.

Collection of the information for this monitoring process should provide an accurate, descriptive record of procedural implementation throughout the life of the program, providing important information for both management and evaluation.

c. *Select appropriate analytic design.* The types of techniques and approaches that are appropriate for the analysis of results depend on several factors—the types of information desired from the evaluation, the characteristics of the activity, and the environmental conditions within and outside the criminal justice system that influence activity.

A brief description of the various designs may help the planner understand what options there are in analytical designs.¹ The *experimental design* compares the pre-and post-participation performance of the activity's participant population with a comparison group whose members are randomly selected from the pool of potential participants and not allowed to participate and receive services. This allows comparison of two groups that start at the same position prior to the program, one receiving services, the other not, providing a strong barrier against intervening non-program variables that could threaten internal validity.

Quasi-experimental designs are more susceptible to threats of internal validity than are experimental designs. Some of these designs relax the requirement that the comparison and experimental groups be

¹ For additional information, see Glaser, Daniel, *Routinizing Evaluation: Getting Feedback of Effectiveness of Crime and Delinquency Programs*, Monograph, Center for Studies in Crime and Delinquency of the National Institutes of Mental Health, 1973. (Copies may be ordered from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402, Price \$1.55—Stock Number 1724-00319). Pages 183-188 provide extensive annotated references to literature on evaluation methods and studies.

See also Rovner-Piezenik, Roberta, *Pretrial Intervention Strategies: An Evaluation of Policy-Related Research and Policymaker Perceptions*, Monograph, ABA Commission on Correctional Facilities and Services, 1974: Chapter Two, pp. 22-52, Methodology of Validity Assessment, discusses analytic evaluation designs. Pages 245-249 provide a bibliography which includes references to pretrial intervention program literature, other diversion literature, diversion legislation and reports, and evaluation research.

randomly assigned from a common pool and are easier to implement. However, the requirement for program stability remains.

Traditional non-experimental methods include the case study, participant-observer studies, and surveys. They allow more detailed examination of an individual or small number of examples, perhaps providing an opportunity for greater insight but not affording data on samples large enough to support precise statistical analysis necessary to confirm or deny special hypotheses. Therefore, although susceptible to questions about validity and reliability, their strengths are their ability to produce highly relevant information for activity directors and policy decision-makers.

Goal Attainment Scaling is a recently developed evaluative process that combines extreme flexibility with the potential for randomized selection of participants and controls.² Its primary feature is its focus on individual staff and participant, and achievement of goals specified for each participant. Goal attainment scaling requires the responsible staff member and participant to identify specific goals and set an attainment scale for each goal. The starting point and periodic progress of each individual for his own goal scales is recorded by the activity staff; the performance information is relayed back to individual staff members who are working with these participants, so that adjustments in service delivery techniques can be effected with very little lag. In order to arrive at an overall performance rating for an individual, the goals can be assigned relative levels of importance through the use of weighting factors, and performance can be aggregated. Levels of possible attainment for each goal (the goal attainment scale) usually involve a continuum of five stages that are described in behavioral indicators, ranging from the most unfavorable outcome thought likely to the most positive outcome thought likely.

² Goal Attainment Scaling was developed at the Hennepin County Mental Health Service. The procedure is described in considerable detail in Kiresek, Thomas J., "Goal Attainment Scaling at a County Mental Health Service," *Evaluation*, Monograph No. 1, 1973, and Kiresek, Thomas J. and Sherman, Robert E., "Goal Attainment Scaling: A General Method for Evaluating Comprehensive Community Mental Health Programs," *Community Mental Health Journal*, Vol. 4, 1968, pp. 443-453.

As noted above, cost-benefit analysis can help a policymaker, understand whether an existing activity provides benefits in excess of costs. The Alternatives Study placed a major emphasis in its evaluation effort on a detailed examination of cost-benefit analysis because of increased interest in its application to evaluating criminal justice programs. In its unpublished *Research Report* to LEAA, the theoretical framework of cost-benefit methodology is presented and illustrated with an example of its application to a pretrial intervention project. Projects yielding quantifiable results, such as reduction in recidivism, are amenable to techniques of economic analysis whether or not dollar values are assigned to the outcome. There is a more fundamental problem with cost-benefit analysis. It was originally developed to analyze the comparative efficiency of factory production lines, where production *techniques* ("process") are understood. But its use in criminal justice is speculative because our understanding of how projects "work," and how they "work best," is inadequate. In a criminal justice program, the same services provided to two different defendants, may affect each differently. Thus, while cost-benefit analysis can be useful in comparing projects to other projects and to other possible expenditures of public funds, it should be used only *after* an adequate evaluation of the project—treating both "process" and "impact"—has been performed. Cost-benefit analysis should not be used as the sole or even the main criterion for evaluation of alternatives. It should only be used as an adjunct to evaluation plans which also employ a "case-history" approach and appropriate methodologies of both "process analysis" and "impact analysis."

Planners and project directors might profitably contact similar established projects which may have already dealt with identical evaluation issues. Appendix C of Part 4 provides a selected list of alternative projects and their addresses. A major recommendation of the Alternatives Study in the evaluation area is the need for technical assistance in designing and undertaking program evaluation. Hopefully, in the future there will be greater availability of evaluation technical assistance along the pattern of LEAA and other efforts to provide technical assistance to courts, police, and corrections.

PART 3
THE PRACTICAL APPLICATION OF ALTERNATIVES

	I. DECISION TO DEFINE CONDUCT AS A CRIME	II. DECISION TO FOCUS ATTENTION ON A SUBJECT	III. DECISION TO ARREST	IV. DECISION TO CHARGE*	DECI DEFEND OR
A. LEGISLATURES	1. Statutory Decriminalization a. Pure decriminalization b. Reclassification: Downgrading to summary offense status c. Substitution of noncriminal response for criminal sanction	1. Creation of Administrative Tribunal a. Consumer complaint b. Professional malpractice c. Other Subject matters	1. Statutory Provision for Field Citation Release a. Permissive b. Mandatory	1. Changes in Grand Jury Function a. Elimination b. Preservation as investigating body 2. Restrictions on Plea Bargaining a. Abolition b. Prohibition in certain predesignated cases c. Regulation of negotiation practices	1. Statutory a. Releas b. Condi c. Cash d d. Aboli ty bon
B. POLICE DEPARTMENTS	1. Uniform Departmental Policy of Nonarrest a. Formal written policy b. Informal policy	1. Complaint Evaluation According to Priorities a. Subjective: Case-by-case b. Objective: Standard Criteria to distribute resources 2. Variation in Patrol Practices a. Concentration on prevention and detection of target offenses b. Deemphasis on outreach	1. Departmental Rulemaking a. Process rules b. Situational rules 2. Implementation of Field Citation Release 3. Crisis Intervention 4. Referral to Social Services a. Noncoercive b. Coercive 5. Referral to Arbitration a. Specialist - binding b. Specialist - advisory c. Nonspecialist - binding d. Nonspecialist - advisory	1. Departmental Rulemaking a. Formalization of charging process b. Centralization of charging function 2. Diversion of Juveniles (at intake screening) a. Minimal service b. Extensive service program 3. Police Department Case-Review Intervention a. Contract/service b. Contract without service c. Noncontract/service d. Noncontract without service	1. Station H a. Master b. Statio
C. PROSECUTOR OFFICES	1. Uniform Policy of Non prosecution a. Formal written policy b. Informal policy	1. Office Policy on Investigation 2. Special Offense Oriented Units a. Specialized bureaus b. Special prosecutors 3. Citizen Complaint Evaluation Center	1. Prosecutor Assigned to Police Station 2. Joint Police-Prosecutor Rule-making a. Process rules b. Situational rules 3. Complaint Referral to Civil Courts	1. Case Evaluation for Initial Charge Decision a. Centralization of charging function b. Formalization of charge process 2. Case Evaluation for Review of Charge Decision a. Centralization of review function b. Rulemaking governing review c. Consultation with counsel 3. Evaluation and Weighting for Noncharge Purposes 4. Prosecutor Case-Review Intervention a. Contract/service b. Contract without service c. Noncontract/service d. Noncontract without service 5. Referral to Arbitration a. Specialist - binding b. Specialist - advisory c. Nonspecialist - binding d. Nonspecialist - advisory 6. Restrictions on Plea Bargaining a. Rules dictating centralization of bargaining function b. Rules describing criteria	1. Uniform C Release a. Rule b. Guideli scrutin
D. TRIAL COURTS	1. Judicial Refusal to Permit Enforcement of Particular Statutes a. Generalized by injunction or declaration of law b. Case-by-case determination		1. Review of Police Discretion a. Injunctive, declaratory, and other equitable and extraordinary remedies b. Civil Damages c. Criminal prosecution d. Adverse case consequences from misuse of police power 2. Review of Requests for Arrest Warrants	1. Court Case-Review Intervention a. Contract/service b. Contract without service c. Noncontract/service d. Noncontract without service 2. Review of Prosecutorial Discretion a. Injunctive, declaratory, and other equitable and extraordinary remedies b. Adverse case consequences from prosecutorial power 3. Supervision of Plea Bargaining a. Increasing the visibility of the bargain b. Increasing judicial participation c. Other modes of supervision 4. Referral to Arbitration a. Specialist - binding b. Specialist - advisory c. Nonspecialist - binding d. Nonspecialist - advisory	1. Option Proced Author a. Condi b. Nomi c. Relie
E. DEFENSE BAR					
F. PUBLIC NONCRIMINAL JUSTICE AND PRIVATE AGENCIES		1. Prearrest Case Finding a. Persons requiring medical service b. Juveniles c. Other Special populations		1. Agency Case-Review Intervention a. Contract/service b. Contract without service c. Noncontract/service d. Noncontract without service	1. Impel Through gation a. Inde service b. Mixed ind
G. CITIZENS/ VOLUNTEERS			1. Community Monitoring of Police Practices		1. Commu 2. Organi
H. PROBATION AND PAROLE OFFICERS				1. Diversion of Juveniles (at intake screening)	1. Bail Fu
I. APPELLATE COURTS	1. Judicial Decriminalization a. Violation of substantive rights b. Inadequate drafting		1. Review of Police Discretion a. Statutory or constitutional prohibition on practices b. Failure to provide equal protection 2. Court Rule Authorizing Field Citation Release a. Permissive b. Mandatory	1. Review of Prosecutorial Discretion a. Statutory or constitutional prohibition on practices b. Failure to provide equal protection 2. Standardization of Plea Bargaining a. Under ruling power b. Through case decisions	1. Bail Ref Power a. Auth b. Decis plem

The "Decision to Charge" (IV) might be described as a process or continuing series of decisions. This process may begin prior to arrest, and is not concluded until the filing of final formal charging papers, which need not occur at any fixed time except that it must precede trial. Consequently, the "Decision to Charge" overlaps and penetrates, chronologically, other "decisions" displayed on the horizontal axis.

TABLE II

MATRIX:

Stages In The Conventional
Adjudication Process and
Potential Alternatives

V. DECISION TO RELEASE DEFENDANT PENDING TRIAL OR DISPOSITION**	VI. DECISION ON PRETRIAL MOTIONS AND APPLICATIONS	VII. DECISION TO TRY OR TO ACCEPT PLEA	VIII. DECISION TO SENTENCE
I. Statutory Bail Reform a. Release on recognition b. Conditional release c. Cash deposit bond d. Abolition of professional surety bonding	1. Statutory Authorization for Intervention a. Mandatory b. Permissive	1. Creation of Administrative Tribunal a. Traffic Offenses b. Other regulatory offenses	1. Statutory Provision of Alternatives to Custodial Sentencing a. Expanded use of probation b. Special conditions of probation 2. Restitution a. Mandatory b. Permissive 3. Victim Compensation 4. Mixed: Restitution-Victim Compensation Plan
1. Station House Release a. Master bond schedules b. Station house citation			
2. Uniform Office Policy on Pretrial Release a. Rules to achieve consistency b. Guidelines emphasizing close scrutiny	1. Prosecutor Case-Review Intervention a. Contract/service b. Contract without service c. Noncontract/service d. Noncontract without service		1. Uniform Policies on Sentencing Recommendation a. Rules to achieve consistency b. Guidelines emphasizing close scrutiny
3. Option of Instituting Reform Procedures in Absence of an Authorizing Statute or Rule a. Conditional release b. Nominal bond c. Release on recognition	1. Omnibus Pretrial Hearing	1. Courts of Special Jurisdiction	1. Nonstatutory Innovative Sentencing a. Restitution b. Public service c. Special probation to services d. Unusual sanctions 2. Contract Sentencing 3. Sentencing Boards (Lay Participation) a. Advisory b. Binding 4. Sentencing Panels (Multi-Judge) a. Advisory b. Binding
4. Implementation of Bail Reform Through Bail Eligibility Investigation a. Independent screening and/or service agency b. Mixed model: Probation with independent agency			1. Organized Defense Planning for Sentence a. Presentence reports b. Voluntary service rehabilitation programs 1. Voluntary Service Rehabilitation Program 2. Presentence Reports
5. Community Bail Funds Organized Third-Party Custody		1. Community Courts a. Formal cession of authority/consent of parties b. Formal cession of authority/no consent of parties c. No cession of authority/consent of parties d. No cession of authority/no consent of parties	1. Community Presentence Investigation and Recommendation
6. Bail Eligibility Investigation			1. Presentence Investigation and Sentence Recommendation a. Expanded use b. Increase in intensity
7. Bail Reform Under Rulemaking Power a. Authorizing rules b. Decisions influencing implementation of bail reform	1. Court Rule Authorizing Intervention 2. Implementation of Speedy Trial Right a. Under rulemaking power b. Through case decision		1. Appellate Review of Sentencing a. Pursuant to general power of review b. Pursuant to statutory scheme

The "Decision to Release Defendant Pending Trial or Disposition" (V)—the bail decision—is made at least once, and may be repeatedly reconsidered or reviewed, during the charge process. It may be modified at any time prior to conviction. In contrast to the "Decision to Charge" (IV), it is not a continuous process.

CHAPTER VIII. APPLYING ALTERNATIVES WITHIN THE MATRIX OF CRIMINAL JUSTICE OPERATIONS

A. The Matrix

Alternatives to conventional criminal case processing can occur at every major decision stage in the criminal process and can be administered by a variety of public and private agencies, both in and out of the criminal justice system. Until now, however, little or no effort has been made to classify comprehensively and systematically the range and nature of these alternatives. One of the principal tasks of the research study upon which this guidebook is based was the development of such a classification system, and the result is Table II, the two-dimensional matrix presented on the preceding sheet.

The Matrix consists of two axes: the horizontal axis, consisting of columns I through VIII, lists the principal decision points in the criminal justice process. The vertical axis, consisting of rows A through I, lists the actors who are primarily involved in these decision stages. Actual and possible alternative programs or activities which might occur at these various stages are described in the matrix boxes, or cells. A detailed description of the structure and function of the matrix is presented in Chapter III of the *Alternatives Report*; the guidebook will therefore focus principally upon the practical application and agency interrelationships described by the classification system.

The purpose of developing the matrix was to devise a tool for analyzing the relationships among various alternatives and actors in the criminal justice system. The matrix includes not only existing programs but also potential alternatives and those in the process of implementation.

B. Decision Points at Which Alternatives Can Apply

Each of the eight "decision" columns of the horizontal axis represent: 1) a major decision point

in the progress of a case through the criminal justice system, and 2) a phase in the chronology of the criminal process. In some cases, a series of decisions is collapsed into one column, capturing the essential character of the decision point. For example, Column VI: *Decisions on Pretrial Motions and Applications* represents a number of primarily judicial decisions. Similarly, Column IV: *Decision to Charge* represents a series of determinations which may have extended over a period of weeks. All of these decision "points" indicate a proximate location on the spectrum of the criminal justice process for the types of alternatives discussed.

It should be noted that the horizontal axis does not describe all events in the criminal process, but focuses upon those steps in the process where alternatives can have a readily discernible effect. Thus, while activities such as public education or crime prevention are important in any balanced discussion of criminal justice, they are not reflected in the decisional stages discussed. The decision points have been defined by the study team as follows:

- *Decision to define conduct as crime.* The point at which the legislature's exercise their authority to determine what conduct or status will be deemed punishable and what sanctions or response may apply.
- *Decision to focus attention on a suspect.* The point at which criminal justice system officials begin investigation before formally initiating criminal proceedings. At this point, potential defendants may be identified as targets of scrutiny, either because they are the subjects of recurrent complaints or because their status makes them appropriate subjects for intensive investigation which may have different outcomes—prosecution, arrest without prosecution or referral out of the justice system, for example.
- *Decision to arrest.* The point at which an individual is taken into custody by police for more

than momentary detainment on the basis of a definite allegation or suspicion of criminality for the purpose of making a criminal charge.

- ***Decision to charge.*** The point at which a decision is made as to what official criminal accusations will be made against a particular defendant as the basis of further criminal proceedings. This process may begin prior to arrest and is not concluded until the filing of final formal charging papers. The process involves the activities of both the police and the prosecuting attorney and, in essence, represents the exercise of official discretion to select from among a large number of possible official accusations those which will constitute formal charges.
- ***Decision to release defendant pending trial or disposition.*** The point at which a judicial or administrative determination is made as to whether and on what terms and conditions an individual charged with a criminal offense will be permitted to remain in or return to the community. The release decision (bail decision) is made at least once for each person charged, and may be repeatedly reconsidered by the original decision-maker or reviewed by other decision-makers during the time preceding disposition of the case.
- ***Decision on pretrial motions and applications.*** The point at which any one of a variety of judicial determinations are made pursuant to a request for ruling from one of the parties in a criminal case in which a formal accusation has been filed with the court. These requests can include motions for continuance, suppression of allegedly illegally seized evidence, and the application for pretrial discovery.
- ***Decision to try or to accept plea.*** The point at which it is determined how the issue of culpability will be settled. This is a judicial decision, heavily influenced by other participating actors—prosecutors, defense attorneys, and probation officers.
- ***Decision to sentence.*** The point at which a choice among available remedies, penalties, or

sanctions is made by the presiding judicial officer. This choice has two distinct dimensions: 1) a qualitative dimension regarding the kind of sentence to be imposed—prison versus probation or fines; and 2) a quantitative dimension measuring how much of the sentence alternative should be imposed—whether in days, dollars or some other terms.¹

C. Individuals and Agencies Which Might Apply Alternatives

The actors listed on the vertical axis represent decision-makers who directly affect the criminal justice process. At the point on the matrix where an actor row and a decision column intersect, that actor is the main source of the alternative and he can devise, authorize, or operate the alternative listed.

The vertical axis is organized to follow the likelihood of involvement. Legislatures (A) are always involved; Police (B) are almost always involved; Prosecutors (C), Trial Courts (D), and Defense Bar (E) are, in descending order of influence, usually involved. Public and Private Agencies (F), Citizens/Volunteers (G), Probation and Parole Officers (H), and Appellate Courts (I) are occasionally or intermittently involved, with no particular ranking with respect to that involvement.

It should be stressed that the classification scheme presented in the matrix is not necessarily the only manner of classification—particularly with respect to the ways in which non-criminal justice actors can affect the system. To the extent that there are other actors not listed, their functions have been included with the listed actor with whom they are most closely affiliated. For example, legal paraprofessionals are subsumed under "Defense Bar" and "Prosecutor."

¹ The types of sentences examined are considered from the perspective of the sentencing court since the issues raised in post-sentence correctional treatment and management are beyond the scope of this study.

CHAPTER IX. DECISION TO DEFINE CONDUCT AS A CRIME

The alternatives possible at this decision point consist of actions that eliminate particular forms of conduct from the purview of the criminal law or limit the criminal penalty imposed. They differ from all other matrix alternatives in that they relate to potential classes of offenses, rather than to the direct progress of individual cases. In addition to the legislature's constitutional authority to decriminalize, other actors may "decriminalize" *de facto*, by refusing to enforce either provisions of criminal statutes or common law offenses not statutorily addressed.

Essentially, alternatives related to the decision to define conduct as a crime can involve the following agencies and types of action:

- *Legislature*—through statutory decriminalization.
- *Police Department*—through uniform departmental policy of non-arrest.
- *Prosecutor*—through a uniform policy of non-prosecution.
- *Trial Court*—by refusing to permit enforcement of particular statutes.
- *Appellate Court*—through review of judicial actions.

The practical operation of these alternatives is described below.

A. The Legislature: Statutory Decriminalization

Statutory decriminalization refers to actions taken by state or local legislative bodies which may remove, reclassify (downgrade), or substitute a non-criminal response for offenses contained in the criminal code. Decriminalization does not necessarily imply "de-penalization." For example, alcoholics may not be criminally prosecuted but may still be involuntarily placed in a detoxification center.

Statutory decriminalization may represent a reaction not only to the growing volume of statutory law itself but to what many consider the overly broad

reach of the criminal law. Removing some inappropriate cases from the criminal law may also help to alleviate problems of caseload in the trial courts. Statutory decriminalization may occur in three ways:

1. *Pure decriminalization.* Particular offenses or classes of offenses may be removed from the statutory law without further attempt to penalize, regulate, or treat the previously prohibited conduct. Offenses decriminalized in this fashion are often those not currently enforced by the police or taken to court by prosecutors, either because criminal justice officials do not view the offense to be sufficiently serious or because arrest and prosecution is highly unpopular or inconsistent with changing values. Frequently, pure decriminalization does not result in any appreciable decline in court caseload because the laws were not previously enforced. Adultery, for example, is still a crime in many states but removing it from the law will have no effect on caseload. However, with regard to offenses which are still enforced, albeit erratically, pure decriminalization can allow police to use their resources for more serious crime which is of public concern. For example, in 1962 the Illinois Legislature eliminated from criminal prosecution homosexual behavior between consenting adults.

2. *Reclassification.* A second method of statutory decriminalization is to downgrade the criminal penalty for particular categories of offenses while still retaining them in the criminal code. Through such action a legislature can demonstrate its desire to regulate the conduct in question and go on record as disapproving of that conduct while, at the same time, respond to public concern that the punishment is unnecessarily severe. This type of alternative may be a response to a recognition that the law as codified is not an effective deterrent; that a large class of persons defined as criminals do not so perceive themselves; that a substantial segment of the population engages in the prohibited behavior; that the behavior in question results in no apparent direct or indirect social or individual harm; and that the

resources of the criminal justice system are inappropriately diverted from more important activity.

Downgrading of penalties in this way could result in the arrest of individuals who, under more stringent penalties, would not have been arrested or prosecuted. That is, the police might be more willing to arrest in some situations if a fine is imposed rather than jail.

For example, in July 1973 Oregon's marijuana statute was amended to reduce the penalty for possession of less than one ounce from a Class A misdemeanor (punishable by a jail term of one year or a \$1,000 fine) to a violation punishable by a fine not to exceed \$100. This action brought legislative policy into accord with law enforcement policy, since no one had received a jail sentence for possession since 1969 and few arrests had been made. The legislature also identified as a law enforcement priority the apprehension of drug dealers rather than minimal users. However, by adding the option of a fine, the legislature maintained its intent to discourage the use of marijuana. Similarly, in Texas, the legislature reduced the penalty for possession of two ounces or less of marijuana from two years to life imprisonment to a maximum prison term of six months and/or a maximum fine of \$1,000.

At least six states are considering code revisions establishing a non-criminal classification for traffic offenses of a non-serious kind. In four others, most moving traffic violations are not classified as criminal.

3. Substitution of a non-criminal response for the criminal sanction. Instead of defining a particular disapproved act as a criminal offense and prescribing a penalty for its commission, the legislature may establish a non-criminal procedure for handling it. Examples of this approach are the administrative handling of minor traffic offenses and the care of public inebriates.

The New York City Administrative Adjudication Bureau was established by statute in 1970 to exercise jurisdiction over minor moving violations previously heard by the criminal court. The effects of this new administrative arrangement have been to provide 1) a more appropriate, informal, and convenient mechanism that removes the stigma of traffic offenses as a criminal act; 2) fairer and more efficient hearings; 3) penalties more suitable to the offenses; and 4) substantial "reduction in courtroom congestion as a result of reduced caseload." (No reliable information is available either on deterrent effects or

changes in traffic safety patterns attributable to the new system.)

In 1967 the U.S. Congress enacted the Alcoholic Rehabilitation Act for the District of Columbia, in response to an appellate court decision, *Easter v. District of Columbia*, 361 F.2d 50 (D.C. Cir. 1966) which held that chronic alcoholics could no longer be convicted under the public drunkenness statute. This Act authorizes the procedures for handling public inebriates and stipulates that:

. . . any person, who is intoxicated in public
(1) may be taken or sent to his home or to a public or private health facility, or (2) if not taken or sent to his home or such facility under paragraph (3) shall be taken to a detoxification center . . .

Under the statute the police cannot arrest an individual but may take him to a detoxification center, against his will, for a period of 72 hours. The legislative action suggests a perception of public drunkenness as a public health rather than a criminal problem. However, the legislative desire to eliminate the penal character of the statute is mitigated by the provision for involuntary detainment and forced treatment—which poses serious legal questions, especially in the absence of procedural safeguards afforded under the former criminal sanction.

The success of substitution depends on adequate resources for implementation. Seven years after passage of the act in the District of Columbia, widespread dissatisfaction was expressed concerning the adequacy of the services provided. The lesson to be learned is that substitution cannot be handled simply by judicial fiat.

Section 647 of California's penal code represents another legislative response, providing for civil confinement rather than arrest of inebriates when appropriate facilities are available in the affected county. Unlike the District of Columbia model, counties have the option of deciding whether or not to make available a facility, and police have discretion as to whether or not to take an individual to a detoxification center. However, the broad opportunity for discretion has resulted in many alcoholism cases still in the courts and jails.

The type of non-criminal substitution model described for public inebriates also has been applied for other forms of "status" offenses such as juvenile delinquency. However, the hoped-for decriminalization in the reform movement establishing separate juvenile courts and facilities ended with a result clearly penal in nature—long-term civil commitment,

and the development of special categories for juveniles such as PINS (Persons In Need of Supervision).

B. Police Departments: Uniform Departmental Policy of Non-arrest

A police department policy of non-arrest is usually informally communicated and applies to selected offenses specified in the criminal code. Most police departments have informal non-arrest policies. If they attempted to enforce all of the laws in the code, they would process more people than the system could handle and, in the end, would generate disrespect for the law. Moreover, in some cases, adequate enforcement of the law poses a virtual impossibility.

When a non-arrest policy is formalized by means of a written rule, it enhances the predictability and consistency in police department operation. However, the establishment of a written rule for non-arrest is unlikely since the police are usually mandated to enforce all criminal laws.

A non-arrest policy—depending on its scope, the prevalence of the conduct, and its visibility—may have a direct effect on decreasing the number of cases entering the system. In Iowa, for example, the police make virtually no effort to arrest the citizen gambler and in most jurisdictions do not enforce, (or enforce selectively) the gambling laws for offenses involving private, non-commercial gambling.

Few examples of non-arrest policies are presented because most departmental rules of this kind are either not formalized or are not publicly announced. However, in Washington, D.C., the police department established a formal rule that motorists were no longer to be stopped for passing red lights between 3:00 a.m. and 6:00 a.m. so that police resources could focus on more serious crimes. In Oregon, a non-arrest policy was developed regarding cultivation of marijuana plants for personal use. The effect on general deterrence of these and other instances of non-arrest policies relates to the visibility of the enforcement pattern.

C. Prosecutor Offices: Uniform Policy of Non-prosecution

Prosecutorial activities may be viewed on a continuum of discretion that begins with the screening function and ends with plea bargaining (or decisions on sentence recommendations). In between are de-

cisions such as whether to intervene and delay proceedings by providing special services to defendants. The objective of prosecution policies is to make the decision-making process more rational, predictable, and fair. As in the police department, the policy may be transmitted by an informally communicated tradition or written rule.

Essentially, policies for non-prosecution may develop in three ways. First, a part of the criminal code may be eliminated, such as through decisions not to prosecute a specific offense; second, special conditions may be stipulated, such as a victim complaint; and third, guidelines may be provided to determine the seriousness of the offense.

In some cases non-arrest and non-prosecution policies correspond, especially where norms are clear and in accordance with the statutory law. Where they operate at cross purposes, another alternative—such as informal restitution by shoplifters to store owners—might be appropriate.

D. Trial Courts: Judicial Refusal to Permit Enforcement of Particular Statutes

Judges, formally or informally, may initiate change in the law by refusing to enforce a particular statute. For example, a trial court may refuse to enforce a statute on grounds of discriminatory enforcement, such as when a superior court judge in the District of Columbia dismissed charges of soliciting prostitution against two women defendants. The court ruled that the police practice of exclusively arresting female prostitutes while ignoring customers who solicit women was an unconstitutional discrimination in violation of the equal protection clause of the Fourteenth Amendment. In this case the law was not declared unconstitutional but rather the nature of its arbitrary and selective enforcement.

A judge may also find a criminal code provision unconstitutionally vague, overbroad, or subject to arbitrary and selective enforcement.) In *U.S. v. Grady*, D.C. Superior Court, No. 17778-72, where a defendant was charged with possession of marijuana in violation of the District of Columbia Code, the judge declared the statute's penalties for "mere possession of marijuana" an unconstitutional violation of the Eighth Amendment prohibition against cruel and unusual punishment. The seriousness of the penalty, in the court's view, was totally unrelated to the seriousness of the offense when compared with other crimes and therefore lacked a rational basis, particularly when avail-

able scientific evidence indicated that marijuana was non-addictive.

Although trial courts can decriminalize in this fashion, a judge cannot use a policy argument simply because he finds the offense distasteful, but must find evidence of an egregious enforcement policy in order not to be criticized for legislating rather than judging. The *Grady* decision, for example, has been reversed on appeal.

The police and the prosecutor may be aided in their work by a decision critiquing enforcement policy if it 1) informs them of potential misapplication of law, 2) provides guidelines sensitizing them in the use of discretionary authority, and 3) ultimately results in a greater congruence between law on the books and the application of law. Moreover, judicial decisions refusing to enforce certain statutes sometimes arise out of ambiguities in the law and changing community norms. These decisions thus create an opportunity to establish new norms and articulate values not yet recognized by the legislature.

E. Appellate Courts: Judicial Decriminalization

Like the trial court, an appellate court may achieve decriminalization by finding that a statute (or city ordinance) violates substantive rights or has been discriminatorily enforced or inadequately drafted. For example, in *Robinson v. California*, 370 U.S. 660 (1962), the Supreme Court struck down a section of California's Health and Safety Code that made narcotics addiction a misdemeanor, punishable by a 90-day jail term, as a violation of due process and as cruel and unusual punishment prohibited by the Eighth Amendment. The court held that, although a prison sentence was not itself cruel and unusual, making the "status" of narcotic addiction a crime was similar to making it a criminal offense "for a person to be mentally ill, or a leper, or to be afflicted with venereal disease."

In *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972), the Supreme Court found Jacksonville's vagrancy ordinance void for vagueness by "encourag[ing] arbitrary and erratic arrests and convictions . . . [and] placing almost unfettered discretion in the hands of the police." An ordinary person, the court argued, would have great difficulty in knowing that his actions were in violation of the statute, which made "criminal activities [of behavior] which by modern standards are normally innocent."

Decisions such as these may stimulate legislative activity, depending on 1) the importance of the law as interpreted or challenged, 2) the level of controversy and visibility surrounding the issues, and 3) the intensity of public pressure on the legislature. Legislative responses to judicial action have been studied in areas other than judicial decriminalization. Subsequent to *Furman v. Georgia*, 408 U.S. 238 (1972), for example, in which the Supreme Court ruled that discretionary death penalty statutes violated the Eighth and Fourteenth Amendments to the Constitution, many state legislatures responded quickly; some immediately abolished the death penalty altogether while others simply eliminated the discretionary provisions. A similar quick response occurred in the wake of *Gideon v. Wainwright*, 372 U.S. 335 (1963), requiring representation of indigents by counsel in serious cases. Whether and how legislatures act in response to or in anticipation of appellate court decisions also depends, in part, on the clarity of guidelines provided by the court, the immediacy of the issue addressed, the political make-up of the legislature, and knowledge and understanding of the decision itself.

The impact that appellate decisions have on police departments—e.g., *Papachristou v. City of Jacksonville* (the decision on vagrancy)—is uncertain, but not likely to result in immediate or widespread compliance for three reasons. First, the police may arrest for a given type of conduct on a series of charges; the elimination of one possible charge will not mean that police arrests for that conduct will end. Second, the police may remain ignorant of the court's ruling or lack understanding of how their behavior ought to be modified. Third, decisions having low public visibility are less likely to be observed than a decision such as *Miranda v. Arizona*, 384 U.S. 436 (1966), which involved procedural requirements for police in-custody interrogation for all cases, not simply minor ones.

A major difference between the impact of an appellate court decision striking down a statute and a trial court decision is that the decision of the former effectively removes it from the criminal code. Moreover, an appellate court decision covering a broader jurisdiction is likely to generate legislative and law enforcement activity more swiftly than a trial court would; the trial court's decriminalization decision, more tenuous in its impact, lacks the finality and jurisdictional coverage of the appellate court and is not binding on other trial courts.

CHAPTER X. DECISION TO FOCUS ATTENTION ON A SUSPECT

The opportunities for alternative actions at the stage of criminal process where the decision is made to focus attention on a suspect are open to the following agencies:

- *The Legislature*—by creating administrative tribunals.
- *Police Departments*—by evaluating complaints according to priorities and by varying patrol practices.
- *Prosecutor Offices*—by developing policies on investigations, establishing special offense oriented units, and creating a citizen's complaint evaluation center.
- *Public Non-criminal Justice and Private Agencies*—by identifying individuals with arrest-prone characteristics for special treatment in pre-arrest case findings.

The alternatives described under this section involve the determination of whether members of identifiable classes of potential defendants will have criminal proceedings initiated against them. These alternatives involve explicit policy decisions about which kinds of cases the criminal justice system will handle or exclude, as well as practical decisions based on resource allocation which necessarily influence policy formulation.

A. Legislatures: Creation of Administrative Tribunals

1. *Discussion.* An administrative tribunal can apply administrative procedures to handle conduct previously under the purview of the criminal courts. Like Federal agencies, it can adjudicate compliance with regulations or resolve disputes between members of the specified group over which it has jurisdiction. Although it involves the promulgation of rules and the imposition of sanctions, the functions of the regulatory agency are civil and not criminal in nature.

The function of the administrative tribunal is to ascertain the facts of a situation and produce a clear, written record from which later determinations can be made. A number of approaches can be used: 1) a formal, trial-type hearing with crossexamination, discovery, and general due process; 2) the filing of written statements with crossexamination; or 3) the filing of written answers to questions propounded by the fact-finder. The actual method used will depend somewhat upon the use to which the determination of fact will be put. For example, if it may result in depriving one of the parties of a vested interest, Constitutional guarantees of due process would mandate a formal hearing.

If an adjudication of guilt or innocence is made on the basis of the facts, a penalty may be applied. In some cases, enforcement is virtually an automatic internal function, usually the suspending or revoking of a status, privilege, or license granted by the agency and necessary for the operation of the "offender's" business. In other cases, enforcement of agency sanctions must be done by means of an external procedure specifically provided for by statute, such as the case of National Labor Relations Board orders which are enforceable by petition to the Federal courts.

The application of administrative procedures is appropriate to high-volume, low-priority cases such as traffic offenses, professional malpractice, consumer fraud, and landlord-tenant disputes.

2. *Examples.* a. *The Montgomery County, Md., Consumer Affairs Office (CAO).* The CAO was created by county ordinance, effective December 5, 1971. The office has two main functions: 1) to receive, investigate, and conciliate consumer complaints; and 2) to prevent the occurrence of unfair practices. The CAO is empowered to issue subpoenas and cease-and-desist orders. In its investigative adjudicatory function, the CAO employs a full-time staff consisting of a director and deputy director (both lawyers), four investigators who are experts

in the field of consumer affairs, and four secretaries. In addition, three part-time law students work as investigators.

Most complaints are received initially over the telephone, but a complaint must be presented in writing to be processed. The written complaint is assigned to an investigator who sends a letter containing a summary of the complaint to the merchant involved, who is required to respond in writing within ten days. If he does not respond within this time, a second letter is sent. If there is no response, the CAO issues a subpoena requiring the merchant to appear with all appropriate documents. After the merchant's response is received, the investigator begins the investigation and attempted conciliation, which may require only a telephone call or which may necessitate weeks of research and preparation.

If conciliation fails, and if there is not sufficient cause to believe that the merchant has violated the Consumer Protection Act, the complainant is told of his right to file a small claim (under \$5,000) in district court or to submit his case to binding arbitration. If it appears that the merchant has violated the Consumer Protection Act, he can be fined \$500 for each violation or be required to pay restitution to the consumer, as well as investigative costs, and ordered to cease and desist the deceptive practice.

If the CAO cannot conciliate the case, or if the merchant fails to abide by the settlement agreement or cease-and desist-order, the executive director, under Section 118-7(f) of the Consumer Protection Act, transmits the matter to the county attorney. Section 118-8 of the act provides for the levy of a fine of \$500 per violation, as well as "other appropriate forms of relief" issued by "any court of competent jurisdiction."

This procedure removes a major problem of administrative action by providing for court review. In essence, any merchant can "appeal" the determination of the CAO by simply failing to comply and therefore invoking the provision of Section 118-7(f), which gives him a trial *de novo* in a county court of competent jurisdiction. The net result of this is to establish the CAO as a primarily investigative and conciliatory organ, rather than an agency empowered to make administrative decisions which are final, absent a finding that they are clearly erroneous, arbitrary, and capricious.

b. *The Hospital Admissions Surveillance Program (HASP)*. HASP, conducted by the Illinois Department of Public Aid, developed not as a response to medical malpractice, but rather as a method of con-

trolling the admissions and duration of hospital stays of those patients whose care is billed to the department. The methods developed by HASP would be applicable to the enforcement of standards for professional care.

When a patient is admitted to a public aid hospital, or to a private hospital as an indigent, a copy of the admission sheet containing the patient's name, address, age, next of kin, admission diagnosis, and ward or room assignment is transmitted to the HASP office in the hospital. The HASP coordinator assigned to that ward or floor places a HASP form in the patient's record file that is kept at the floor nurses' station. This form contains the number of days of certified inpatient care based on the admission diagnosis, as authorized by a table of average hospital stays prepared by the Department of Public Aid. Two days before the end of the certified number of days, the HASP coordinator places a tag on the record to alert the doctor that the certified stay is almost complete; if for any reason, such as complications or a change of diagnosis, the patient should be retained past this time, the doctor should note this reason and the number of days he expects to retain the patient on the HASP form.

If the patient is discharged before the end of the certified period, the HASP form, complete with the discharge diagnosis, is sent to the HASP office; the patient's card is stamped with a certified seal and sent to the billing office; the bill is sent with the HASP card to the Department of Public Aid. If, however, the patient is retained beyond the certified period and the extension form is not filled out or the reason given does not meet HASP standards, the remaining days are not certified and the hospital will not receive payment. Since cases are billed at a per diem rate regardless of treatment, non-certified days result in a loss of approximately \$100 per day. Because all patient HASP forms must be signed by the attending physician, they provide a record of which doctors repeatedly request extensions, fail to fill out forms, or have extensions denied certification (usually refused because the reason given indicated failure of the physician to give proper care). While HASP itself does not take any measures to discipline hospital staff members, it provides an ongoing review that can be used by the existing disciplinary forces in the hospital as well as an impetus to do so, since no hospital can absorb for long the loss of payment that results from denial of certification by the HASP.

3. Implications. Administrative tribunals can have several uses. Their establishment permits increased enforcement of laws that are considered low priority by police and prosecutors.

Although the authorized penalties of an administrative tribunal are less severe than criminal courts, an administrative tribunal may be more penal in relation to sanctions actually meted out for ordinary cases of the types of conduct described above. In those relatively rare situations where a pattern of repeated violations occurs or which present unusual aggravating circumstances, the cases can be referred by the administrative staff to the prosecutor for criminal processing under collateral criminal statutes. For example, in the consumer fraud area, criminal statutes relating to fraudulent advertising, false pretenses, conspiracy and other offenses can be invoked. The net effect of establishing an administrative tribunal will probably be to increase rather than decrease the number and severity of sanctions assessed against persons committing disapproved conduct. Thus, as a functional matter, this alternative is better regarded as a new mode of case finding rather than as a type of decriminalization.

The conventional law enforcement function is often too narrowly conceived with the result that inadequate consideration is given to the potential contributions of the investigative and fact-finding capabilities of existing and potential administrative tribunals. With proper coordination, administrative agencies can augment scarce police, prosecutor, and criminal court resources. A specially created white collar fraud section in the U.S. Attorney's Office in the District of Columbia has enabled prosecutors to more closely coordinate their efforts with the efforts of local administrative agencies. Nevertheless, the services of administrative tribunals are costly. The well-documented examples of lack of responsiveness and inefficiency of existing regulatory agencies suggest the need for careful planning in setting up a new administrative tribunal and appropriate monitoring of its performance.

A major issue in the creation of an administrative tribunal to relieve the criminal courts of certain classes of cases is the relationship between these tribunals and the formal courts themselves. Review of and appeal from administrative decisions is a necessary component of this system, much as in civil matters. Whenever an agency is given the power to license, fine, or restrict certain behavior, a channel of review and certain elements of due process must be provided.

B. Police Departments

1. Complaint evaluation according to priorities. In practice, the police cannot respond to all complaints and at the same time effectively enforce the law. Effective law enforcement entails effective responses to patterns of minor offenses which culminate in major community problems. Not every citizen request for police service, however, involves either a major offense or a serious community problem. Those requests that involve neither may be de-emphasized in a police complaint evaluation scheme.

Subjective decisions traditionally are made in individual cases, based on good judgment in the evaluation of complaints. Another, more objective method involves established criteria indicating that certain kinds of crimes (based on calls) will receive different levels of attention. A file may be opened when a complaint is made, for example, and if the police receive enough of these calls and note a pattern, they respond. Complaint evaluation could reduce caseload because the police would be responding to a better "quality" of complaints.

2. Variation in patrol practices. Police patrol policies influence whether certain classes of potential defendants ultimately enter the criminal justice process. Traditional routine street patrol has resulted in the routine intake of certain kinds of minor or petty offenses, such as drunkenness.

a. Concentration of protection and detection of target offenses. One alternative submodel of police patrol practice is to focus on the apprehension of suspects for specified target offenses, such as larceny from commercial establishments, with or without a de-emphasis on having a substantial number of regular patrol units. It stresses the deployment of officers to areas where offenses are anticipated.

This technique reduces the flow of some types of cases into the system—usually minor crimes—and increases those associated with the target offenses. Targeting offenses implies that certain arrests are more valuable than others and also that certain groups such as proprietors of commercial establishments or individuals ought to receive better protection. Depending on what offenses are targeted for special concentration, inappropriate arrests, discriminatory enforcement, and possible illegal arrests may be reduced.

b. De-emphasis on outreach. A second method of varying police patrol practice is to put less emphasis

on general preventive patrol and focus on high crime areas and response to citizen complaints.

C. Prosecutor Offices

1. *Office policy on investigation.* Traditionally, the prosecutor enters a case following an arrest at arraignment or first court appearance. A prosecutor's office may, however, through informal agreements with the police department, influence the structure of an investigation and, in some instances, direct an investigation in particular classes of cases. The police may either assign a special unit to be housed in the prosecutor's office on a permanent basis or request cooperation on a case-by-case basis. The purpose of this approach is 1) to generate the development of classes of cases for certain offenses that were formerly ignored, such as complaints involving consumer or welfare fraud; and 2) to channel police investigations in all types of ordinary cases. The result of such an approach may be to include categories of offenses that ought to have been investigated but were not, and, conversely, to minimize bad arrests by indicating to the police the kind of evidence sufficient to warrant prosecution and to avoid violating Constitutional requirements in pursuing cases.

2. *Special offense/offender oriented units.* This alternative refers to a unit, either independent or within the prosecutor's office, that has full-time jurisdiction over a particular class of offenses or offenders at the preinvestigation phase. The purpose of the unit is to improve the quality of case handling and increase the number of cases relating to those offenses. The offenses, usually categories of felonies, are defined by statute. Several examples of such units already exist. Two submodels are described below.

a. *Specialized bureaus* operate as separate units in a prosecutor's office to handle a limited portion of the prosecutor's general jurisdiction for a specified class of offenses or offenders. The specialized bureau is a formalized attempt to identify and focus on particular cases for the purpose of charging. By identifying these cases early, the prosecutor may hope to develop better cases and maintain some degree of quality control over which offenses come to his office for prosecution.

The impact of the specialized bureau on case flow *per se* may not be significant, but the types of cases handled will change; some cases previously ignored because of lack of investigative resource may be handled more effectively.

b. *Special prosecutors* may be established with either concurrent or superseding jurisdiction over the local prosecutor's general jurisdiction. The special office uses its own investigative personnel with respect to the grand jury as well as a special investigative force, independent of the local prosecutor's office.

The purpose of establishing such an office is to focus particular attention and resources on cases that can be resolved only by systematic attention. In a city or county with separate prosecutor's offices operating independently of each other, the special prosecutor may perform a unification or coordination function by accepting responsibility for a broader jurisdiction.

c. *Citizen's Complaint Evaluation Centers* can be established within a prosecutor's office where a citizen may enter a formal complaint about criminal behavior against him or his property. The center is a screening mechanism (a type of precharge case screening) for citizen-initiated (rather than police-initiated) criminal complaints where the traditional prosecutorial disposition of a complaint is made. This screening differs, however, from general case screening in the prosecutor's office in that citizen-initiated complaints typically concern potentially criminal intrafamily and intraneighborhood activity. The screening decisions in these cases are based not only on the criminal content, strength, or weakness of the complaint but also on the feasibility of using alternative methods to deal with the specific situation, such as referral to independent agencies, social service, mediation, or arbitration.

The citizen complaint generally receives low priority from the prosecutor for a number of reasons. Most such complaints concern a person who has some relationship to the complaining witness and are therefore less "prosecutable" because of the intimate relationships and feelings involved. Moreover, the victim is frequently found to have provoked the actions of the potential defendant. The community has not been endangered and, most often, the offenses relate to petty theft or assaults resulting in little or no injury—all of which are difficult to prove and of little interest to the prosecutor. Nevertheless, these complaints represent a significant percentage of total complaints screened by the prosecutor and result in a waste of resources, time, space and money.

Since citizens' complaints place a significant burden on the prosecutor's screening process, citizen's complaint evaluation centers can provide a useful and visible tool in identifying, at the earliest possible

stage, those cases inappropriate for formal prosecution. The evaluation of a citizen's complaint for probable cause to issue an arrest warrant requires determining the veracity of the complaining witness, the ability of the prosecutor to develop a case worthy of the time of the court, and a policy decision as to whether the case is prosecutable in the jurisdiction.

Centralization of all citizen complaints in a single office can relieve the physical congestion of the prosecutor's office and permit all cases to be heard in turn on an equal priority basis.

A citizen's complaint evaluation center can operate with a minimum of staff. Technically, its function necessitates only a prosecutor although paralegals may be used as screeners if they are acquainted with prosecutorial discretionary policy. However, paralegals may not issue arrest warrants.

The two models of citizen's complaint evaluation centers currently operating have expanded their focus beyond pure case screening, although their individual operations differ. In Washington, D.C., the *Citizen's Complaint Evaluation Center* focuses primarily upon efficient prosecutor case screening. In Columbus, Ohio, the *Night Prosecutor Program* emphasizes aiding victims to settle disputes.

- *D. C. Citizen's Complaint Center.* The emphasis in the District of Columbia is on gathering, organizing, and concisely recording the data needed by the prosecutor to make a screening determination. Once the decision is made whether to prosecute, the prosecutor may or may not consider additional services for the client. Frequently the client is told that the case is simply not criminal in nature and that the remedy lies in small claims court or another form of civil relief. Other cases are excluded from the criminal process because of a lack of sufficient evidence, or because of a policy in the prosecutor's office not to paper such cases. These reasons are explained to the client. In a certain percentage of cases, an offer or referral is made to a mediation unit. The client is informed that the potential defendant cannot be compelled to attend the hearing.

The screening policy essentially parallels the exclusionary policy in operation in the prosecutor's office before the center opened. Even though the high visibility of the center has resulted in an increase in the number of citizen complaints, the screening criteria removes most of them from the system, with roughly the same

percentage of cases excluded from the system now as before the center opened—although the victims now benefit from having the prosecutor explain the disposition of their cases.

- *Columbus, Ohio, Night Prosecutor Program.* The citizen's complaint evaluation component of the Night Prosecutor Program in Columbus, Ohio, has as its primary goal dispute settlement between two parties by referral to social service and arbitration. It screens out only those cases totally inappropriate for criminal prosecution, referral, or arbitration. Of primary importance is the screener's understanding of the circumstances of the conflict and the relief sought by the victim, so that the screener can determine which mode of referral, social service or arbitration, would achieve the desired results. The program represents a shift in prosecutorial policy with a view to making the prosecutor more responsive to the needs of the citizenry, regardless of the merits of the case as judged by internal policy standards.

The policy of retaining cases that otherwise would be excluded from further penetration into the criminal justice system, however useful in preventing potentially serious crime, raises the problem of over-inclusion of inappropriate cases and the role of coercion, even if minimal. However, in removing a case temporarily (and potentially permanently) from the workload of the prosecutor's office and the courts, such referral achieves two positive goals: 1) the "defendant" (and the complaining witness) has been spared the trauma of the criminal procedure; and 2) prosecutorial and judicial time has been freed to pursue additional cases where the adjudication process is beneficial.

D. Public Non-Criminal Justice and Private Agencies: Prearrest Case Finding

1. *Discussion.* Prearrest case finding permits public non-criminal justice and private agencies to seek out and draw individuals with arrest-prone characteristics, such as drug use, into voluntary service programs. Without such intervention, they might have criminal proceedings initiated against them in the future. To the extent that police and other criminal justice agencies cooperate with these programs, their effectiveness should increase, but such coopera-

tion is not a prerequisite to their successful functioning.

In the past several years, a number of programs have been devised that replace or avoid the criminal process by providing voluntary, medically oriented detoxification treatment to skid row men as well as welfare and counseling services to juveniles whose present behavior, while not itself sanctionable, may make them subject to adjudication in the future.

2. Examples.

a. *Manhattan Bowery Project*. An example of such a program is the Manhattan Bowery Project (MBP) in New York City, established by the Vera Institute of Justice in 1966 to provide 1) immediate medical treatment and supervised followup services on a voluntary basis for seriously ill intoxicated derelicts and 2) long-term care through counseling and referral. A major initial goal was replacement of the criminal process. Over time, as the police de-emphasized arrest, modified rehabilitation was also sought.

All admissions, except for a limited number of referrals to hospitals (about three percent) and walk-in admissions, first come in contact with the project through efforts of two-man rescue teams consisting of a rescue aide (usually a recovered alcoholic) and a plainclothes police officer. The police officer's function is to protect both the derelict and the rescue aide from assault (and possible abridgement of rights). These rescue teams cruise the Bowery area in the immediate vicinity of the project's main facility, seeking men in the most physically debilitated and intoxicated condition who are unable to care for themselves. Every effort is made to avoid the appearance of arrest. The program is explained to each potential client who is asked if he wishes to enter the detoxification unit. Anyone may freely reject the service or leave at any time once they enter. Approximately eighty percent of those approached accept. The number of men picked up is limited by the number of beds available. If the individual is unconscious or requires emergency medical attention, an ambulance is called. Upon acceptance, the client is taken to the Men's Shelter, which houses the program, and is formally admitted after medical screening.

Although initially the police continued arrests, gradually policy shifted to providing early medical care. This shift in police attitude permitted police to focus on more serious crimes, and permitted the project to focus more fully on serving the needs of the men.

The decision to operate the program on a voluntary basis was based on a belief that the procedural, legal, and management problems associated with involuntary commitment negated any gains potentially derived from including recalcitrant clients. A preliminary study, conducted by the Vera Institute and the New York City Police Department, indicated that the majority of men approached would accept on a voluntary basis. However, one can seriously ask whether the program is truly voluntary. Can an unconscious, physically debilitated or seriously intoxicated individual make a choice when selected for pickup?

One important consequence of the voluntary approach by civilians as opposed to the police is that the project providing the service determines those most suitable for its service and regulates the number of admissions that the facility can properly handle. When the police pick up inebriates for referral, they rarely are able to judge or influence the adequacy of available service with respect both to quality of service and the service capacity of a detoxification or treatment facility. On the other hand, there is a danger that a civilian rescue team, while not picking up inappropriate cases, will not take the hard cases—those most in need of service—either because of understaffing, lack of resources or proper facilities, or a desire to produce a good record of successful statistics. The MBP is particularly sensitive to this problem and attempts, as one of its goals, to pick up those most in need of service.

Implicit in the idea of prearrest case finding is the possibility that the same individuals will be located and processed repeatedly and periodically. The problem of treating chronic public inebriates has been referred to as the "revolving-door syndrome." In the early phase of MBP, the staff believed it could solve the problem by offering a treatment program that went beyond detoxification. The project now recognizes that success need not be measured by the number of "100 percent cures," and that effectively reducing recidivism for this project is related to how long an individual remains off the street and reduction in the number of men on the street.

The potential of a project such as MBP for reducing court caseload and increasing the resources of the police are substantial. In 1972, approximately 2,500 persons were arrested for public drunkenness in New York City, with between 100 and 200 of these arrests in the Bowery. Prior to the establishment of the project, 3,000 men were arrested each

year in the Bowery alone; the decline may be directly attributed to the MBP.

b. *Boston Alcohol Detoxification Project*

Another medical model servicing alcoholics is the Boston Alcohol Detoxification Project, funded by LEAA through the Massachusetts State Planning Agency and the Mayor's Safe Streets Advisory Committee. The project was planned with particular attention to the effects of public drunkenness—one half of all arrests made by the department.

Like the MBP, this project uses a rescue team that patrols and monitors certain areas of the city where there are alcoholics. Upon locating a potential client, the rescue team offers the individual—both men and women—the opportunity to receive medical services available at the Detoxification Center. The client is informed that he is not compelled to come with the rescue team. If the person accepts, he is transported to the center for a drying-out period of five to seven days. No one may be admitted without approval by the rescue team. Four teams of five work 10-hour shifts every day.

In contrast to the MBP, the rescue team consists entirely of civilians, all of whom are recovered alcoholics, rather than being composed of both civilians and police. Whereas in the MBP clients are selected on the basis of the seriousness of their condition, the Boston Alcohol Detoxification Project attempts to select those persons most likely to be arrested by the police, although referrals are accepted from hospitals and other sources and either of these criteria may result in pickups. Once in the program, the alcoholic receives a medical examination, detoxification, referral, and followup service.

Most significantly, the police role in Boston differs radically from that in New York. In July 1973, the Alcoholism Treatment and Rehabilitation Act in Massachusetts became effective. Under its provisions, police officers may take a person into protective custody for being drunk in public view; they are obligated to notify the Detoxification Center that a person is being held at the station. At this time, the rescue team takes those who consent to the Detoxification Center. The hope is to reduce the number of people that the police must take into protective custody. The police sometimes contact the rescue team by radio prior to a pickup so that officers do not have to take an individual into protective custody. The rescue team also regularly visits the station house to accept people the police have picked up. Statistics collected for evaluation pur-

poses suggest that the project is indeed relieving the criminal justice system of cases.

Whatever the merits of this intake approach from the perspective of improving the functioning of the criminal justice system, some serious issues remain for the potential client. There is the problem of overcontrol inherent in the protective custody aspect of the police role. There may be a danger, raising questions of due process, in allowing the police to detain individuals without formally arresting them. This could potentially lead to harassment of citizens who could be taken to the station house for being drunk in public without any record or right to counsel.

c. *Portsmouth, N.H., Juvenile Program*

In Portsmouth, N. H., a program has been established to "reduce the number of young people who become involved in the juvenile justice system." The type of behavior of concern to such a program covers a broad spectrum and includes a traditional referral system, as well as an active outreach mechanism.

One component of the delinquency prevention program involves referrals by parents, schools, and the welfare department to a facility known as "Junction 13," which provides recreation, social, and counseling services. Another component of the juvenile program functions through a civilian police aide who roams Portsmouth neighborhoods on foot or in his car and can interview or refer youths to service provided by the system.

The case finders under any form of this alternative may be police in a non-law enforcement role, a civilian aide in a police department, or an agency with a particular anti-law enforcement orientation which would never refer individuals to the police.

3. *Implications.* A serious problem with some forms of prearrest case finding of juveniles results from a tendency toward over-inclusion—the addition of inappropriate cases—and overcontrol. The conduct typically under scrutiny in no way reflects criminality, and the judgments by case finders about which children ought to be referred are extremely subjective, related, in some instances, to conduct those persons found unpleasant, disruptive, or simply disagreeable.

There is also a danger of class bias in these subjective determinations. What a teacher in a suburban school may consider natural rebellion (such as a two-day absence of a child from school) may be

interpreted as truancy by a teacher in a ghetto school. Moreover, the question must be raised: how truly voluntary are these programs? Children are vulnerable and less capable of knowing or exercising their rights when confronted by disapproval and sanctions by authority figures for conduct the latter find unacceptable. The impact of these prearrest juvenile programs on court case flow is not likely to be substantial. First, many children who participate in these programs probably would have been diverted out anyway. Even if there is no formal diversion program in a jurisdiction, savings in case-flow would still be negligible. Many persons channeled into these programs escape contact with the courts because their conduct would not necessarily have led to more serious crime. Moreover, the programs will miss children who will later commit offenses, and the voluntary, non-coercive nature of the programs themselves limit the most delinquent-prone juveniles from receiving services, because few people like to work with the intractable or hard cases.

A more critical assessment is also needed of the many new public inebriate detoxification programs. These programs do remove the criminal label from persons intoxicated in public who would otherwise be processed through the criminal justice system. Hence these programs do respond to the problem of inappropriate subject matter jurisdiction of our criminal courts and release scarce resources for more

serious criminal cases. Nevertheless, available cost data suggests that these new programs may be as expensive or more expensive than conventional criminal justice processing.

More information needs to be obtained on the impact of detoxification programs on the public inebriate. Detox centers are the functional equivalent of the "drunk tank" but there is absent adequate long-term followup facilities—the functional equivalent of the "work farm" of the conventional criminal justice system. The detox center is said to be more humane than criminal justice processing. While this may be true in the sense that medical detox centers offer clean sheets, nourishment, and medical attention, unless pickup can be said to be truly voluntary, detention in a medical facility without a due process hearing and the administration of medication to all patients cannot unqualifiedly be termed humane. Advocates of social setting detoxification centers—such as those in San Francisco and San Jose, California—argue that less than 10 per cent of public inebriates need any medication. In addition, the "revolving door syndrome" remains and may be accelerating. The 72 hour stay at many detoxification centers may provide time for the inebriate to "sober up" but not enough time to "dry-out"; as a result, both police officers and detox center personnel in several cities have subjectively observed a deteriorating physical condition of many inebriates.

CHAPTER XI. DECISION TO ARREST

The "Decision to Arrest" is the taking into custody of an individual by a police officer(s) for more than momentary detainment on the basis of a definite allegation or suspicion of criminal behavior. For purposes of this study the arrest decision means that a person must be detained, however briefly, and must be held with the purpose of making a criminal charge.

Alternatives at this point refer to actions which may limit, control, monitor, review, or replace arrest, either by the use or creation of alternative institutional structures exterior to the police department or by the establishment of guidelines for exercising the power of arrest. These alternatives include procedures 1) which permit law enforcement agents to dispense with the use of custody in initiating proceedings against persons accused or suspected of criminal behavior, and 2) which enable law enforcement officers dealing with such persons to dispense with the use of custody and with formal initiation of the criminal proceeding itself.

The following alternatives are discussed in this chapter:

- *Legislative provision by statute for field citation release*
- *Police department actions*
 - departmental rulemaking
 - implementation of field citation release
 - crisis intervention
 - referral to social services
 - referral to arbitration
- *Prosecutor practices*
 - assigning a prosecutor to the police station
 - joint police-prosecutor rulemaking
 - complaint referral to civil court
 - trial court review of police discretion and of request for arrest warrants
- *Community monitoring of police practices by citizens/volunteers*
- *Appellate court review of police discretion and court rules authorizing field citation release*

A. The Legislature: Field Citation Release Authority

1. *Discussion.* Field citation release is a mechanism whereby a police officer, in lieu of a warrantless street arrest, issues a citation, without judicial participation, ordering an individual to appear in court for the commencement of judicial proceedings. The field citation procedure authorizes the issuance of a document (not unlike a traffic ticket) in which the nature of the conduct is specified in conjunction with the date for the court appearance.

A legislature may issue two types of laws authorizing and defining a citation release procedure. One is mandatory, requiring police to issue a citation for particular classes of offenses. The other is permissive, with the legislature indicating that the police may initiate a citation procedure. The legislature's purpose in passing a citation statute may be 1) to clarify the existence of the citation power for law enforcement officers, 2) to limit the power with respect to offenses not covered in the bill, or 3) to encourage citation release by authorizing its use.

Few examples exist of a mandated citation. Current Virginia law, on its face, provides for mandatory citation release. Traditionally, citation procedures have been authorized in most states for traffic offenses. Some legislatures have determined that this technique may be applicable to other misdemeanors and summary offenses. The procedure in California, Michigan, and Florida covers all misdemeanors. The procedure in Oregon is even broader. It applies "in any instance when a person is subject to arrest on a misdemeanor charge or on a felony charge which may be deemed a misdemeanor charge after sentence is imposed." Pennsylvania's code is more restrictive and applicable only to summary offenses. Ohio's code, also fairly restrictive, specifies the use of citation for minor misdemeanors ("an offense for which the potential penalty does not exceed a fine of fifty dollars").

2. *Implications.* A citation release procedure could result in the immediate reduction of those usually custodially detained and would minimize the overuse of detention. A statute may, by reducing the complexity of elaborate procedures surrounding arrest for particular classes of offenses, affect the level of attention paid to that offense and how seriously police consider it, thereby reducing the caseload. On the other hand, most offenses where citation applies may already be nuisance offenses. The police may have been underenforcing the law because time and paperwork are disproportionate to the importance of the conduct. Citation release based on a statute could result in more contacts of less intensity and thus increase caseload. A legislature should anticipate how the police are likely to respond by considering these effects.

B. Police Departments

1. *Departmental rulemaking*

a. *Discussion.* Rulemaking is an internal police department process usually conducted with some degree of public consultation. Its product is a set of specific guidelines, standards, or rules governing police discretion. Rulemaking, as distinguished from policymaking, requires a written product that is arrived at openly through a definable process and that the rule have general applicability, be department-wide, be directed to the conduct of police department members, and relate to a specific procedure.

The need for rulemaking arises because the legislature has difficulty in promulgating practical guidelines and also in clarifying the law once enacted. The judiciary, while capable of reviewing police discretion, acts only subsequent to challenges to it and cannot devise rules for individual police departments. Like most other administrative agencies, the police may devise rules governing discretion.

Rules may be classified as process or situational. *Process* rules explain what steps are used to accomplish a legitimate result, rather than dictating a choice among possible results. Rules specifying in advance the appropriate discretionary decision to be made in particular circumstances are *situational* rules, in which the decision being regulated involves a choice of outcomes, such as which persons to take into custody. A rule barring or mandating the arrest of any person found drunk in public would be a situational rule. It tells the officer *what* to do. Situ-

ational rules explain "what to do" as opposed to "how to do it." Situational rules apply to decisions on whether to pass the defendant on to the next phase of the criminal process.

It should be noted that there are serious problems involved with the rulemaking approach, among which is the tension created between the need for publicity and effective law enforcement. The law may be difficult to enforce if policies are made public. There also is a doubt whether proscribed procedures can be drafted that offer effective, practical guidance to the law enforcement officer. Rules must be specific enough to ensure guidance in all cases and inclusive enough to contain all or most situations an officer will encounter. These problems reflect those the legislature confronts in devising laws governing police behavior.

b. *Examples.* An example of these kinds of non-arrest and non-charge rules is the model rules for law enforcement on "search warrant execution" prepared by the Project in Law Enforcement Policy and Rulemaking of Arizona State University's College of Law.

The rules, particularly important in meeting Constitutional and statutory requirements, contain elements of both process and situational rulemaking. An example of the former are those segments of the rules regarding conduct immediately prior to entry that explain what to do during a period of delay following the announcement of the search:

Rule 205. *Delay Following Announcement*

A. Items sought are readily disposable. If the warrant lists readily disposable items, the search team shall delay their entry [for at least twenty seconds] following the announcement required by Rule 204, unless:

1. They are admitted to the premises by an occupant; or
2. There is substantial indication that the person(s) required on the premises is willfully delaying responding to the announcement.

The situational approach has been used in establishing procedures for protecting premises if damage occurred during entry:

Rule 403. *Protecting Premises if Damage Occurred During Entry*

A. Premises to Be Vacant. If damage occurred during an entry to premises that will be left vacant, and the damage is sufficient to jeopardize the security of the premises, the search team

shall make arrangements to protect the premises until they can be secured.

In 1971, the Metropolitan Police Department of the District of Columbia established a situational/procedural rule for handling intoxicated persons that distinguishes different classes of intoxicated persons and how each is to be handled. The following is an excerpt from that rule:

This order deals with three classes of intoxicated persons: (1) those not endangering the safety of themselves, other persons, or property, (2) *those who endanger the safety of themselves, other persons, or property*, (3) *those who are charged with offenses other than those specified in D.C. Code Section 28-128.*

The General Order of the Metropolitan Police Department of the District of Columbia on handling juveniles combines elements of both a process and a situational rule. It establishes a general policy for handling juveniles and then specifies a series of five categories of juveniles that "members of the force shall be especially alert in observing." These categories are:

- Of school age (7 through 15 years) loitering on the streets—or in public places during school hours without proper knowledge and consent from either parents or school authorities.
- Employed contrary to the provisions of the Child Labor Law and Cruelty to Children Statute.
- Abandoned, abused, or neglected to the point of endangering their welfare, morals, or safety.
- Involved in anti-social behavior or violations of law.
- Who may be runaways or fugitives from home, institutions, or other jurisdictions.

The other segments of the rule explain what an officer must do upon coming in contact with the above-mentioned juveniles, what forms to use, how to transport and process, what court procedures to follow, etc.

c. *Implications.* Substantive departmental rule-making may affect caseload in the courts depending on the intent of current enforcement policy and the type of conduct to which a rule may apply. Rules that establish guidelines for responding to existing laws, for example, are likely to reduce caseload. Rulemaking that reflects changes in priorities may increase caseload, particularly where laws never

previously enforced come to the attention of rule-makers.

Establishing clear, understandable, rational guidelines may lead to increased fairness and equality in the application of law. Limiting selective enforcement by individual officers reduces "the injustice that results from uneven enforcement" and also facilitates review of police actions—and the policy guiding those actions—by implementing standards for evaluating behavior and by identifying a central source of authority responsible for the behavior of individual officers.

Making the department responsible for individual discretionary activity through rulemaking minimizes uncertainty and places responsibility where it can be effectively challenged. The development of rules, especially with respect to law in areas not formerly enforced, might stimulate the legislature to reform laws that they believe ought to be repealed, and further the achievement of congruence with legislative policies.

2. *Implementation of Field Citation Release*

a. *Discussion.* Field citation release refers to a procedure whereby a policeman, in lieu of arrest without a warrant, presents an individual with a citation to appear in court on a given day for violation of a particular statute. It is the implementation either of a legislatively authorized or a police-initiated program.

Field citation has been extensively used in lieu of arrests for traffic violations. Only recently have states and police departments considered employing this device for other kinds of minor offenses.

Two types of field citation are used, depending on whether permissible statutes exist to authorize them.

b. *Examples.* In February 1970, the Oakland, California, Police Department, hoping to reduce police time and station-house costs, issued a general order and a departmental bulletin on field citation release procedures for adult misdemeanors, specifying that all officers must issue citations at the point of arrest unless any of the following conditions apply whereby the person would be subject to arrest.

- The suspect requires medical care or is unable to care for his own safety.
- There is a reasonable likelihood that the misconduct would reoccur, or that persons or property would be endangered.
- The suspect cannot or will not offer satisfactory evidence of his identity.

- The prosecution of the offense for which the subject was arrested or of another offense would be jeopardized.
- A reasonable likelihood exists that the arrested person will fail to appear in court as promised (a warrant check is mandatory).
- The misdemeanant demands to be taken before a magistrate or refuses to sign the citation.

A police officer, in deciding to employ the citation procedure, must consider the following:

- Notifying the citizen cited that he must appear for booking.
- Informing the citizen orally of the instructions pertaining to booking procedures and pointing out to him the instructions set forth on the reverse of his copy of the citation.
- Instructing the citizen to appear at 9:00 a.m. as follows: For shoplifting cases, at the Prosecuting Attorney's Office, 600 Washington Street; for all other misdemeanors, at the Information Desk of the Criminal Investigation Division.

While the officer may exercise some degree of discretion in deciding not to use field citation where appropriate conditions apply, the reasons must be listed on the arrest report. This suggests that the Oakland Department actively encourages the use of field citation and provides an incentive which a more permissive statute or departmental order would not supply. The department, sensitive to the potential for abuse, stressed that the procedure must not be used to increase the number of arrests for conduct that would "ordinarily be handled with oral admonishment and release."

A point system is used in determining eligibility for the field citation procedure, based on whether the person has roots in the community. This is established by gathering information about 1) employment, 2) residence of more than one year, and 3) stability in the community as demonstrated by the existence of a family. Generally, in the first eight months, officers had to issue citations based on little more than their own assessment of the arrestee's credibility and adequacy of identification.

San Francisco's field citation release procedure, also based on Section 853.6 of the California Penal Code,¹ is mandatory; General Order No. 125 states that:

¹ See Feeney, Floyd, "Citation in Lieu of Arrest: The New California Law," 25 *Vanderbilt Law Review*, 367 (1972).

It shall be the responsibility of the Commanding Officers to determine that members of their command are using the new [notice to appear] form. . . .

Members shall issue citations to all adults (eighteen years and older) arrested for any nontraffic, misdemeanor offense, or taken into custody after a citizen's arrest for a misdemeanor offense with only the following exceptions . . .

A similar procedure and set of criteria apply in this program as it does in Oakland.

Chicago's field citation procedure is the most restrictive of any of the examples, applying only to serious traffic offenses. The police are authorized by statute to accept valid Illinois state licenses on a first pickup in lieu of arrest or money bond. For traffic offenses more serious than those usually handled by ticket citation, the officer takes the driver's license and issues a voucher with a date stamped on it signifying when the defendant must appear in court; the voucher itself serves as a license until that date. If the defendant fails to appear, an arrest warrant is issued.

c. *Implications.* From the viewpoint of the defendant, an important consequence of the field citation procedure may be the elimination of the stigma of arrest and the need to remain in jail while awaiting trial or other disposition. The procedure reduces detention costs on the criminal justice system, and lessens police case-processing time and other custodial chores, thereby improving police efficiency. If it is to be a convenient and practical tool, however, the procedure should not contain an overly complicated set of requirements resulting in more paperwork and police time than ordinary custodial arrest.

How field citation release actually affects case-flow depends on the types of offenses for which the police use it, and on their perception of the importance or seriousness of crimes where the use of citation is permissible. The procedure affects the kinds of cases entering the system rather than case-flow itself. Whereas the police may in the past have ignored particular minor or nuisance offenses as not worth their time, the option of a citation procedure affords them a new opportunity to focus their attention on those cases previously underenforced.

In determining whether to implement citation release as an alternative, criminal justice planners should be aware of the tension the program will cause between two conflicting goals for the criminal justice system: 1) case finding for service and 2) minimizing penetration into the system. Field citation release is clearly inconsistent with the first goal, because it will not provide an opportunity to channel individuals into service programs. This usually occurs at a detention facility where individuals are screened for service. It does, however, serve the second goal.

3. Crisis intervention.

a. *Discussion.* A great potential exists for coping with intrapersonal and family conflict through crisis intervention. This represents a positive police response to a crisis that may consist of 1) direct service delivery, such as *ad hoc* counseling and defusing of the situation; 2) indirect service delivery, such as referral to medical or social services; or 3) some combination of direct and indirect service delivery. Crisis intervention theory, as applied to law enforcement, uses developments and strategies employed in mental health research.*

There are a number of reasons why the police are especially suitable for performing crisis intervention. They are usually first to arrive on the scene of a crime or disturbance, and thereby have the opportunity to influence future behavior; the importance of early intervention cannot be overemphasized. The police, as professionals, also possess both the legal and symbolic authority necessary for effective intervention. Their job, in essence, is violence management, and they have a great deal of experience with it. The major problem is that other aspects of police role and training can lead to poor judgment or inappropriate response.

In order to increase the effectiveness of the police response to crisis situations, new techniques are being developed. Some of the more interesting are those using training techniques common to a family crisis intervention unit (FCIU) established, in part, to minimize the danger to police associated with

* See Parnas, "Police Discretion and Diversion of Incidents of Intra Family Violence," 36 *Law and Contemporary Problems* 542 (1971); Bard, "Family Crisis Intervention: From Concept to Implementation." Prepared for the NILE-CJ, LEAA, U.S. Dept. of Justice; Bard, "The Role of Law Enforcement in the Helping System," 7 *Community Mental Health Journal* 155 (1971); McPhiston, *The Training of Police in Family Crisis Intervention*, Family & Children's Service, Charlotte, N.C. (1973).

familial conflicts, and to reduce the level of homicide and serious injury to the parties involved.

Three basic departmental training models have been proposed for crisis intervention affecting the functional role of police: 1) the generalist specialist, 2) the generalist, and 3) the specialist.

b. Examples.

(1) *Generalist specialist model.* In the generalist specialist approach, most useful in large departments, a number of regular patrolmen received special training, respond to all family disturbance calls in a given geographic area, and maintain their regular patrol duty when not engaged in managing family disturbances. This model, used in New York City, Oakland, California, and Charlotte, North Carolina, may be the most effective model for large cities since it preserves the professional identity of the officers, renders the service without limiting regular patrol, and provides the officer with expertise that enhances his respect among colleagues and the public.

New York City. New York, among the first cities to use this model, received a grant from LEAA to establish a demonstration program in a Harlem precinct for training a selected police group. The idea was to use the police as a mental health resource by training them in the theories and methods of the behavioral sciences, particularly clinical psychology. The research laboratory was the community. Police became "psychological intervention agents" who could achieve the goals of both crime prevention and preventive mental health "while resolving disputes rather than simply maintaining order."

The training procedures were divided into two stages: preparatory and operational. In the former, lasting a month, officers received intensive training through lectures, workshops, prepared social science reading materials, field trips to referral agencies, and discussion groups. Special plays were written and enacted by professionals to simulate crisis situations. Pair of patrolmen would intervene as if participating in an actual conflict. These practice interventions were reviewed and critiqued. This intensive training helped make the men sensitive to their attitudes about disrupted families.

During the operational phase, which lasted 22 months, special radio cars were assigned to handle all calls in a selected biracial precinct. Nine biracial police teams were organized, three for each 8-hour period. These units engaged in their regular patrol

duties when not responding to family calls. Other patrolmen assisted them in accepting calls during particularly busy periods. Each week the 18 unit members consulted with graduate students in clinical psychology and other mental health professionals and discussed problems and issues.

Oakland, California. The police department in Oakland, California, instituted a FCIU program based on the New York model in 1970. Its goals stressed problem solving and the management of crisis in contrast to arrest and prosecution.

While Oakland was modeled on the New York experience, the training techniques differed significantly. Oakland officials believed the extensive one-month intensive training in New York was not necessary. Instead they offered a one-day seminar—with group meetings, self-evaluation, and the participation of representatives of social service agencies—in the belief that the experience and judgment of carefully selected officers would compensate for any absence of specialized training. The men were selected as volunteers on the basis of recent street experience. Officers entered the field the following day.

The program operated on a six-month experimental basis. Two-man field units were established during peak call hours in those parts of the city (two districts) with the highest level of family disturbances. The teams responded to all family calls in their district and were provided with special guidelines for determining what procedures to apply at the scene. For each assignment, the unit completed a special "Family Disturbance Form" for recordkeeping purposes, followup, and future evaluation. The program was coordinated by the Experimental Project Section of the Violence Prevention Unit, which was in charge of training programs for unit members, evaluation of success of referral agencies, and acting as liaison with those agencies.

Initially, the field unit officer determined whether the disputants should be 1) referred directly to a social service agency or 2) instructed to call the coordinator of the unit, who would set up an appointment for them. After a few weeks, the system was changed because the disputants failed to make appointments. The coordinator began making the appointments with the referral agency and then informing the families involved. Subsequent to the appointments the FCIU coordinator mailed questionnaires to the referral agency and the disputants in order "to measure the level of effectiveness of referrals made by FCIU."

The project was not continued because of lack of funds, a cutback in the police force, and a belief that the separate unit approach was not viable. The department wanted, ideally, to train the entire force (generalist model), but that was not believed feasible. An additional implementation problem was caused by the overlapping supervision of the units during peak hours and the conflicting instructions and styles of the supervisory teams.

Charlotte, North Carolina. The Charlotte Police Department, established a FCIU in 1971. Their program, however, was coordinated and implemented by a social service agency—the Family and Children's Service. Eighteen police officers received training by the Family and Children's Service for three weeks with classes three days per week. Volunteers were selected on the basis of district, age, race, and experience. The training included field trips to social service agencies and simulated crisis dramas, similar to those used in New York and Oakland. Training was followed by discussions every two weeks during which the officers discussed their experiences in responding to crisis calls. Instructors included social workers, marriage counselors, psychiatrists, and staff members of mental health clinics. Officers engaged in regular patrol work when not responding to family calls, and, as in Oakland, were assigned during peak hours when disputes were most frequent.

(2) *Generalist Model.* In the generalist approach—most useful in small departments—every patrolman receives training in family crisis intervention. Its advantages are: 1) its suitability for small organizations, 2) the involvement of all personnel in acquiring special knowledge, 3) the importance of the program's effect on the entire department and the community, and 4) the reinforcement of the idea that family crisis intervention is an ongoing responsibility of the department. The following paragraphs describe the generalist model as applied in Louisville, Kentucky, and Wheaton, Illinois.

Louisville, Kentucky. The Louisville Police Department uses this model to train its entire 790 member force in crisis intervention techniques. The training techniques resemble those used in the *New York demonstration* project, although on a small scale, lasting only a week.

Wheaton, Illinois. Wheaton also follows the generalist model. Officers receive training as rookies (at the University of Illinois) during regular departmental training and in specialized training semi-

nars held once a year. Because Wheaton is a relatively small community with a low crime rate, the role-conflict problems that cause tension in other departments are absent. Police officers are most apt to perceive themselves as community servants and crime preventers (order-maintenance function) than as law enforcers. Eighty-five percent of their work may be classified as community-service oriented. Most officers are trained to understand crime as the result of behavioral or personal problems.

(3) *Specialist Model*. Under the specialist model, a selected group of patrolmen receive exhaustive training in family crisis and have no other patrol duties. This approach follows the typical police pattern of assigning special tasks—such as traffic control—to special groups. This may be the least effective model since it threatens to weaken the organizational role and police identity; the individual officer might experience ambivalence between “real” police work and social work, and as far as we know no cities have used this model.

c. *Implications*. Some serious questions remain, however, concerning 1) how easily such programs can be implemented, 2) the tensions presented and yet unresolved in the police role and organization, and 3) the problems of protecting the rights of citizens involved.

Serious problems can arise in implementation. Most bureaucratic organizations resist change. But implementing FCIU in the police department entails special organizational difficulties and changes, both with respect to the relationships within the department and changes in the police function itself. First, the relationship between the supervisor and the patrol officer is affected. The supervisor would have to function more as a counselor, a teacher, and a resource. The training itself is antagonistic to the traditional model of law enforcement—a military one. Although the demonstration program in New York is generally considered a success, it was never institutionalized. It has been suggested that an important factor was the department's lack of acceptance of the program as not fitting in with the departmental structure.

Even if the police can be successfully trained to perform the tasks associated with family crisis intervention, it does not necessarily follow that the law enforcement role—and the helper, mental health resource, or order-maintenance role—can be functionally synthesized when choices must be made between the conflicting values incorporated within

each role model. What, for example, is the officer to do during an intervention when other crimes are discovered or suspected, unrelated to the family dispute? A danger also exists that police will overstep their authority when their assessment of the likelihood of future violence—made in their capacity as law enforcement officers—conflicts with the mental health resources they should be providing in their FCIU role.

The extent of these problems will vary widely—depending, among other things, on the size of a city. In the relatively small Wheaton Police Department, most minor crime is seen to relate to underlying personal problems. This “style” reflects Wheaton’s lack of extensive serious crime and a recognition of the order-maintenance function as the primary role of the police officer.

As part of the intervention process, a great deal of information is developed and filed on client families. Will its use be restricted to helping with future incidents? What if one party tries to initiate criminal proceedings at some future date? Could this information be used? Family crisis intervention will undoubtedly increase the number of police involved in personal matters, and the implications of this increased involvement must be recognized.

The referral process and the nature of the followup techniques suggest the possibility of over-control. In Oakland, for example, police involvement in the appointment process (supposedly voluntary) suggests a potential coerciveness, whether intended or not, that may limit the effectiveness of the intervention technique. Followups in Oakland were done through questionnaires to the agency and to the disputants, as well as occasional personal visits by the intervention team, to evaluate the effectiveness of referral. These procedures also suggest dangers associated with violations of the client’s right of privacy.

Problems can also occur regarding referrals and followup. An important factor in the success of family crisis intervention is the quality of the referral procedure. In New York City, officers maintained a master file of social service agencies for referral and were instructed to refer to them as a last resort when their own service effort failed. Problems occurred when police did not intervene properly and “dumped” people into agencies. More important than proper use is adequate followup, which should be the responsibility of the individual officer, independent of that of the agency. Given the middle-class bias of many city agencies and their

tendency to refer individuals to still other agencies, the officer must keep a record of referrals and make an effort to know the effect of such referral.

In the New York experiment, more referrals were made to city agencies and to a greater variety of agencies in the FCIU precinct as opposed to the comparison precinct. The results in New York point to the need for a permanent police liaison to maintain effective relationships with referral agencies. In order to work, agencies must modify their existing practices with respect to qualifications for eligibility and intake paperwork. Police must be sensitive to the difficulties in making demands on bureaucratic structures.

What effect will FCIU have on the courts? The impact on arrests and courts is likely to be minimal. Prior to the establishment of these units, police would mediate rather than initiate criminal proceedings in family disputes. With FICU they are even less likely to do so. However, when police are successful in defusing violent situations and restoring order through positive mediation and referral, then the families helped are less likely to commit assaults and homicides in the future. Inappropriate cases—those that should not be completely processed—may be diverted out of the criminal justice system by narrowing the scope of behavior subject to arrest. But in the long run, the police may handle more cases, because they deal with some conflicts that would not otherwise have received police attention.

4. Referral to social services.

a. *Discussion.* Referral to social services represents an election by a police officer to suggest or require that an individual in his custody, under circumstances permitting arrest, submit to or participate in rehabilitative service in lieu of being processed further as a criminal defendant.

Police sometimes refer an individual to a social service agency, instead of making an arrest, because they believe an arrest would be wasteful—particularly if the behavior is insignificant—and because they recognize that the probable response will be social or medical services if the case reaches court. In addition, the arrest may not lead to a solution of the person's problem. The result is that police may formalize their own system of referring people in particular types of cases. Their main problem is channeling a person to an adequate service facility that does not result in further delay or referral to still another agency.

The police have traditionally had unsystematic practices whereby a referral would be made to a social service agency in lieu of arrest. In some cases, arrests may have been made only because of the unavailability of service or the lack of knowledge about its availability.

Characteristics of referral procedures which represent genuine social service referral programs include the following elements: 1) the police are informed that referral, under given conditions, is a priority; 2) the procedure is formalized and organized; 3) training as well as incentives are provided to use the system; and 4) social service agencies cooperate with the police.

Essentially, there are two submodels of referral to social services: non-coercive and coercive. What distinguishes the two is the perception of the offender—what the offender thinks the police will do in the event of non-cooperation. If an offender believes that the police will otherwise arrest, there has been coercion.

b. Examples.

(1) *Non-coercive.* Referral to youth service bureaus by police in lieu of arrest can result in a definition of the young person's problem, and subsequent treatment. It might be reasonable to establish an "adult service bureau"—an umbrella agency that provides delivery of a wide range of services—rather than sending defendants through a large bureaucracy which refers them to social services.

An example of a non-coercive procedure is to take individuals to mental health centers for examination and possible commitment in lieu of arrest. In the District of Columbia, the Metropolitan Police Department has issued a general order entitled "Hospitalization of the Mentally Ill," which allows for emergency hospitalization when police believe an individual may injure himself/herself or others. It describes procedures to be followed when such an individual is taken into custody. The order stipulates that a severe penalty will be imposed for filing a false certificate for submission to a hospital. The police must make a judgment about their understanding of mental illness and about where to take the individual. There is a danger associated with the stigma and loss of liberty of being committed and detained at a mental institution. On the other hand, if the person referred is not given immediate attention, he/she may suffer later. The police have admitted limited expertise in making such difficult

judgments, involving potentially "coercive" mental health detentions.

In New York City, Project Outreach was established as a pilot project by the Vera Institute of Justice, September-November 1972. It attempted to train certain police officers to recruit drug addicts to a methadone program. On locating an addict, particularly one in a drug transaction, the officer would refer him immediately to a Vera-affiliated treatment program with limited support services, such as jobs or vocational training. The program was never institutionalized, since Vera did not have the resources and management capability to continue.

(2) *Coercive*. The St. Louis Detoxification Program represents an example of a "coercive" program. The police are the only agents permitted to pick up inebriates. The police typically make pickups and transport individuals to the detoxification unit when: 1) there are no other charges, 2) there are no signs of illness or injury requiring emergency treatment at a hospital, 3) no complainant presses charges, and 4) the subject does not want arrest and trial. A summons for the charge of "Public Drunkenness" is completed by the officer, but no records are kept of either the arrest or the admission to the Detoxification Center. The patient is required to stay at the center for seven days. Technically, he may leave at any time, but if he chooses to leave prior to authorized medical release, he will usually be designated as a "defendant not found," and the next time the police pick him up, he will be booked and sent to court for trial.

c. *Implications*. Problems exist in implementing police referrals to social services. Police officers may be uncertain of their role and authority. They may not have adequate information about various referral facilities and the quality of their services. They may not know exactly where to take the individual. If a non-coercive referral is made, there may be inadequate feedback of information of whether the suggestion or order was followed and, if followed, whether there were positive results.

Social service referrals by police have resulted in difficult problems of coordination. The social service agency is often not in the position to schedule an immediate appointment and provide the emergency-type services that the police officer feels is required. Many social service agencies prefer to deal with middle class clientele whereas the situation that often confronts an officer on the street involves persons of lower socio-economic status. While police

are on patrol during an entire twenty-four hour period, many social service agencies are only open during regular office hours. In addition, many social service agencies have involved bureaucratic intake procedures. Persons referred have difficulty in making and keeping appointments. These factors account, in part, for feelings of frustration that police officers often feel toward social service agencies.

The relationship of social service agencies to the police raises special problems. Should police officers be required to keep records of referrals to discourage overuse and to determine the pattern of use? Can traditional social service agencies be expected to render adequate services equitably and appropriately to the types of individuals referred by the police? Can police referrals be misused so that the police will be given control over individuals in non-arrest situations? It is questionable whether the person at the receiving end can adequately distinguish coercive versus non-coercive requests by police officers. What will be the impact of large-scale police referrals on the work-load of social service agencies? If police referrals are to be substantial, it may be desirable for the director of the social service agency to enter into a written letter of understanding with police department officials concerning the conditions and extent of use of the social service and the types of services that will be provided.

5. *Referral to arbitration*.

a. *Discussion*. Referral to arbitration is a police suggestion that the parties in a dispute submit to a process of arbitration that includes a decision by a designated person. The referral is based on field observation or on the receipt of a complaint in which the dispute has the potential to generate criminal behavior. The process of referral to an arbitration unit may occur at a variety of stages in the criminal process; the decision may be made by police, prosecutors, or the courts. The referral agent is the last actor who deals with the case before it is referred to the arbitration unit.

Arbitration in the context of alternative modes of criminal case processing differs from arbitration of civil disputes, such as labor management and commercial arbitration, in two ways: 1) the parties do not influence or control the choice of the decision-maker; and 2) the decision-making process involves greater informal mediation and conciliation.

The kind of cases particularly amenable to arbitration include those which may first come to the

attention of the justice system through a family crisis intervention unit in the police department and minor disputes among non-strangers involved in a continuous relationship, such as disputes between neighbors.

b. *Example: Philadelphia 4-A Program.* In one of the first programs designed to handle criminally defined conduct through arbitration—the 4-A Program in Philadelphia—the intake referral mechanism was the court. Although never funded, the Philadelphia Court of Common Pleas Neighborhood Arbitration Project was designed to “encourage referral of disputes directly from the community.” The project also sought to reduce crime, to use police resources more efficiently, and to improve community relations. It specified, in part, a police referral to an arbitration component.

The referral mechanism was designed to function as follows. The 4-A arbitration unit would provide trained project staff to a division in the police department. When the police were called in response to a family or neighborhood dispute in the assigned division, the officers would determine whether the conflict could be better resolved by the 4-A staff than by arrest or some other disposition. At this point, the dispatcher would notify 4-A to send project staff immediately to handle the situation. This freed officers for resumption of other duties and reduced voluminous paperwork. On the scene, staff would employ crisis intervention and mediation techniques to minimize tension.

c. *Implications.* Police referral is important because it occurs at an early stage in the criminal process. As cases penetrate further into the criminal justice system, they are less likely to be removed. When the police come upon a case, it has not yet been defined as criminal; the police, for example, can define an action as an “assault,” or they can refer it to arbitration. Also, the police possess greater opportunity for referral decisions, since there are more police officers than other actors in the system.

The possibility of avoiding the stigma of arrest supports police referral. With proper training in recognizing the most propitious cases for arbitration, arrests could be substantially reduced.

The stage at which people are most likely to accept arbitration is difficult to determine. It depends on their understanding of the procedures, on their perception of the options available to them for resolving a conflict, and possibly on their fear

of the consequences of not cooperating. Whether the kind of coercion the police implicitly apply will result in more completed referrals remains an open question.

Police referral to arbitration probably will increase the number of cases coming within the purview of the criminal law, even though it probably will reduce court caseload. This is so because police may refer cases to arbitration where previously arrest would never have been considered. While the referral of cases that are both arrestable and prosecutable is desirable, referring non-arrestable cases or non-prosecutable cases raises a difficult issue. There is a conflict between the police desire to prevent future violence and the citizen's right to be let alone. While disputes may ignite into serious conflicts if not handled by someone, the question is whether that someone should be the police. The symbolic authority of the police, coupled with their arrest power, detracts from the supposedly voluntary character of the referral. The use of a civilian staff member as a replacement for the police officer may limit, to some extent, the perception or actual coerciveness of a direct police suggestion. Consideration must be given to what would happen if an individual refuses arbitration as suggested by an officer or by the civilian staff member.

C. Prosecutor Offices

1. *Prosecutor assignment to police station.*

a. *Discussion.* The placement of an assistant prosecutor in a police station permits the prosecutor to advise the police on potential arrest decisions, and on making charges subsequent to an arrest. An example of the effective use of this alternative is the Houston, Texas, Police Department where representatives of the Harris County District Attorney's Office are assigned on a twenty-four hour basis. The prosecutor is an integral part of paper work process for certain offenses. The prosecutor reviews the appropriateness of the charge and, depending on the case, the adequacy of the supporting evidence in the presence of the police officer. The prosecutor must place his initials on the appropriate documents before the police officer can complete the papering process and obtain an expected court date. The Houston program is an example of how the prosecutor, an outsider, can become an effective integral part of the police decision-making process.

b. *Implications.* The assignment of a prosecutor in a police station should aid in preventing overinclusion by minimizing inappropriate arrests. It should also reduce the need for subsequent charge revisions at the prosecutorial stage of case processing. It provides for a case by case review and permits police officers an opportunity to obtain expert advice on legal weaknesses in the case at the earliest possible stage. Mistakes often can be readily corrected.

An historic, but often inadequately fulfilled, aspect of the prosecutorial role is to act as a buffer between the police and the citizen. Placing a prosecutor in a police station may be a vehicle for implementing this role in a low-keyed way, although the prosecutor may be more likely to view his position as an adjunct to the police function. There may be tension between this role and providing maximum help to the police in a non-threatening way. At a minimum, coordination and cooperation between the police and the prosecutor should be facilitated.

The existence of a prosecutor regularly assigned to the police department may appear threatening to the police. Trust needs to be developed. The police may have difficulty accepting this alternative, if the prosecutor is viewed as an outsider who might obtain access to potentially embarrassing information. One implementation question is how frequently assistant prosecutors should be rotated. Developing trust suggests that the same individuals should be present for a sufficiently adequate period of time in order to become familiar with police procedures and gain the confidence of police officers. Another question is whether more experienced or less experienced prosecutors should be assigned to this task. The more experienced the prosecutor the greater the likelihood of acceptance of the judgment of the prosecutor by police officers. Another question is whether the police officer should be required to follow the advice of the prosecutor or whether the advice should be viewed as optional. Is the role of the prosecutor to be an advisor or a screener or a combination of the two? In the Houston Police Department, visited by a representative of the Alternatives Study, police officers seemed to accept the recommendations of the prosecutor on what charges should be listed. An informal and cooperative relationship seemed to prevail.

2. *Joint police-prosecutor rulemaking.* Joint police-prosecutor rulemaking allows for cooperative and co-equal activity between a prosecutor's office

and a police department, whereby each devises a set of internal departmental rules that are complementary and consistent. Each makes its rules known to and participates in the rulemaking process of the other. The police devise rules on the substantive regulation of arrest discretion, and the prosecutor focuses on the regulation of charge discretion. Its purpose is to establish rational rulemaking by improving the character and quality of cooperation and communication.

Rulemaking functions now are performed in isolation. One method of implementing a joint system would be to establish an ongoing law revision committee whose activity would be visible and which would involve the support and participation of the citizenry.

The law enforcement participants would consist of both senior and line officials and would receive advisory citizen participation.

3. *Complaint referral to civil courts.* Complaint referral to civil courts is a prosecutorial decision representing an aspect of screening that consists of the referral of a complaining witness to the civil courts for a remedy.

Prosecutors traditionally have referred complainants to the civil courts, such as small claims or landlord-tenant courts, when they believed that a complainant's case was not suitable for prosecution. It is possible that this traditional technique, through formalization, could become a new alternative. An assistant prosecutor, for example, might be assigned the job of referring those cases he believes have the greatest chance of success.

A sincere attempt to make appropriate policy decisions, not based solely on expediency, could significantly increase caseload on the civil side, while only modestly decreasing caseload in the criminal courts. Presumably most cases referred would not have been prosecutable anyway. Under the proposed system the prosecutor also might refer prosecutable cases if civil remedies were more appropriate.

D. Trial Courts: Review of Police Discretion

1. *Discussion.* Review of police discretion refers to trial court rulings that limit or control selective enforcement practices and policies of the police, based on formal requests made by defendants or potential defendants. Four types of remedies are

identified under this alternative, corresponding to the kind of proceedings in which a challenge is made: 1) injunctive, declaratory, and other extraordinary remedies; 2) civil damages; 3) criminal prosecution; and 4) adverse case consequences from misuse of police power. The first three remedies are usually instituted pursuant to a complaint. They are independent of the defense in a particular prosecution and anticipate illegal or inappropriate police action. They usually represent a request that police refrain from acting in some specified manner. The last form of relief—adverse case consequence—may result from a defense in a criminal prosecution. The application of all the remedies described below generally occurs as a consequence of the failure of agencies in the justice system to adequately control and regulate police conduct.

2. Specific applications.

a. *Injunctive relief.* This remedy is a preventive, anticipatory action that challenges a police enforcement policy prior to, as the result of, or in the absence of a particular arrest. It involves a request by a defendant or potential defendant that police be enjoined from engaging in a specified activity or from pursuing an enforcement policy. This bar to action may be direct (injunctive relief); or the result of a declaration of a defendant's rights (declaratory relief) whereby a court prohibits certain police conduct, regardless of its source, as an illegal exercise of discretion in violation of a given legal or Constitutional principle. This latter measure operates on the assumption that police will comply. If not, the complainant may return to court for injunctive relief.

In *Bargain City U.S.A. Inc. v. Dilworth*, Philadelphia Court of Common Pleas (1960), the trial court granted an injunction against the police for discriminatory enforcement of the Philadelphia blue law against certain large department stores. The complainant, owner of such a store, contended that police were arresting his employees and those in other department stores, under the city blue law, while ignoring violations in smaller stores.

D.C. v. Norfleet (D.C. Superior Court No. 71214-71 (1972), involved the Constitutionality of an enforcement policy regarding a section of the District of Columbia Code on which the police based their arrests for homosexual behavior. The judge granted injunctive relief, subsequent to a finding that police were contacting defendant's employers by telephone upon arrest. Individual officers' discretion

determined the condition under which such notification would be made.

It is not clear what limits there are on the scope of action that can be encompassed in seeking injunctive relief against law enforcement officials. Many issues are involved, including that of administering the relief, the possibility of using other remedies, etc. However, in many kind of cases, other forms of relief such as damages will not suffice because the nature and intensity of the injury may not be quantifiable and because the complainant usually finds the monetary award inadequate.

Judges generally have been reluctant to grant injunctive relief, given the perceived effects of preventive action on the law enforcement function—that it "interferes with the processes of criminal justice."

An essential requirement for granting injunctive relief is a showing of irreparable or irreversible injury. The courts have not always been willing to recognize this claim, although the state courts have been more willing to do so than the Supreme Court.

In cases of discriminatory enforcement one might expect declaratory judgments to be more readily applied because they order a less drastic change in police action. An example of a declaratory judgment was the ruling in the District of Columbia in *United States v. Wilson*, D.C. Superior Court No. 69-7673 (1969), which stated that the enforcement practice of arresting only women in prostitution cases constituted unconstitutional discrimination against females.

b. *Awards of civil damages.* A request for civil damages usually occurs after an arrest, but conceivably damages may be awarded prior to an arrest because of fear of a future liability based on a discriminatory police practice. Success in civil damage suits is rare because judges and juries remain unwilling in most cases to decide against a police officer, particularly when an officer justifies the conduct in question by citing departmental policy as its source.

Chief Justice Burger, in a dissenting opinion in *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), has suggested that—rather than dismiss cases in which police violate Fourth Amendment rights and otherwise abuse their authority—defendants should be provided with a remedy of civil damages, paid by the state in lieu of dismissal. Others suggest the need for both remedies.

c. *Criminal prosecution.* Criminal prosecution is rare and rarely succeeds as a remedy for abuse of discretionary arrest power. It might conceivably be successfully employed only in cases of gross misconduct, overwhelming evidence, and where politically sensitive issues are present.

d. *Adverse case consequences.* The court in seeking to deter certain forms of illegal or discriminatory police conduct may decide against the state when the police violate procedural requirements, such as search and seizure rules.

Using adverse case consequences to regulate police discretion in the area of unjustified discriminatory law enforcement is exceedingly difficult. By its nature, police discretion involves judgments based on class or categorical distinctions. Which of these selective enforcement policies should be protected, and which should be condemned as violating Constitutional or other governing principles? Proving systematic behavior or discriminatory patterns is extremely difficult, especially when only one individual brings a case.

Improved police internal regulations and rule-making may be a more effective approach to regulate unjustified discriminatory law enforcement than adverse case consequences. If police devoted more attention to stating and clarifying policies, review would be more focused on the policy than on individual practice. Accountability would be better established at the top level of the department and individual officers would be less likely to be blamed for behavior conforming to departmental policy.

Judicial review may be one pressure that discourages or limits police rulemaking in order to avoid scrutiny. It is more difficult to challenge a practice than a stated rule. Nevertheless, rulemaking may serve the police interest more adequately by locating responsibility in a central authority and providing clear standards by which to evaluate police conduct. In this sense, rulemaking can reduce the need for court decisions.

At present, police policy is not reviewed extensively at the trial-court level, but a potential exists for judicial review to control police rulemaking. If the courts become more effective in setting the boundaries of acceptable policy—by specifying what cases will be prosecutable—it may lead to less arbitrary and more consistent policy on the part of the police, which in turn should reduce inappropriate cases. It could also expand arrests, however, by attempting to achieve equity. The D.C. prostitution

case noted above, in which men are being arrested as well as women, is such an example.

e. *Review of requests for arrest warrants.* Review of requests for arrest warrants refers to increasing the number and types of cases submitted to judicial decision-makers by police for a probable cause review, prior to the making of an arrest.

Generally, as practiced by most law enforcement agencies, judicial probable cause determinations occur *after* an arrest, by means of a preliminary hearing. Judicial review of arrest warrants, although a traditional mechanism of the criminal justice system, has been in disuse. This alternative proposes a potential reinvigoration of that practice.

One explanation for the minimal reliance on arrest warrants is that as a practical matter police do not have time to obtain them. An arrest coming after "hot pursuit" supports this reasoning. The popular image of the police officer catching the criminal in hot pursuit, however, should be qualified. Statistical studies show that in approximately 45 percent of the arrests made the police do have time to obtain an arrest warrant—almost 50 percent of all arrests are made within two hours of the crime; about 45 percent occur more than one day after the crime, and nearly 35 percent are made after one week has passed.

A reinvigoration of the use of arrest warrants will occur only if the procedures are practical for law enforcement and the advantages of the practice are understood. One practical advantage is that police will find that individuals affected by the warrant are more willing to cooperate. The warrant indicates to these persons that the arrest does not result from a spur-of-the-moment decision but from a deliberate conclusion reached by the police and a judicial officer. The warrant will minimize the possibility of an altercation by allowing the policeman to explain that he is only doing his duty in carrying out the warrant's command. Even when it appears that the officer himself demanded the warrant, the arrestee will see that others concurred in his decision. An important benefit from increasing use of the warrant process is the increased citizen respect, cooperation, and support for law enforcement. In 1966 the President's Commission on Law Enforcement and Administration of Justice concluded that police estrangement from the community and the courts is the biggest problem confronting law enforcement, and that this estrangement is an urgent problem in cities.

To encourage and make practical a reinvigoration of the warrant practice, the police should be allowed to obtain warrants over the telephone. A telephonic arrest warrant process would provide a practical alternative to existing procedures. During a recorded telephone conversation, the officer makes a sworn statement requesting the issuance of an arrest warrant and presenting the facts giving probable cause to arrest. This statement would be tantamount to an affidavit and would be transcribed for later reference. The judicial officer's oral authorization to make the arrest would permit the requesting officer to sign the judge's name on a duplicate warrant form, which would be deemed a proper arrest warrant. The judge signs and files the original warrant with the court clerk. It should be noted California in 1970 and Arizona in 1971 enacted legislation that allow for telephonic search warrants. A similar procedure can be used for arrest warrants.

E. Citizens/Volunteers: Community Monitoring of Police Practices

Community monitoring of police practices involves citizen participation in influencing or reviewing police enforcement policies on a regular basis; it is based on the belief that community representatives should participate in determining how laws which affect them should be enforced to protect citizen rights and interests.

The kinds of police practices that define the focus of this alternative are those aspects of police discretion appropriate to the equal and fair application of law. What may not seem fair in one jurisdiction—such as enforcement of blue laws and arrests for disturbing the peace—may seem fair in another. The idea of community monitoring reflects a recognition of these differences and is also based on the desire to protect fundamental rights. Its effectiveness is greatly determined by the degree of homogeneity of values within a community. New York's Civilian Review Board, though established for purposes other than those described here, may have failed in part because of the diversity of values characteristic of a large metropolitan area. If the monitoring mechanism—whether a police review board, ombudsman, independent agency, or other governmental unit—is not truly representative and reflects only the values of special interests and powerful groups, it will not only fail but potentially

could operate as a repressive force against powerless groups. Establishing legitimacy may thus be the most important task of a monitoring unit. If the unit is successful, however, an opportunity arises for close interaction between police and the community.

F. Appellate Courts

1. Review of police discretion.

a. *Discussion.* This alternative is similar in content to judicial review at the trial court level, except that its applicability extends statewide. The appellate decision differs from that of the trial court in two respects: first, the former extends to a broader range of cases and focuses on issues rather than on questions of fact; second, appellate judges are expected to make decisions with broad applicability whereas trial judges generally only make exceptions to interpretations of law.

Appellate court review of police action is based on two rationales: 1) identifying a statutory or Constitutional prohibition on the practice in question, and 2) identifying a failure to provide equal protections.

b. *Examples.* In *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972), the Supreme Court declared Jacksonville's vagrancy ordinance void, as a violation of due process, because it did not inform an ordinary person "that his conduct was forbidden by the state" and because it encouraged arbitrary and erratic arrests and convictions. While this decision essentially invalidated a statute, it did so because the statute confers on the police a discretion so broad that its misuse may be inferred from its existence.

In *Easter v. District of Columbia*, 361 F.2d 50 (D.C. Cir. 1966), the U.S. Court of Appeals for the District of Columbia reversed a lower court decision that had resulted in the arrest and conviction of a chronic alcoholic. The court ruled that public drunkenness arrests of chronic alcoholics violated statutory policy as well as the Eighth Amendment's prohibition against cruel and unusual punishment and defined chronic alcoholism as a disease rather than a crime. In *Powell v. Texas*, 392 U.S. 514 (1968), a case involving the arrest and conviction of a chronic alcoholic, the Supreme Court ruled that arrest and prosecution for the condition of being drunk in public is not a violation of the Eighth Amendment's prohibition against cruel and unusual punishment.

The case of *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), although not involving a police action, exemplifies a Supreme Court decision affirming that laws must be equally enforced under the Fourteenth Amendment. A San Francisco ordinance prohibited the operation of laundries without consent of the Board of Supervisors, except where the building used was made of stone or brick. The complainant, whose business was constructed from wood, successfully argued that he was improperly jailed and fined since only people of Chinese ancestry received penalties.

While appellate courts may review actions of individual police officers or particular policies of police departments in narrowly framed decisions, they probably will be reluctant to rule on broad issues, especially in class action suits where immediate responsible injury cannot be demonstrated. In *Spomer v. Littleton* 414 U.S. 514 (1974), (a case involving judges and not police) the Supreme Court, reversing an appeals court decision, ruled that despite the presence of clear discriminatory patterns of conduct in the administration of criminal justice in Cairo, Ill., plaintiffs had not demonstrated any injury in specific terms and dismissed the case. The court argued that it could not anticipate future discriminatory practices, and that the court was reluctant "to interfere with the normal operations of state administration of its criminal laws."

c. *Implications.* The cases indicate the difficulty and limitations of achieving successful review of broad discretionary authority.

The effectiveness of this mode of review will depend upon such problems as 1) standards of proof, 2) timeliness, 3) standing, and 4) the reluctance of appellate courts to entangle themselves in the intricacies of administrative police functions. For these reasons appellate courts, even if capable of providing some leadership, are limited in what they can hope to accomplish. Rulemaking in the police department can supplement appellate court action and enhance the possibility of judicial review.

2. *Court rule authorizing field citation release.*

a. *Discussion.* Field citation procedures can be accomplished by the highest appellate court in a state as part of its rulemaking function.

b. *Examples.* The Supreme Court of Arkansas accepted such a rule as prepared by the Arkansas

Criminal Code Commission. The rule stipulates the following:

Rule 5.2 *Authority to Issue Citations.*

A. A law enforcement officer in the field acting without a warrant who has reasonable cause to believe that a person has committed any misdemeanor may issue a citation in lieu of continued custody.

B. When a person is arrested for any misdemeanor, the ranking officer on duty at the place of detention to which the arrested person is taken may issue a citation in lieu of continued custody.

C. Upon the recommendation of a prosecuting attorney, the ranking officer on duty at the place of detention to which the person is taken may issue a citation in lieu of continued custody when the person has been arrested for a felony.

D. In determining whether to continue custody or issue a citation under A, or B, above, the ranking officer shall inquire into and consider facts about the accused, including but not limited to:

- (i) place and length of residence;
- (ii) family relationships;
- (iii) references;
- (iv) present and past employment;
- (v) criminal record, and
- (vi) other relevant facts such as:

- (1) whether an accused fails to identify himself satisfactorily;
- (2) whether an accused refuses to sign a promise to appear pursuant to citation;
- (3) whether detention is necessary to prevent imminent bodily harm to the accused or to another;
- (4) whether the accused has ties to the jurisdiction reasonably sufficient to assure his appearance and there is a substantial likelihood that he will respond to a citation;
- (5) whether the accused previously has failed to appear in response to a citation.

c. *Implications.* Maximum use of citation should be encouraged in circumstances where issuance of

a citation is consistent with effective law enforcement policy. A law enforcement officer who has grounds for making an arrest should take the accused into custody or, already having done so, detain him further only when such action is required to

carry out legitimate investigative functions, or to protect the accused or others where his continued liberty would constitute a risk of immediate harm or when there are reasonable grounds to believe that the accused will fail to respond to a citation.

CHAPTER XII. DECISION TO CHARGE

The "decision to charge" involves one of a series of official decisions which identify particular legal prohibitions which, if violated, will result in a defendant being accused and subject to further criminal processing.

The decision to charge might be described as a process or continuing series of decisions. This process may begin prior to arrest (for example, if the policeman has a particular charge in mind prior to making the formal arrest) and is not concluded until the filing of *final* formal charging papers, which need not occur at any fixed time except that it must precede trial.

The decision to charge affords an opportunity to institute alternatives as follows:

- *Legislative* changes in grand jury function and restrictions on plea bargaining.
- *Police department* rulemaking, diversion of juveniles, and case-review intervention.
- *Prosecution offices'* case evaluation for initial charge decision, reviewing charge decision, weighting for non-charge purposes, case-review intervention, referral to arbitration, and restrictions on plea bargaining.
- *Trial court* case-review intervention, review of prosecutorial discretion, supervision of plea bargaining, and referral to arbitration.
- *Public non-criminal justice and private agency* case-review intervention.
- *Probation and Public Officer* diversion of juveniles at intake screening.
- *Appellate court* review of prosecutorial discretion and standardization of plea bargaining.

Whatever stage of the charging process is under consideration, and whatever level of formality or informality the official choice of charge under consideration may possess, the essence of the "decision to charge" is the exercise of official discretion to select from among a large number of possible official accusations of criminality those particular accusations which will be, for the purposes of case processing, laid against a particular defendant.

Alternatives in this column refer to practices, activities, and programs which 1) make some or all of the events which constitute the charging process unnecessary, 2) provide for the formulation of charges by persons or organizations not conventionally involved in this form of decision-making, or 3) provide for the formulation of charges by conventional decision-makers employing new decision-making modes.

The alternatives share an important common feature: they involve the systematization of existing activities or practices, the importance of which may not now be recognized by the actors involved in them. In addition, the range of alternatives included in this column must obviously reflect the breadth of the definition of "decision to charge." Hence police activities as well as prosecution activities are included.

A. The Legislature

1. *Changes in grand jury function.* The grand jury performs two functions: investigation and indictment. In recent years there has been a discernible erosion in the indictment function of the grand jury. Because of this trend, it is not surprising that influential writers in the field are calling for the abolishment of the indicting grand jury.

Many jurisdictions have eliminated or modified the indicting grand jury. It is argued that the indicting function is often illusory, since most of the time the grand jury merely acts as a rubber stamp for the prosecutor. Grand jurors generally follow the prosecutor's direction, hearing only selected witnesses and examining only the evidence chosen for their consideration. Advocates of elimination of the indicting grand jury also note that the costs of impaneling and servicing a grand jury are high. Facilities must be provided; grand jurors must be compensated. The time and effort of prosecutors, judges, sheriffs, witnesses, and jury commissioners are involved.

Those who advocate elimination of the indicting grand jury often propose, as the main alternative, the use of information filed by the prosecutor and a preliminary hearing. Although a preliminary hearing can also be time-consuming and expensive, it is argued that it is a better screening device than an indicting grand jury and is more likely to be protective of the defendant's rights. Another alternative is to limit the availability and use of the indicting grand jury to specific circumstances—for instance, only serious cases.

Proposals to modify or eliminate the indicting grand jury need not preclude the use of investigative grand jury. It is often contended that the grand jury can be a very effective instrument—with its subpoena power—for investigating more complex cases, such as those involving fraud, organized crime, and government corruption. Consequently, there are fewer advocates for eliminating the investigating grand jury. Some argue that the prosecutor should have to file an affidavit stating the grounds for wanting to use an investigating grand jury. If statutory category were met, the court would order the impaneling. A concern expressed is that the investigating grand jury can be abused with unwarranted fishing expeditions.

2. Restrictions on plea bargaining. Plea bargaining represents a procedure in which defendant elects to enter a plea of guilty to a specific charge, rather than to exercise the right to trial. This occurs because the defendant has been led to expect that such an election will predispose agents of the justice system to afford him favored treatment, rather than because of a spontaneous impulse to admit or not to contest his culpability. The broad and vague character of this definition reflects the complexity of the phenomenon under study. For any given situation, for example, the focus of treatment may differ; it may involve a concession of a related charge or a sentence recommendation. The procedure may be formal or it may function by means of an unspoken understanding.

The task of locating plea bargaining items in the matrix is compounded because more than one actor participates. In both traditional practice and reform, both the judge and someone else participate. Either actor may take unilateral action that will affect the practice. The entire scheme is amenable to change by an actor who does not directly take part in the bargain. The legislature may establish diversion, for example, but cannot as easily compel its use.

Plea bargaining regulation is not simple. There will always be some pleas of guilty because some offenders, for personal and subjective reasons, wish to acknowledge guilt and accept penalties. It is difficult for the parties to be honest about what kind of plea they will negotiate since it is difficult to determine whether a plea has in fact been negotiated or is a function of the defendant's willingness to accept a penalty for an alleged offense. Therefore, if prosecutors and judges do not concur in a responsible restriction or proscription of existing plea negotiation practices, they have the option of reducing its visibility rather than eliminating it. There are a variety of ways that this possibility can be anticipated and offset. They include requirements for record keeping and detailed disclosure. There is a problem, therefore, with the legislature's attempt to restrict plea bargaining because it may not work without detailed and difficult implementation efforts.

The legislature may attempt to restrict plea bargaining in three ways: 1) by abolition, which directly reduces the number of cases bargained; 2) by prohibition in certain predesignated cases, a form of regulation affecting the number of cases; and 3) by the regulation of negotiating practices.

a. *Abolition.* Proposals to abolish plea bargaining derive from the belief that its deficiencies cannot be remedied by reforms designed to regulate its use, and that the criminal justice system can work effectively without it. The National Advisory Commission on Criminal Justice Standards and Goals suggests that total elimination, among other accomplishments, will 1) remove prosecutor incentive to overcharge, 2) not substantially increase the number of trials, and 3) increase the rationality and fairness of the system.

Recently Alaska abolished plea bargaining by court rule. However, it is too early to evaluate the impact of this action. No state law has yet abolished plea bargaining; since relatively few jurisdictions have implemented reform proposals (Philadelphia claims that it has), it may be too early to state categorically that they cannot achieve the purpose for which they were designed. Without an examination of empirical evidence in reforming locales, no evidence yet substantiates the appeal for immediate and total abolition.

b. *Prohibition in "certain predesignated cases."* Effective limitation of plea bargaining can only be implemented by prohibiting characteristics of the plea bargain, because the legislature cannot specify the subject matter of the charge but rather the ele-

ments that constitute plea bargaining. Guilty pleas, for example, cannot be eliminated.

The so-called New York State Drug Law speaks to the particulars of cases with respect to concession of charge, concession of sentence, etc. It identifies subpractices common to the form of plea bargaining that it desires to eliminate for drug-related and other types of offenses. Section 220.10, 6(a) and (b), of the New York Penal Code is as follows:

6. (a) Where the indictment charges one of the class A felonies defined in article 220 of the penal law or the attempt to commit any such class A felony, then any plea of guilty entered pursuant to subdivision four or five must be or must include at least a plea of guilty of a class A felony.

(b) Where the indictment charges a felony and it appears that the defendant has previously been subjected to a predicate felony conviction as defined in penal law section 70.06 then any plea of guilty entered pursuant to subdivision four or five must be or must include at least a plea of guilty of a class A felony.

Section 220 of the New York Penal Code identifies the following as class "A" felonies: Criminal possession and attempted criminal possession (class A1-A3) and criminal sale and attempted criminal sale (class A1-A3). Someone charged on these offenses cannot plead to a lesser felony nor to another related felony within the "A" category, since the other "A" offenses are not drug-related. Thus sentencing decisions under the class "A" provision are non-discretionary. By prohibiting bargaining from the 220 class of offenses, the defendant has nothing to gain by way of charge concession and little to gain by way of sentence concession by pleading guilty. The prosecutor can no longer offer an advantage to a defendant in return for a plea of guilty. As a result of the new law, the courts are becoming clogged, with 20-25 percent of the cases going to trial.

Another limit on plea bargaining in Section 6(b) is concerned with a failure of the courts to punish recidivists where the defendant has a prior (predicate) felony conviction. Although a defendant cannot change a felony to a misdemeanor, he can bargain within the felony range, thus having more leeway than the drug defendant. Section 6(b) is thus a *limitation* on bargaining rather than a prohibition.

The drug law has been criticized from a variety of perspectives. First, it is ineffective; drug traffic has not declined. Second, not only has the law failed as a deterrent, but those most likely to obtain long sentences are the low-level drug pushers. Third, the courts are becoming clogged with cases as more defendants who cannot plea bargain come to trial, even with the addition of new judges. Fourth, some prosecutors expect to avoid the problems posed by the mandatory life sentences by offering lesser charges to defendants at the preindictment stage not covered by the law. Fifth, many defendants are appealing cases, arguing Constitutional issues. Although the law has been upheld by an appellate court, the justices contended that the law was too harsh. Many judges in New York believe that there ought to be greater latitude in plea bargaining between prosecutors and drug defendants and greater freedom for judges to impose relatively light sentences when warranted. The difficulties with such rigid legislative attempts to regulate plea bargaining—which so directly limit prosecutorial and judicial discretion, while leading to such unfair, irrational, and non-humanely dispositions—suggest that ways will be found to circumvent the law. However, the alternative submodel itself may be feasible if the mandatory penalties imposed are graded rationally and are suited to the offense without unduly limiting the discretion of prosecutors and judges.

c. *Regulation of negotiating practices.* The purpose of this method is to ensure the fairness and acceptability of the procedure. Most proposals of this type consist of two components: 1) a statement of the necessary steps (regularization of the procedure) and 2) an increase in visibility (the bargain becomes a matter of public record). The reform proposals noted below contain a mixture of these components. Regularizing the procedure may mean, for example, that bargains are made at a conference, possibly presided over by a judge, or that the prosecutor discusses the bargain with every defendant without consideration of eligibility, in order to create more equal access. The goal is to achieve a more equitable system of opportunities to negotiate.

A variety of organizations have proposed or implemented specific models for regulating negotiating procedures. The reforms offered have focused on considerations of the overall process prior to negotiation, the formulation of standards for the negotiating process, and post-negotiation procedures.

All of the major organizations that have proposed

reforms stress the need for record-keeping, which allows for a reformed plea bargaining system to be adequately tested.

(1) *Specific proposals.*

(a) *Formulation of standards during negotiation.* The most important proposal on this subject is that the prosecutor offer equal opportunities for bargaining for defendants similarly situated. The ABA provides no specific restrictions. The Model Code of the American Law Institute specifies that the prosecutor must issue guidelines and is the only document that prohibits specific unfair bargaining practices by the prosecutor. Generally, judicial participation is prohibited in the proposed negotiating process—the judge may only inquire into the fairness of the plea, then approve or disapprove the bargain. The negotiating process is viewed as an independent meeting between prosecutor and defense counsel.

The prosecutors retain most of their discretion under these plans, but it is controlled discretion coextensive with limited judicial review of the bargain.

(b) *Judicial review in post-negotiation.* Judicial inquiry in the post-negotiation phase of the plea bargaining process consists of three parts, ensuring that 1) the defendant understands the nature of the charge, 2) the plea was given voluntarily and without coercion, and 3) the plea is factually accurate. None of the reform proposals suggest how the judge may achieve the first objective, but all suggest that the defendant must be informed of the sentence. With respect to voluntariness, all agree that a plea is not voluntary if promises other than those in the agreement were given. The requirement of factual accuracy is reasonable and the most detailed. Its advantages are increased visibility of the charge reduction process, provision of a more adequate record of conviction, and evidence that the crime committed is as serious as the one pleaded to. One proposal suggests that witnesses be examined to determine factual information about the plea procedure.

Oregon has implemented many of the ABA proposals with respect to plea discussions and agreements and the role of the court in evaluating the plea.

(2) *Implications.* Rules must be detailed, although it remains to be seen whether the legislature can provide the necessary level of procedural detail. Even if laws could provide the necessary detail, the

imposition of legislative fiat creates resistance when it seeks to regulate prosecutorial discretion.

Given the extent of dissatisfaction with plea bargaining, and given the difficulties associated with any reform effort that begins at the low levels of the system and proceeds upward, it would appear, on first analysis, that the legislature could resolve the issue. Theoretically, plea bargaining is amenable to legislative control, but in practice the actors may devise means of circumventing the law.

B. Police Departments

1. *Departmental rulemaking.* Departmental rulemaking is a process conducted internally by the police department in its concern with the enforcement of particular laws and standards; it uses some degree of public consultation. The product of rulemaking is a set of guidelines, standards, or rules guiding police conduct that are more specific than the general commands given to the police department. The rulemaking described in this matrix cell, in contrast to that in column III, involves police discretion after the decision to arrest has been made.

The charging process is not exclusively prosecutorial, but involves a series of decisions. The first is made by the arresting officer, who decides the informal charge on the basis of which the arrest is justified to a magistrate. The police decision to charge is highly influential on the prosecutorial charging decisions that follow and on the ultimate accusatory action.

The police decision about the nature of the charge is also critical in determining the individual's arrest record, particularly because employers sometime rely on it.

Rulemaking in this matrix cell is designed to aid the arresting officers or other line officers in charge of making charge entries, perform this function more fairly and uniformly by choosing between a number of legally justified charges that may be generated by alleged or suspected conduct. Such rules would describe how to exercise discretion under the applicable law of crimes.

Two submodels of rulemaking may be examined: 1) specific rules that describe situations of making particular decisions by formalizing the charging process, and 2) the concentration of authority in a police specialist who would make the final charging decision.

Under the first submodel, the department might develop a checklist that identifies factors influencing discretion and that assigns a weight to each factor. The factors might cover characteristics related to the gravity or level of a charge. A rule could be devised for drunkenness, for example, that would prohibit an officer from arresting someone on the basis of the vagrancy laws. Forms now used in police departments are open-ended; the officer decides what the facts are and makes a charge accordingly. With a checklist, an officer would spend less time on paperwork; the checklist itself would be the expression of the rules.

The difficulty with this submodel is that the police officers making an arrest must, to some extent, prepare their own paperwork. It logically should be done by the person most intimately connected with the case and not by an administrative supervisor.

To the extent that rules governing police charging can be initiated and result in limited paperwork, the police may accept the idea as an incentive to abide by the rules.

A problem common to both submodels is the difficulty of devising rules specific enough to anticipate every possibility or case situation. The police problem in this respect is similar to the legislature's, but the police possess greater experience and thereby the potential to devise more realistic rules than the legislature. However, specificity is also a problem of draftsmanship: without drafting experience and a staff, the police may fare no better than the legislature.

2. Diversion of juveniles at intake screening

Juvenile diversion at intake screening refers to the informal dispensation of a juvenile case by police discretion, wholly exclusive of the formal criminal justice system. The juvenile's record reveals no penetration into the system, although he may be required by the police officer to perform certain tasks or restrictions as "punishment" for his "crime." Known generally as station-house adjustment (although it may have a different name in each jurisdiction), this is the oldest and most informal type of pretrial intervention in America. It would be impossible to estimate how frequently it occurs, because no records are kept of the process; indeed, most officers would consider time spent "talking to" young offenders instead of arresting them simply a normal police activity and not a separate innovation.

Typically, the child and his parents meet at the station on at least one occasion with the officer. The child may be required to find a job, attend school regularly, or make restitution, or he may be forbidden to see certain friends or to frequent "trouble spots" in the town.

Most station-house adjustment falls under the submodel of minimal services. The officer involved usually has neither the time nor the training to provide in-depth counseling. The procedure works best with the child whose "criminal" behavior is incidental, rather than habitual or a symptom of a deeper disturbance in the family, school, or community. This child is frequently sufficiently frightened by merely being apprehended by the police, and having his parents informed, to make further processing of the case unnecessary. Station-house adjustment in these cases is really a method of providing some type of restitution to a victim of the child's offense and to reinforce the valuable lesson that the child must take the responsibility for his own actions.

The extensive services program model attempts to deal with the child whose criminal activity is part of a pattern and whose need is for in-depth help to resolve the personal conflict that is the underlying cause of his problems with the police. In the past, this type of treatment could only be provided by referral to an agency outside of the police department. However, police departments—following the model of the Wheaton, Illinois, Social Service Project—are beginning to look into the possibility of providing counselors at the time of "arrest" and continuing the treatment within the context and confines of the police station experience.

Disobedience by the child can result in the application of further restrictions on his behavior by the officer and possible referral to juvenile court intake. This referral is not formally prejudiced by the fact that station-house adjustment was attempted, although this information may be conveyed to the intake officer by the police and may be counted as a factor in his decision to attempt this type of informal adjustment.

There are many benefits to the practice of sparing the child the trauma of the court process, including no record of his offense, and lowering the caseload on the juvenile court and intake screening personnel. Less visibly, there is the development of a relationship of personal involvement between the community and the police officer, rather than having the

police function merely as a conduit from street to courtroom.

However, as with any highly informal and discretionary program, the possibility of improper inclusion and overcontrol exist. For the child there are very few safeguards. In station-house adjustment, the officer is judge, jury, and probation department. Since there has been no arrest, counsel plays no role. Only the child's parents are in a position to question the process; since they are apt to be unschooled in legal principles and apprehensive of the power of the police, they will often make no protest.

3. Police case-review intervention

a. *Discussion.* Intervention refers to a suspension of criminal proceedings during which an individual can influence the ultimate disposition of the case against him by his conduct or performance. The possibility of resumption of proceedings is used to encourage compliance with the program's requirements during the suspension. A person eligible for intervention is one against whom some accusatory action has been taken by a law enforcement agency for a specific instance of suspected criminal conduct. Intervention does not always imply that a person is channeled into a formal program. As noted below, intervention may be non-contractual, non-service, or informal, as well as contractual and service-oriented. Most of the projects described in the matrix cells, however, are programmatic.

Case review refers to authority over the intake function and, in some instances, the termination function. Intake means authority over case selection. This involves case-by-case decision-making to determine whether a defendant is accepted into a program or has proceedings delayed. In some instances, it may also involve the formulation of criteria for entry into a program, possibly merged with the charging decision. Termination refers to authority over case outcome by the definition of success during the suspension of proceedings. In both intake and termination, the critical requirement is day-to-day control of entry and exit. The person who formulates the criteria for these decisions is not necessarily the person making case decisions. If an actor controls *only* the intake function, that actor is said to have case-review authority. This definition is justified on the grounds that control over intake may become control over outcomes as well, since accepting low risk cases, for example, will influence termination.

Two important variables in the design of most programs are whether the program is based on a contract and whether services are provided. The concept of contract, as used here, refers to a definite understanding and obligation on both sides which includes specifying the outcome of successful participation in the program. Combining both legal and lay elements, a contract refers to an exchange of promises whereby the intervention agent (police, prosecutor, trial judge) agrees to definite things (such as to provide certain services and to drop or reduce charges upon successful completion of the program) on the contingent performance of the defendant (such as to participate in a service program, to avoid arrest for a given period of time, to make restitution to the victim, and so forth). Programs not based on a contract involve no definite commitment on the part of the intervention agent to take any particular action upon the successful completion of the program but only to take the client's participation into consideration in arriving at a particular decision or outcome.

The second variable is the service component. This refers to the regular and systematic delivery of services, of which there are many types. For a service component to exist, a program must consider the service needs of a defendant and must have the capability of delivering them.

b. *Examples.* The Wheaton, Illinois, Police Social Service Project (PSSP) is an example of a contract with a service program—the first project of its kind in the nation. The program, begun in 1970, puts professional social workers into the police station as a response to three distinct law enforcement problems: 1) to provide an alternative to formal arrest when that seems inappropriate, 2) to provide crisis intervention services satisfactory to both police and community, and 3) to deal with the failure of the community social and mental health facilities to cope with law enforcement related problems.

(1) *Intake:* The first point of contact between the alleged offender and the police officer is the beginning of the intake process. A veteran line officer who has made many referrals develops a "sense" of whether a person is amenable to the program, depending on the offender's personality and attitude, and on the alleged criminal activity involved. The standard eligibility criteria that guide the officer in his decision are broad and allow for a high degree of personal discretion. There are no age or sex criteria: both juvenile and adult males, and female

clients are accepted. The types of criminal activity involved are fluid and determined by inhouse police rulemaking. Initially, written guidelines were used which excluded crimes of violence and serious felonies, but during the course of the operation the officers' "feel" for the program has resulted in a significant number of referrals of individuals who were alleged to have committed crimes such as violent assaults, robberies, and weapon offenses.

Once the offender is in the station, the officer considering a referral will suspend any papering of the arrest until he has checked the station's records and, depending upon the offender, the statewide FBI rap sheet. If there are serious questions about the offender's mental condition, records will be sought from mental health organizations or hospitals. The offender's consent must be obtained to release information not regularly released to law enforcement agencies. If the officer decides to refer, he sends the offender to the social service unit. At this point there is no written, formal record of the alleged offender's contact with the police.

In the social service office, the offender is interviewed by a social worker who completes the intake process by determining the client's needs and whether the project can provide the required services. The social worker may reject a potential client and send him back to the "arresting" officer with an explanation and suggestion of further treatment or disposition of the case because 1) offender's problems require intensive treatment or 2) the offender's attitude exhibits a refusal to cooperate to such an extent that any attempt at treatment would be futile. In a significant number of cases, the worker will delay his decision pending receipt of more information about the circumstances of the "arrest." If it appears from the offender's description of the event that the arrest was incorrect and that the officer might be using the project to avoid having to admit error, the worker will release the offender. It is a policy of the social service staff to accept police referrals only in cases where there is probable cause for arrest.

Participants who are accepted into the program sign a consent form, attend scheduled counseling sessions, and agree not to repeat the offensive behavior. In return, participants are promised the full use of the project's facilities and a sympathetic ear whenever they need help in working out their problems, so that subsequent contacts with the police are avoided.

(2) *Participation:* The service rendered by the social service unit is aimed at helping both the client and the police. By having trained counselors in the police station during the day and on call during the night, services can be delivered to the client at the time of arrest. This is the time the client is most receptive to help. (A major drawback of other models of police referral to outside social service agencies is the delay between the time that the need for such services becomes apparent and the time they are delivered.) In Wheaton, the police are also involved in the delivery of services. Counseling sessions are usually held at the police station, and the police are aware of who is in treatment.

The project provides individual psychological counseling. Its value depends on what the client makes of it. Referrals are made if medical treatment is deemed necessary. There is some vocational and educational counseling designed to help people to hold a job or to remain in school rather than to develop a saleable skill.

The program goal is to help each client adjust to realities of his life and environment, pinpoint the cause of his anti-self or anti-social behavior, and, if necessary, help the client make the personal or environmental changes necessary to his development.

There is a period in every case of about five or six weeks when the project and the client "size each other up" and determine how much they think they can accomplish. If treatment continues after that period, the client usually has a good idea of what he wants to do and at least some idea of how he thinks the project can help him.

A file is maintained on each client in treatment, containing:

- Interview notes.
- Social history questionnaire.
- Any information from other mental health, educational, or vocational agencies.
- Referral summary from police.
- Social assessment and recommendation form.
- Rap sheet and other police documents.
- Termination report (when treatment is completed).

The social history questionnaire is the most detailed factual record that is kept on the client. It contains information on family, employment, economic status, religious affiliation, race, sex, education, past medical and emotional health problems, and alcohol and drug use. The social worker will

frequently learn of past criminal conduct that does not appear elsewhere in police records.

Only the director, social workers, and secretary of the project are permitted access to these records. The officer involved in the case may request a verbal progress report or, in the event of a subsequent arrest, a consultation with the social worker, but the officer cannot demand to see the file. No determination has been made as to the "right" of the officer who made the referral to further information about the case.

If clients believe that it is in their best interest to have material in the file released to an employer or a police officer, they can sign a consent form. The form specifies which agency will receive the information. It also authorizes the release of "any and all confidential information now or hereinafter acquired."

(3) *Termination*: Positive completion of the PSSP is totally subjective. Completion is determined by the client, with the concurrence of the social worker, when they agree that the client "feels better" about the situations in which he must function, about himself and others, or feels that he has achieved other goals (e.g., finished school, found and held a job, patched up a marriage, or adjusted to a divorce). The police play no role in the decision to terminate counseling. There is no scheduled evaluation of progress nor is there any prejudice attached to a lengthy treatment. The average duration is three months, with sessions occurring on the average of one every week and a half.

The consequences of a positive completion, for an adult referred by a police officer, are that the client is free from all stigma of the original encounter with the police. Additionally, the police know that they have solved some of his problems and they are not "looking for him" to get into trouble again.

There is no formal mechanism for disseminating information about a client's completion of the counseling sessions to police officers. A termination report is placed in the client's permanent file, but copies of this are not routinely circulated. Most officers learn of terminations "through the grapevine" or by inquiring why a certain client is no longer seen at the station.

There are three reasons for negative termination. First, the client may terminate with the agreement of the counselor. Second, the client may be rearrested and put in jail, or the social worker may decide, based on the client's behavior or his additional con-

tacts with police, that the counseling was ineffective and that some other treatment is indicated. Third, the client may stop coming to the sessions and be terminated by default.

There are several subtle consequences of an unfavorable termination. At the time of referral, all processing of the arrest ends. This is generally not told to the client; in fact, the impression is often purposely given that the arrest can be "held over" his head. Where there is a complaining witness who has agreed not to swear out a complaint while the offender is in the program, a termination would free the complaining witness from that agreement and leave open the possibility of a formal complaint to the prosecutor and a warrant for the offender's arrest.

The major sanction that results from an unfavorable termination is psychological. Clients know that the police will be watching them; they know if they ever get into trouble again that things may "go hard" because they had a chance and did nothing with it.

Generally, the social service worker and the police make the termination decision together. There is no hearing or right of appeal.

A later arrest is not an automatic termination. At the time of the later arrest, there are several options open to the police. First, they can permit the client to stay in treatment and not charge the new offense. (This is done frequently when both offenses are part of a related pattern of social behavior, and when the social service office believes that the client is responding to treatment despite a repeated incidence of undesired behavior.) Second, the police can permit and encourage the client to stay in treatment while processing the subsequent arrest. Third, they can process the arrest and "recommend" that the social service staff terminate the client.

c. *Implications*. While the police function described in case-review intervention appears to be an innovation, it is also a return to the traditional police role as community servants who respond to the community's needs.

There is a potential for overinclusion in station-house adjustment; yet the overall benefit of providing an early exit from the system may justify its continuance.

The social service staff at Wheaton is keenly aware of the potential for abuse in a program based entirely upon the discretionary role of the police. As part of screening, the social workers question the offender about the arrest and will not admit

anyone who does not seem to have been the subject of a proper arrest. In this situation, the social worker takes on the function of a defense attorney. Because he is not qualified to make judgments about the validity of arrests, it is probable that he includes some that are technically invalid and questions others that merely sound improper. This function also puts him in direct conflict with the line officer, which is contrary to the goal of harmony and cooperation within a PSSP, and might be better assigned to a qualified part-time defense-oriented attorney, who could review the arrests of those referred to the program on a weekly basis. Where there is already a prosecutor assigned to the police station, screening for PSSP diversion might be done routinely along with papered arrests.

Police referral to an internal social service unit contains the same potential for benefit and abuse as other discretionary decisions, such as arrest/non-arrest and referral to community social services. An issue arises, however, as to whether the police could make and paper an arrest following an unsuccessful termination, based on the same incident of allegedly criminal behavior that brought the offender into the program.

Even a full arrest and release is not prohibitive of a subsequent arrest on the same charge if, for example, new evidence emerges.

C. Prosecutor Offices

These alternatives involve systems for gathering information about cases pending in the prosecutor's office, and for using that information rationally and predictably when bringing formal charges in a case. They are a part of the general effort to improve screening in the prosecutor's office.

The first two items involve procedures that influence the final charge. Their purpose is to encourage similar prosecutorial charges where there are similar allegations, and to ensure that the charge reflects society's perception of the seriousness of the crime.

Alternatives dealing with Evaluation and Weighting for Non-charge Purposes involve similar procedures but have a different purpose: to regularize procedures that may not necessarily lead to charging, such as plea bargaining or referral of a client to an alternative program.

1. Case evaluation for initial charge decision.

a. *Discussion.* "Case Evaluation for Initial Charge Decision" refers to the early review, by a prosecutor, of evidence of any potential or alleged criminal act. It occurs after a first charge by police and prior to formal indictment or information. To qualify as an alternative of this type, however, the procedure should have its primary effect on the charging process at or before the formulation of the initial prosecutorial charge.

b. Specific Applications.

(1) *Centralization of charging function.* To ensure that the charge consistently agrees with the facts, the screening function can be removed from assistant prosecutors operating on a rotating basis and assigned to an experienced prosecutor who would serve for a longer period.

The work is apparently disagreeable to most prosecutors: it is often mechanical, it does not require courtroom work, the hours are bad, and the offenses are often petty. On the other hand, the function itself, which is quasi-judicial in nature, is critical. Senior, experienced people with the right temperament should be found to perform the job.

The interdependence of criminal justice system actors must be considered. The conventional system promotes smooth relations between police and prosecutors; the prosecutor charge is similar or identical to the police charge. This system may be detrimental to the defendant and to the judicial system by increasing the number of "junk cases," but it maintains a comfortable working relationship with the police. In the short run, the alternative approach might increase tension. Police dislike having their cases modified at the papering stage. In the long run, however, the police may come to accept qualified reassessment of their charging and may learn to produce better charges. Charges may always be modified at a later stage prior to final charge.

Convincing the public that justice is being served may prove more difficult. This approach may give the appearance of leniency because more cases are dismissed or charges lowered. More important, a prosecutor with greater authority means the mistakes may be more serious. A senior prosecutor's decisions are not likely to be challenged because of his authority and experience. The substantive changes that result may not be what was desired.

(2) *Formalization of Charge Process.* A variety of rules may be implemented in this area. In some

cases absolute rules might specify conditions under which charging will or will not occur, particularly where a great volume of cases uses up the resources of the prosecutor's office. In Washington, D.C., Chief Prosecutor Earl Silbert devised a rule stipulating that no one would be prosecuted for possession of five or less marijuana cigarettes. (This rule was later rescinded.) A variation on this could be as follows: if persons are arrested with a certain amount of a drug, they will be charged with simple possession; if a greater amount, the charge will be increased to a higher level.

Devising rules for other categories of crime such as burglary and larceny is more difficult. For some serious cases, guidelines may be applicable.

A point system might be established that lists characteristic aspects of any given offense, and crimes could be weighted according to their seriousness.

Since this type of rulemaking is quasi-legislative, it may be inappropriate without legislative consultation and possibly without police and public consultation. These rules in a sense may determine what constitutes crime. A most important consideration in devising rules is that they can be unmade as easily as they are made. The process should be open to periodic review at specific intervals.

2. Case evaluation for review of charge decision.

a. *Discussion.* This alternative provides for screening methods or mechanisms to be used by the prosecutor after the initial charge, but before a formal accusation has been filed with the court by means of grand jury indictment or prosecutorial information.

The prosecutor must ask several questions in making the charging decision. Is the content of the final charge provable? Does the charge appropriately reflect the values of the prosecutor? Of the community? Should the case be prosecuted? Have similar cases been handled in the same way? The prosecutor should strive for justice as well as efficiency; the prosecutor's responsibility, in this sense, is of a quasi-judicial nature.

Discretion at this stage presents serious problems, and an effort to systematize the process is crucial.

b. Specific application.

(1) *Centralization of the review function.* Regardless of the assignment system, every office might benefit from establishing a systematic review function. A senior person is required with the capability to make judgments and translate the decisions into

action. While decisions at a minimum should be *reviewed*, they may even be made directly by a senior person when an assistant finds this way of proceeding desirable.

Successful review requires a system for arranging the flow of cases—not just problem cases, but all cases. An adequate support staff also is needed. To maintain some degree of consistency, reviewers ought not rotate too often. Moreover, the reviewer must have regular access to the office head, since the charge decision reflects on the policy of the office; the reviewer must ensure that the charging decision conforms with the policy of the office. This alternative cannot work, however, without the co-operation of the assistants whose discretion it will diminish.

Bad decisions made by a central review authority may have graver consequences than if the function were never centralized. Apart from ensuring that all cases are reviewed by the central review authority, some method also must ensure that comparable information is received in each case.

(2) *Rulemaking governing review.* The rules guiding the review function cannot be conceived in detail to eliminate discriminatory charging. Their purpose is to state general principles and guidelines that may be transformed into individual decisions.

A rule might refer to the importance of specific circumstances, for example:

In no case where a firearm is present will the charge review decision eliminate the firearm element from the crime.

While this alternative cannot specify *how* to consider conditions, it can specify *what* to consider (prior record, community ties, etc.).

Rules might state that the charging decision should be made on the basis of offenses not encompassed in the charge. The prosecutor may desire to deal more leniently with defendants who have no prior offenses.

(3) *Consultation with defense counsel.* The prosecutor may offer, in cases involving some minimum level of seriousness, the opportunity for informal consultation before the filing of final charges. This alternative recognizes that not all defendants necessarily want such a procedure, and there is no guarantee that there will be new information to present to the prosecutor. It would guarantee, however, that there would be an opportunity to present useful, information to the prosecutor if

it were available. This alternative may be used as an adjunct to the procedures suggested for centralizing the review function and the rules governing review. It represents a corrective procedure designed to improve prosecutorial screening by giving more equal access to defendants.

Once the prosecutor sets up conferences with defense counsel, other persons may be included such as victim complainants or other witnesses who have a stake in the proceedings or have important information to contribute.

Some secondary uses also can be made of this alternative submodel, which provides an opportunity for: 1) some degree of discovery, 2) early initiation of plea discussions, and 3) discussion of diversionary alternatives available at the precharging stage. The main concern, however, is with the primary function of influencing the prosecutorial charging decision.

A determination must be made of the range of cases to which this alternative should apply. Resource limitations—manpower, and money—will act as a limit on how adequately this procedure can be implemented.

To the degree possible, a general rule might be promulgated, applicable to these conferences, specifying that their content will be unavailable for use in the prosecuting or sentencing phases of cases. Upon announcement of such a rule, the defendant would then have to determine, given the risks, if it would be useful to participate in a conference.

3. Evaluating and weighting for non-charge purposes. This alternative refers to innovative screening by prosecutors to help them make decisions not related to charging, affecting how cases should proceed and desired results. This alternative addresses non-charge-related decisions such as whether to plea, refer to a pretrial intervention project, and so forth. The prosecutor should know as early as possible what route to follow. The decision will affect how staff and other resources are deployed.

Screening for non-charge purposes should be reduced to a system by discovering the options available, the prosecutor should be encouraged or required to select an option. The decision may be subject to review but will eliminate at an early stage those defendants who would be diverted out later. There are two dimensions to the job of devising options: *directional*—will the case be disposed of immediately or go to trial? and *temporal*—how quickly is the case proceeding and should it be expedited or delayed? Whether or not these procedures should

be associated with charging depends on the assignment system and variations in local offices.

4. *Prosecutor case-review intervention.*

a. *Discussion.* Prosecutor case-review intervention refers to an intervention in which the prosecutor decides who enters and exists from the program. The accusatory action on which intervention follows is either a police charge and/or an intermediate prosecutorial charge, an internal decision that occurs before the filing of formal charging papers. In practice, this is in fact what happens. Programs are structured so that intervention occurs before the formal charging rather than after indictment. Delaying proceedings requires the suspension of the presentation of formal charging documents to the trial court.

The consequences of successful participation in an intervention program involve two types of outcomes: a dismissal of the charge by the prosecutor; or a reduction or change in the nature of the charge. Submodels of this alternative may involve a contract with or without services or a non-contract arrangement with or without services.

b. *Example: Flint, Michigan: Contract with Service.* An example of this type of intervention is the Citizen's Probation Authority of Genesee County, Flint, Michigan, a contract with services program.

(1) *Intake.* The eligibility criteria for this program are as follows:

- Minimum age of 17 years, no maximum age.
- Present offense shall not constitute part of a continuing pattern of anti-social behavior.
- Offense shall not be of an assaultive or violent nature, whether in the act itself or in the possible injurious consequences of the act.
- Accused must accept *moral responsibility* for his behavior in the alleged offense.
- Restitution to victim where possible, or deferred payment during probationary period.
- Offender must live within an area which makes close supervision feasible.

All offenders who meet these criteria, including those accused of committing felonies, are automatically referred to the Citizen's Probation Authority (CPA) by the prosecutor who authorizes the diversion. Defense counsel has no role in this determination. The CPA then interviews offenders, advises them of their rights, describes the program, and requests permission to conduct a confidential background investigation. If CPA believes an off-

fender meets the eligibility criteria, it recommends a "treatment plan" to the prosecutor.

The "treatment plan" is a contract that is tailored to each participant. It is the product of negotiations between a staff counselor and the defendant. It specifies short-term goals and how they will be implemented. It is reduced to writing and signed. It is agreed that if the defendant follows the plan for one year, all charges will be dropped. In practice, charges are usually dropped in substantially less than one year upon a recommendation to the prosecutor by the program staff.

(2) *Participation:* CPA provides both direct and referral services. Types of referral services include employment and financial aid, health services, and legal aid. Approximately 25 agencies serve as referral resources.

(3) *Termination:* If the offender completes the program successfully, the charges are dropped and police record is usually expunged. The unsuccessful offender faces prosecution on the original charge. If the defendant commits another offense, participation may be terminated. Before this happens, the case is discussed by the police, the prosecutor, and the client. The prosecutor retains final discretion on whether to prosecute or return the case for further supervision by CPA.

c. *Implications.* Whether it is desirable to adopt an alternative that may add to the amount of discretion exercised by the prosecutor must be considered. Is prosecutorial control over intervention part of traditional discretion? Is it consistent with the role and function of the prosecutor to set requirements for future conduct of the defendant and to be a provider of social services? Does this encroach upon the role of the trial judge and of probation and other correctional officials?

The prosecutor always runs the political risk that his programs will be criticized as compromising public safety. There is an inclination to develop low risk programs so that failed cases will not compromise his position. If only misdemeanors and minor crimes are accepted, an elaborate structure is being established for cases which otherwise might never have consumed the resources of the criminal justice system nor have limited the freedom of the defendant. Many individuals who might otherwise have their cases dismissed will proceed through the system.

There is a danger that the prosecutor may use intervention as a place to "dump" bad or marginal

cases (e.g., inappropriate cases or those not backed by sufficient evidence). Low visibility ensures that the prosecutor's decisions and his control of the defendant will not be supervised.

In deciding how to provide services, the prosecutor might 1) offer only a low level of services, 2) develop a referral network, 3) subcontract service—in which case control is lost over the quality of services—or 4) develop an expansive service capability, or a combination of the above. In Flint, Michigan, the Citizen's Probation Authority is separately housed, has its own budget provided by the county and its own project director and staff. The prosecutor is not involved in the day-to-day contacts and delivery of services to clients.

Even if all service authority is delegated, the prosecutor may still retain control of the program through the intake and termination decisions. There must, however, be some coordination between the prosecutor's office and the service agency because this relationship can influence the success of the entire program. They must trust each other's judgments and establish criteria for resolving disagreements that do not compromise the rights or needs of the client.

The influence of prosecutorial intervention on caseload depends, initially, on the definition of caseload. If we define it as a time factor, caseload increases; if we define it as minimizing penetration into the system, caseload decreases. However, if issues are raised in the courts concerning access to these programs and the rights of defendants, new court business (litigating these issues) will arise. If an individual is granted termination rights, the termination hearings themselves would represent new business for the criminal justice system.

The total number of persons entering the system and having *something* done to them may increase, even if court caseload declines. With the knowledge that an intervention program exists, police may increase their arrests. It may be important to know, for example, whether police would continue to arrest if First Offender Programs did not exist. Intervention thus could increase caseload at the entrance level.

Scheduling poses another problem. Intervention usually requires new types of continuances for adjournments. These continuances will cause new problems in docketing cases increasing the complexity of court scheduling.

5. *Prosecutor referral to arbitration.*

a. *Discussion.* This alternative refers to a system of non-judicial dispute settlement in which the parties agree to submit their case to arbitration, as a result of a directive or even a mildly coercive suggestion by a member of the criminal justice system—police, prosecutor, or judge. (The prosecutor's decision to refer is a variation of the charge/no-charge screening decision done routinely upon the receipt of a complaint.) There are four basic submodels of arbitration based on the two variable components of any arbitration procedure: 1) who is the arbiter (a generalist or a specialist)? and 2) how will the decision or award be enforced (advisory or binding)?

The arbiter can be a specialist with either a legal education or extensive training in arbitration and mediation. The non-specialist arbitrator has some non-criminal justice system full-time professional experience and, after receiving a brief instruction course in basic law and the techniques of arbitration, is qualified to hear disputes.

Enforcement can be binding or advisory. Binding enforcement means simply that the award or decision of the arbiter is written and has the same force and effect as a rule of court. Secondary agencies—the police or courts—may be called upon to enforce the award, but they do not make an independent determination of the facts.

In a program of advisory enforcement, the award or order is binding only if the parties involved are willing to comply. Failure to comply does not result in direct action by an enforcement agency. But the burden is shifted back to the complainant to secure another adjudication of the facts by the formal court system which will result in an order enforceable against the defendant.

The binding method raises issues of appeal and due process. How much power can a lay body exercise to compel a modification of behavior or payment of monetary restitution? Yet the advisory method may result in awards that are unenforceable, and may prevent the arbitration process from dealing with truly criminal behavior or being accepted by the criminal justice system and the community as a viable alternative to prosecution.

b. *Example.* In Columbus, Ohio, the Night Prosecutor Program is administered by the Office of the City Attorney and consists of a screening component, discussed previously, and an arbitration unit.

Referral is made to the arbitration component in two ways. First, most referrals are made after a screening interview with the complaining witness by an assistant prosecutor or a clerk in his office. Sec-

ond, some referrals are made by the Night Prosecutor's Office itself and are not initiated by a complaining witness. The program has the court's standing permission to inspect the daily summons docket of misdemeanor cases and to "pull" any case that it believes to be amenable to arbitration and to notify the parties. Occasionally a judge may refer a case at its onset or accept the motion of a defense attorney to do so. Generally, a continuance is granted pending the outcome.

Arbitration hearings are held each weekday evening from 6:00 p.m. until the last scheduled case is finished, usually at 10:30 or 11:00 p.m. The hearing officers are law students at Capitol University in Columbus who are hired to sit one evening per week. Because of their specialized background, the training for hearing examiners consists of learning to handle people in a conflict situation and on-the-job observance of seasoned examiners. A case comes up for hearing approximately two weeks from the date of the intake interview at the Night Prosecutor's Office in the Central Police Station where the City Attorney's main offices also are located. The parties involved, the "complainant" and the "respondent," appear before the hearing examiner. They are permitted to have counsel present, although this is not encouraged. The presence of counsel seems to inject some adversariness into the desired atmosphere of conciliation and mediation. Counsel is rarely used, even when the respondent is a corporation or store manager in consumer disputes. The parties are permitted to produce witnesses; if children are involved, they are requested to appear, although the Night Prosecutor does not handle complaints specifically against minors under the jurisdiction of the Juvenile Court.

Formal rules of court procedure and evidence do not apply. Witnesses do not swear an oath, but there is a "right" of confrontation and cross-examination. Hearing procedures are dictated by considerations of politeness, fairness, and decorum. The examiner explains 1) that they are attempting to reach a solution and to avoid a formal adjudication of the matter in court, 2) that they may present and question witnesses in court, and 3) that at the close of the discussion they will be offered suggested solutions. He explains that at any time they may make conciliatory suggestions and reach an agreement, and that they therefore need not wait for the examiner's decision or solution.

The examiners are trained to discover the underlying reason for the dispute and to lead the parties

to suggest their own solutions, rather than to determine guilt.

Hearing examiners also have the option to set restitution and to recommend referral to social service agencies in the community as part of the decision. They usually do not try to force referrals because they believe that the greatest benefits are derived from voluntary attendance. In some cases, however, the complainant will be told to call the Night Prosecutor and report whether or not the respondent has complied with the terms of the decision and contacted the referral agency.

If there is a total breakdown of the process and no solution can be reached, the complainant is instructed of the right to file a formal complaint in the general office of the City Attorney the following day.

If the complaint is processed and the case comes to trial, no evidence is presented of the outcome or of the fact that arbitration occurred. If the judges are interested, however, they can obtain such evidence.

No records of the arbitration process have ever been subpoenaed by a court during a criminal trial, although several attorneys have threatened to take depositions of the hearing examiners. The records kept by the prosecutor are few and contain little detail. The outcome is given with as little detail as possible—for example: “settled, restitution \$600, dropped.” The card is signed by the hearing examiner. This is the only permanent record kept by the program.

The arbitration decision reached in this program is advisory; it is enforceable only through the auspices of the courts, who must reach the same conclusion as the arbiter after an independent evaluation. If complainants cannot have their cases heard in court, because the prosecutor will not prosecute or because they haven’t enough money to pursue tort claims, they may be left with unenforceable decisions.

c. *Implications.* The arbitration process in the criminal justice system raises issues of due process. By agreeing to submit their dispute to arbitration, the parties waive a number of rights attendant to a formal criminal trial. They forego the rights to challenge the sufficiency of the criminal allegations, to a speedy trial, to a jury trial, to representation by publicly funded counsel if they are indigent, to the presumption of innocence, and to exclude unconstitutionally obtained information.

However, submission to arbitration in all models and programs is voluntary. By refusal to submit or

through non-compliance with an unfavorable award, a party can bring his case before a court where all of the above-mentioned rights would be applicable. For a program to be really voluntary, the parties must be presented with a clear picture of what the arbitration procedure entails, what rights they are waiving, and what possible sanctions may be taken in a case of non-compliance. Adequate time for consideration also must be provided.

6. *Restrictions on plea bargaining.*

The actor most likely to alter plea bargaining is the prosecutor, since his office conducts it. Whatever the particular reform goal of the prosecutor—abolition or regularization—two approaches are used: 1) rules dictating centralization of the bargaining function, and 2) rules describing the criteria for general use. The purposes of rules are to equalize and humanize the process; to limit manpower and to establish a system that saves time in the prosecutor’s office; and, to put in place a basic set of rules that cover the entire range of prosecutorial discretion. One of the negative aspects of conventional plea bargaining is that different assistants may have conflicting ideas about what constitutes an appropriate bargain. Thus, what is perceived as sentencing disparity is in reality a bargaining disparity.

a. *Rules dictating centralization of the bargaining function.* Under this approach, a prosecutor in charge of bargaining is appointed who has direct responsibility to the District Attorney. Assistant District Attorneys are required to clear their bargaining proposals through this office. Decisions are made on a case-by-case basis.

In Philadelphia, the daily functioning of the District Attorney’s Office has involved the vesting (in bureau chiefs) of authority to approve charges and sentence concessions designed to induce or make acceptable to a defendant a plea of guilty. Directions to assistants have stipulated that no such concessions are to be offered to defendants without the approval of these persons.

While this alternative may improve accountability and consistency, it may not reduce the amount of bargaining. Bottlenecks may arise pending approval. If any difficulties existed in obtaining bargains through the central office, the alternative may inhibit the ability of assistants to act, thereby creating more trials and a greater caseload.

b. *Rules describing criteria.* These rules could describe criteria for general use, such as to reduce

felonies to misdemeanors in non-violent burglaries, or to recommend probation in cases of persons without conviction for a prior offense. Their purpose would be to achieve consistent results with individual assistant district attorneys making the decisions.

The suggested subject areas of coverage are as follows: 1) screening (if inappropriate cases are identified early, they will not need to be made the subject of plea bargaining later on); 2) form of formal charge; 3) conduct of negotiations; 4) rules on permissible or authorized charge reduction; 5) rules governing degree to which the prosecutor can consider the defendant's promises other than plea; 6) rules governing the extent to which matters are not relevant to proof but are descriptive of the defendant; 7) rules equalizing opportunity to bargain; 8) regulations on offers of sentence concessions; 9) limits on inducements ancillary to the case at hand; 10) rules governing transactions with the court that follow the bargain between the defendant and the prosecutor; and 11) rules incorporating sanctions if the rule is disobeyed.

In the summer of 1974, for example, the District Attorney's Office in Manhattan developed rules on plea bargaining. The following is a brief overview of the topics covered in the rules.

I. General

- A. *Avoid Overindictment.* Overcharging: Start with provable crime. There should not be a claim that the office can prove a crime when it is clear that it cannot.
- B. *Nonprovable Indictments and Close Issues of Fact.* No plea bargaining should take place if the prosecutor believes the defendant is innocent.
- C. *Reductions to Misdemeanors.* If reduction will be to that of a misdemeanor, reduction should occur in the appropriate lower court, not in the State Supreme Court.
- D. *Motion Practice and Bargaining.* Plea bargaining is not to be conditional on withdrawal of proper motions by the defendant.
- E. *Confidors.* All plea negotiations must occur with counsel. No applied misstatements.
- F. *Sentencing.* Sentencing is the court's role (a special memorandum is provided).

G. *Conferences with Defense Counsel.* These must be unhurried. A time will be set for plea bargaining during regular hours.

II. Defendant Charged with Multiple Crimes.

Policies under (I) shall be applied to each indictment of a defendant, with exceptions.

III. Reduction of Felonies in Criminal Court.

If a case is worthy of misdemeanor treatment only, it is to be accorded even if the defendant does not plead guilty.

IV. Plea Bargaining in General: The Prepleading Report.

- A. Assistants may routinely reduce charges one class but only one class except if the defendant agrees to prepleading investigation (same as presentence except occurs before plea).
- B. Under certain conditions, no reduction below the highest count of the indictment.
- C. Reductions of more than one class, aggravating and mitigating circumstances are presented.

V. Procedure in Court.

This is off the record *except* in a case where lesser plea is recommended by the Assistant that is one class below the highest count charged in the indictment. This requires full statement on record about reason for recommending acceptance of that plea.

VI. Reduced Pleas Concerning Specific Crimes.

For example, homicides, kidnapping.

Those devising rules must consider 1) the level of detail necessary for it to be effective and enforceable; 2) whether the problem may be reduced to a formula approach, such as a point system or a system that allows for specific pleas given specific types of testimony.

Assistant prosecutors are professionals and believe they should exercise discretion and responsibility. With respect to the feasibility and appropriateness of this approach, there may be difficulty in convincing them to follow rules that result in a reduction of their autonomy.

D. Trial Courts

1. Court case-review intervention.

a. *Discussion.* Court case-review intervention refers to an intervention in which a judge deter-

mines who enters and exits from the program. The accusatory action on which intervention is based is the formal charging document filed with the court. A court referral delays proceedings in the trial and other pretrial proceedings as well. The influences on disposition may be dismissal of charges, a prosecution with a sentence recommendation to the judge, or leniency in sentencing itself based on the individual's diversion experience. The court programs may take the form of any one of four submodels: 1) contract with service, 2) contract without service, 3) non-contract with service, or 4) non-contract without service.

b. *Examples: Boston Court Resources Project.* This project employs the contract service model with a target population of first offenders and those involved in misdemeanors and non-serious felonies. Clients usually are poor, lack a high school diploma, are unemployed or in marginal jobs, and have family problems. Eligibility criteria were developed with consideration for what individuals the project could benefit and what the court would be willing to accept.

They specify that the defendant:

- Must be between 17 and 26 (with exceptions at lower end).
- Must be a resident of Boston with a verifiable address.
- Must not be addicted to drugs.
- Must be unemployed or underemployed.
- Must be charged with a misdemeanor or felony within the court jurisdiction (i.e., not a serious felony).
- Must not have more than one prior conviction (with exceptions).
- Must not be a full-time student.

These criteria continue to be modified. Most drug addicts are now accepted, and consideration is given to those accused of more serious felonies where a dismissal is likely.

Potential project participants are selected by screeners assigned to each of four district courts. They review the "cards" of new arrests and discuss cases with probation officers and other court officials, and with defendants and their attorneys, before making a "paper" selection of those potentially suitable. Judges and probation officers sometimes make referrals. The screener then locates the defendant, describes the program, and explains the requirements; he then decides if the defendant appears motivated and appropriate for the project. When the

client is accepted, the project develops a program to meet the individual's needs during an initial seven-to ten-day continuance period, based on a request to the court for a continuance and on acceptance of that request. The screener also verifies information offered by the defendant.

Following arraignment and this initial screening period, the defendant is assigned to an advocate at the project office who serves as his counselor. The advocate further determines the client's eligibility and sincerity to participate; then, based on discussion with a superior, assigns him to another advocate.

To be formally admitted, the defendant must sign a "motion for admission to the Boston Court Resource Project."

(1) *Participation.* BCRP provides services either directly to the client or on a referral basis, using other special service agencies. Direct services are counseling, employment referral, job training, and schooling. Individual counseling sessions are required by each defendant once a week; some counselors hold group sessions as well. Job developers assist clients in finding jobs, primarily in state and federal agencies. The project stresses direct job placement rather than training programs.

Since the BCRP has no academic facilities, referrals are made to local high schools for night sessions in preparation for high school equivalency exams. Universities and other private educational institutions cooperate with the project.

The court receives information on the client at a number of stages prior to termination. The court obtains information on the nature of the service plan and bi-monthly reports from advocates describing the client's progress. A probation officer in each court is assigned to review these reports.

A minimum of record-keeping is done, making data collection and analysis difficult.

(2) *Termination.* After 90 days, the advocate prepares a recommendation to the court for the purpose of disposition. The recommendation may request 1) dismissal, 2) continuance for further services (to a maximum of 150 days), or 3) no recommendation (return to court). Most cases receive dismissals. Successful completion of the program means meeting "the objectives of the service plan [which is] viewed by the project and by the client as a contract to be fulfilled before a positive completion can be reached." Thus success is defined subjectively, and there is no particular behavior pattern that automatically means failure. The advo-

cate has primary responsibility for evaluating success within the program, although other staff members are consulted.

Operation Midway in Mineola, New York operates within the Probation Department of Nassau County. It is an example of non-contract with services program. The particular program differs from most court programs because it is controlled by the probation department, an arm of the court, rather than by a judge. Because Midway exists within the court structure, it is not classified in the "Probation and Parole" row of the matrix, although logically it could have been placed there. Moreover, although Midway fully controls the intake procedure, it is not classified under "Public and Private Agencies" because of the program's attachment to the court. Although staff members perform specialized functions and receive special training, they are still probation officers responsible to the department.

(1) *Intake.* Participation is limited to residents of Nassau County, between the ages of 16 and 25, who are under indictment for a felony charge other than homicide or sale of narcotics. All eligible defendants are informed at the time of indictment that they may voluntarily apply within 30 days through a formal defense motion by counsel for participation. A staff member sits in court to help identify eligible defendants. The individual must agree to a deferred prosecution not to exceed one year and must show that he wants to change the behavior that led to the crime.

After filing of the motion by defense counsel, a project liaison officer reviews the case to determine if the defendant meets the eligibility criteria and is not under supervision by any probation or parole officer or by the State Narcotics Commission.

The next step for the defendant is an interview with a counselor or to determine motivation and problems. Recommendations are made to the judge on the motion of defense counsel, based on the initial interview. If the motion is granted, the case is assigned to a project counselor. Prosecution may be deferred for up to one year from the date of arraignment. There is no agreement that a defendant will receive any specified outcome based on successful completion.

The project staff make all of the basic intake decisions. The judge's rule in approving the motion to suspend proceedings is *pro forma*. The program is considered a court intervention, as noted earlier, because the agency performing the intake function

operates through the court within the probation department.

(2) *Participation.* Services in the Midway program are intensive counseling and other social and rehabilitative services. The counseling services are offered directly through the project by trained probation counselors. Non-counseling services, such as employment training, are provided on a referral basis.

(3) *Termination.* Successful participation consists of keeping appointments at counseling sessions, no rearrest, maintaining county residence, and submitting to psychiatric and medical examinations. If the client completes the program successfully, the director may recommend dismissal with the consent of the Assistant District Attorney, the judge, and defense counsel. Not all cases are dismissed, even if the client participates successfully. This depends usually on the seriousness of the offense. The Midway staff may also engage in plea bargaining. No successful participant receives a jail sentence and all receive a more lenient disposition than would have occurred without participation in the program. A defendant whose participation is evaluated as unsuccessful is returned to the court for prosecution.

Those who complete successfully may receive followup services if they so desire for another 90 days. Advocates generally make contact with the individual periodically on an *ad hoc* basis.

c. *Implications.* The following implications have been identified:

- *Impartiality.* The professed and necessary impartial role of a judge may be impaired by involvement in bargaining with the defendant during the intake procedure.
- *Expertise.* Consideration must be given as to whether the court has the ability to inform itself about, and to make judgments about, the quality and types of medical and social services. There may be a problem posed by the court's organizing intervention since the same biases, pressures, and ignorance that may detract from the quality of the sentence may influence the intervention decision. The creation of a new organization at an early stage in the criminal justice process provides greater possibilities for innovation and change.
- *Penetration.* Some proponents of intervention oppose court intervention because it requires further penetration into the criminal justice

system. However, others believe that the "courtroom drama" is necessary in order to relay to the defendant the seriousness of the criminal justice process.

- *Judicial Role.* There is a risk that judicial participation may become merely nominal in nature, and a program may drift to prosecutorial control. If this drift is inevitable, it may not be wise to begin a program at the court level.
- *Overcontrol.* If the prosecutorial design of intervention poses risks of overcontrol, the dangers in the judicial model may be even more serious, because a judicial order suggests a greater legitimacy of authority than an "understanding" with the prosecutor. Other issues to be considered include the relationship of bail reform to court-controlled intervention; the duration of supervision; access to information; relationships with social service agencies; and the accountability of the program actors.

2. *Review of prosecutorial charging discretion.* Review of prosecutorial charging discretion refers to trial court rulings that limit or control prosecutorial discretion to levy formal charges based on specified, alleged, or suspected criminal conduct. The rulings follow formal requests to rule made by defendants or potential defendants.

Judicial monitoring of this type is limited. The idea of prosecutorial discretion is well entrenched in the criminal justice system, and any litigant seeking to invoke judicial review of discretionary prosecutorial charging decisions begins with an exceptionally heavy burden of persuasion.

Two of the most important problems of the courts are the large number of cases presented to them and the inappropriately severe or harsh penal consequences assessed against those found guilty of minor criminal conduct. These problems are directly associated with that of overcharging.

Equal protection may provide a basis on which courts could rule that—absent other compelling justifications—law enforcement officers must treat similar cases in a similar manner. For example, the court might rule that all persons accused of participation in a given transaction must be charged with either the most serious or least serious legislatively defined offense which proof of alleged conditions would justify.

Although courts presented with challenges of this type have generally considered the preservation of broad prosecutorial discretion to be so important

that it outweighs or diminishes the interest in parity of treatment for the individual defendant, the doctrine of prosecutorial discretion is not an immutable law that bars the courts from considering the behavior of agents who make decisions before defendants appear in court.

It is extremely difficult to control prosecutorial discretion. The prosecutor bases his discretion on more information than the police and also on information that does not relate directly to the case, such as the availability of witnesses, the number of cases on the court docket, and backlogs.

3. *Supervision of plea bargaining.* By unilateral action, unless the court is multi-judge, a trial judge may initiate several of the moderate proposals for supervising plea bargaining, discussed earlier in Chapter XII, Decision to Charge, Section A, Sub-section 2.

A decision must be made as to how much judgment a judge may exercise, if he decides to become involved in plea bargaining, and the role he should play. There are also implications for the judge's workload, which may increase due to the judge's supervisory responsibilities.

The defendant may also believe the system is plea-oriented if he perceives that the judge condones plea bargaining. This may detract from his perception of the judge as a neutral arbiter and of his right to trial.

4. *Court referral to arbitration.*

a. *Discussion.* The alternative of court referral to arbitration is the final stage at which referral can occur and focuses on cases whose referral truly represent an alternative to trials.

The referral decision is not based upon the strength or weakness of an arrest, complaint, or prosecutor preparation. It is rather, the relinquishing of rightful jurisdiction by a court to another agency because the court believes the other agency can better settle the dispute, and that a determination of guilt or innocence will not benefit either the parties or the community. This decision frequently is made because of some relationship between the defendant and the complainant, as either family or friends, that is likely to continue after the case is adjudicated.

b. *Example.* In Philadelphia, Pennsylvania, the "4-A" arbitration program is administered by the Philadelphia branch of the National Center for Dispute Settlement. Referrals come exclusively from

a citizen complaint process, in which a complainant files a complaint and pays an \$11 filing fee. The complaint center is staffed by police detectives and is attached to the prosecutor's office. If the conduct alleged is serious, the complaint is referred to the police. If there is some question about the seriousness of the complaint, or if the case is seen as a candidate for arbitration, the parties are notified to appear before the trial commissioner of arraignment court. They may appear with or without counsel. The trial commissioner attempts to resolve the dispute and to dissuade the parties from pressing formal charges. If there is no resolution of the case at this stage, the trial commissioner must choose between assigning the case to a court docket for trial or referring it to the arbitration process.

Should arbitration be the choice, both parties are sent to speak to the arbitration project screener who explains the process and requests their consent. If either party withdraws consent, the case is assigned a court date. Upon agreement to submit the case to arbitration, each party signs a submission form which includes name, address, telephone number, and a short description of the dispute. Hearings are usually scheduled within 30 days. Failure to appear, without a serious and documented excuse, results in a fine of \$10.

The hearings are held before an arbitrator, who is empowered to administer oaths to the parties and their witnesses and also to issue a summons for the appearance of witnesses. Clients may bring counsel and witnesses, and evidence may be introduced. The hearings are conducted informally and usually last about an hour. If during the hearing the parties reach an agreement, the arbitrator draws up a "consent award" which states the terms of the agreement. If there is no consensus, the hearing is adjourned and the arbitrator deliberates and arrives at an award. Where there are verifiable facts in dispute, a staff member will make an investigation. This is done routinely in matters involving disputed money damages. The final arbitration award is binding. Copies are sent to the parties and filed with the court within ten days of the hearing.

Compliance is assumed unless the arbitration program is informed otherwise by the aggrieved party. In cases of non-compliance, the program staff will attempt to influence the recalcitrant party by telephone. A followup call may be made by the arbitrator himself. If necessary, a second hearing may be scheduled. A complete failure will result in the

case being turned back to the trial commissioner for docket assignment. The trial court may, at its discretion, enforce the award or hold a trial *de novo* on the issue.

The arbitrators in the 4-A program are recruited from the general public by an informal word-of-mouth method. Training consists of lectures on the philosophy and techniques of arbitration and role-playing exercises. Later, the trainees sit in on actual hearings and conduct them under supervision.

5. *Omnibus pretrial hearing.*

a. *Discussion.* The omnibus pretrial hearing is a procedural reform in which all pretrial motions in a criminal case can be considered by the court at one proceeding with a minimum of formality and filings. A failure to raise such motions prior to the hearing would result in their waiver. Under omnibus, the pretrial motions (typically, motion to suppress, motion to grant severance, motion for discovery, motion to dismiss the indictment or information, etc.) can be made orally, instead of the usual practice of requiring written papers.

The omnibus pretrial hearing serves as a criminal justice variation on the pretrial conference theme, as contemplated by the Federal Rules of Civil Procedure. The primary function of the hearing is to provide a focal point for the simplification of the motion practice. However, it can also have several related functions. As recommended by the American Bar Association, it involves extensive discovery by both defense and prosecution before the hearing and can become not only a forum for motion-raising, but a means of sharpening and narrowing issues prior to trial. The hearing provides the context in which the court itself asserts affirmative control over the early identification and disposition of issues, so as to move the case more speedily and efficiently toward disposition.

b. *Examples.* In 1970, the ABA in its *Standards Relating to Discovery and Procedure Before Trial* endorsed the concept of omnibus hearing, which the association described as a proceeding to ensure that discovery has been properly conducted and that pretrial motions have been simply and effectively raised. Standard 5.3 set out the recommended procedures for the hearing:

(b) All motions, demurrers and other requests prior to trial should ordinarily be reserved for and presented orally at the Omnibus Hearing unless the court otherwise directs. Failure to

raise any prior-to-trial error or issue at this time constitutes waiver of such error or issue if the party concerned then has the information necessary to raise it. Check-list forms should be established and made available by the court and utilized at the hearing to ensure that all requests, errors and issues are then considered.

As conceived by the ABA, the omnibus hearing is designed to serve cases destined for guilty plea disposition as well as those destined for trial. In either event, it is essential that the accused be well-informed about the issues in the case. The *Standards*, however, take no position on whether the accused should be present at the hearing. A suggestion is made, though, that the presence of the accused might inhibit the effectiveness of the proceedings, since the primary function of the hearing is to promote a full exchange of information between counsel and between counsel and court.

For the unusually complicated case, the ABA recommends, in Standard 5.4, a pretrial conference in addition to the omnibus hearing. This conference, in contrast to an omnibus hearing, is contemplated for only a small portion of all criminal cases—those with several defendants and much documentary evidence. Matters to be considered at the conference might include making stipulations as to facts about which there can be no doubt, severance of defendants or offenses, conduct or *voir dire*, number and use of peremptory challenges, and the order of presentation of evidence and arguments. The *Standards* also state, however, that for the simpler case there is no reason why the motion simplification of an omnibus hearing and the trial planning of the pretrial conference could not be combined in one proceeding.

Like the ABA, the National Advisory Commission on Criminal Justice Standards and Goals report, *Courts*, has developed a special standard for pretrial motions. Standards 4.10 of that report provides, in essence, that all pretrial motions should be filed at once and that a hearing should be held on the motions within 5 days of their filing. Failure to raise an issue appropriately raised before trial should preclude its being raised later.

The *Federal Rules of Criminal Procedure* for the United States District Courts have, since 1966, contained a provision for a pretrial conference. The pretrial conference is not specifically a motion-raising forum; rather, it is intended to deal with

"such matters as will promote a fair and expeditious trial." Thus the 1970 preliminary draft of proposed amendments to the rules set out a procedure particularly designed to encourage the making of motions prior to trial in a single hearing. To implement this procedure, it was recommended that Rule 12 be amended to provide some additional requests and matters which must be made prior to trial. A new subdivision was added:

c) Motion Date. Unless otherwise provided by local rule, the court may, at the time for the arraignment or as soon thereafter as practicable, set a time for the making of pretrial motions and, if required, a later date for hearing.

The Advisory Committee Note commented:

Although the Advisory Committee is of the view that it would be premature to write the omnibus hearing procedure into the rules, it is of the view that the single pretrial hearing should be made possible and its use encouraged by the rules.

c. *Implications.* Because of its broad information discovery and the use of a notation motion form instead of written brief, the omnibus hearings actually involves substantial reworking of the early stages of processing of a criminal case. There are commentators who question whether this substantial reworking really simplifies a case. They state that the supposed benefit of oral motions can result in more motions and, in fact, the easy assertion of frivolous motions.

It is difficult to evaluate the merits of omnibus because it is still such a recent development. There are both strong proponents and critics of this alternative. What is needed is further experimentation with different forms of omnibus hearings in different settings. Only through variation of omnibus procedures can an objective appraisal of the value of this unique innovation be made.¹

E. Public Non-criminal Justice and Private Agencies: Agency Case-Review Intervention

Agency case-review intervention refers to an intervention in which a public or private agency

¹ See Miller, "The Omnibus Hearing: An Experiment in Federal Criminal Discovery," 5 *San Diego L. Rev.* 293, 297 (1968); Nimmer, *The Omnibus Hearing: An Experiment in Relieving Inefficiency, Unfairness and Judicial Delay* (American Bar Foundation, 1971); Clark, "The Omnibus Hearing in State & Federal Courts," 59 *Cornell L. Rev.* 761 (1974).

determines entry and exit into the program. An agency case-review program (operating by virtue of a delegation of prosecutorial authority) is distinguishable from a prosecutor case-review program employing non-criminal justice personnel because the agency has full day-to-day practical control over program intake. This control may be terminated, but not continuously modified or influenced by the prosecutor. Alternative programs of this type consist of variations of the contract with service approach.

For example, the *Dade County Pretrial Intervention Project* is a contract/service program. The target population for this program consists of young resident first offenders, both male and female, who require vocational, educational, or psychological counseling. The eligibility criteria are as follows:

- No prior criminal record.
- Age: 17-35.
- Charge: Misdemeanor or specified third-degree felonies (e.g., grand larceny, breaking and entry of auto, using auto without owner's consent).
- The victim and arresting officer must be consulted in writing and must concur in program participation.
- Defendant must be a resident of Dade County.
- Defendant must have a demonstrable need for educational, vocational, or psychological assistance, and must be in need of supervision by project staff.
- Generally, narcotics addicts (except marijuana and experimental users) are excluded.

Each day the project director attends bail-bond hearings at the Committing Magistrate Section of County Court. He selects eligible first offenders, based on an analysis of jail interview sheets, records, and discussions with attorneys, assistant district attorneys, and the police. Materials are also reviewed from case files sent from the court directly to the project. Eligible candidates are interviewed by the project director and staff to develop an acceptable rehabilitation plan. If the defendant agrees to participate, and if the arresting officer and victim consent, a waiver of speedy trial is signed. If charges have already been filed, a continuance will be requested from the court. Some participants also are referred to the program by the police; others are ex-clients who may continue to receive services on a voluntary basis.

1. *Participation.* The project's basic services consist of job placement and vocational training pro-

grams, educational services (remedial reading), and mandatory intensive counseling. Special vocational, family, and psychological counseling is also offered. Referrals are also made to community social service agencies and to educational institutions for instruction other than remedial reading.

Records are kept on participation and attendance in counseling sessions. Individuals are contacted if a session is missed; field workers also contact individuals from time to time to follow their progress. There are regular staff review sessions to discuss the progress of all cases and a bi-weekly progress report is prepared on each.

2. *Termination.* After three months, the staff submits a final evaluation to the director. This may lead to one of three outcomes, assuming the case is not extended beyond the 3 to 6 month period when participation is unsatisfactory but not unsuccessful. First, if the outcome is successful, a "No Information" may be filed which results in the dismissal of charges; second, a record of satisfactory completion of the program may be used as a sentence determinant (this usually occurs when the crime is serious); third, the case may be filed and adjudicated following unsatisfactory participation. When the defendant is returned for prosecution, there is no indication of his program failure.

Eligibility requirements that the victim and the arresting officer concur in program participation raise legal and policy questions. There is a concern that some police officers might condition their consent upon certain types of cooperation by the defendant, such supplying information or becoming an informant in drug cases. Whether a victim withdraws consent might have no reasonable relationship to the purposes of the program or to the defendant's prospects for successful completion of the program. While consulting victims may be worthwhile, giving victims a veto power on a defendant's participation provides a formal role for victims that is not found elsewhere in the criminal justice process and may be constitutionally suspect.

Although deriving its authority from a criminal justice system decision-maker, agency case-review intervention may be perceived by the defendant not as an agency of law enforcement but as a service bureaucracy. The problem may become one of clarifying the legitimacy of such an agency which lacks a clear role as a criminal justice system actor. If the agency must report on its activities, to whom should the agency report? An additional problem to consider in using the agency approach is that a staff

will be assembled that might make decisions leading to overcontrol.

F. Probation and Parole Officers: Diversion of Juveniles at Intake Screening

1. *Discussion.* Diversion of juveniles at intake screening refers to diversion at the first contact point within the juvenile court system.

Although the intake officer has many roles—counselor, investigator, etc.,—the two major functions relevant to this model are the screening and hearing officer roles. As screener, the officer must consider two legal questions before proceeding to disposition. First, the officer must consider complaints involving acts over which the juvenile court has no jurisdiction. For example, the juvenile court may be asked to adjudicate a child to be incorrigible merely because the child failed to do homework assignment or cut his hair. Second, he must consider complaints which, although they allege sufficient grounds for juvenile court jurisdiction, are not supported by sufficient evidence.

As intake worker, he must decide what is the best dispositional option for the child. This depends both on the offense committed and on the history of the accused juvenile. The officer has four dispositional types that involve the following different options.

- Remove the case altogether from the jurisdiction of the juvenile court which may be done by counseling the youth followed by release, by dismissal on legal grounds, or by non-binding referral to social services.
- Informal probation.
- File a petition for formal adjudication, which usually results in a court hearing and a judicial disposition.
- Refer the juvenile to a special diversion unit.

Usually any traditional adjustment procedure has no in-house services; few referrals are made, and there is rarely any followup by the intake worker.

Adjustment augmented by service agency or program is a more recent and more formal process of intake diversion. This refers to the fourth intake option listed above, referral to a diversion unit.

2. *Examples.* Two such diversion programs are the Sacramento County, California, Probation Department's 601/602 Diversion Projects, and the Baltimore, Maryland, Diversion of Youthful Impact Offenders Program. The 601/602 programs provide

in-house services, while the Impact Offenders Program contracts services from various community organizations.

The Sacramento County program was initiated in October 1970 to handle cases classified as "601" by the California Welfare and Institutions Code. These are the so-called "predelinquent" offenses—those that are not crimes in the adult system, such as being a runaway or being in danger of leading an immoral life. Cases from the "602" classification, which were added to the project in 1972, are those for which an adult may also be prosecuted.

Only in the intake procedure is there a difference in the handling of the two offense categories. Any-one charged with a 601 "offense" may participate; the 602 requirements are more stringent, and only those charged with minor criminal offenses are eligible. More serious cases, such as sexual offenses, drug sales, and major assaults are excluded. Also excluded are juveniles who have a case pending in court, who have an outstanding warrant, who are currently on probation, or who have been incarcerated in the California Youth Authority's Sacramento County Boy's or Girl's Ranches.

The only other factor concerning entry is the research design. Program intake officers operate only four days each week. This is done to provide a control group that is handled by more traditional intake procedures—by petitions filed in the court, informal probation, or other means.

Once a juvenile is referred to intake, a meeting is arranged by a counselor with the juvenile and his parents. From this point, the 601/602 distinctions end. The intake officer schedules a minimum of five family counseling sessions per case. If there are tensions between the juvenile and parents, a temporary residence can be found for the child. This occurs more often with 601 cases.

No matter what the outcome of the counseling, the case is terminated when the individual has been accepted by the project. Even if the juvenile or the parents fail to continue counseling after the first meeting, the case is not processed for petitioning to the juvenile court.

The Baltimore Impact Offender Program is a version of agency case review intervention applied to juvenile cases. It is the non-contract with service submodel. Referral is made by the juvenile intake officer. Once an individual is accepted for project participation, referral is made to one of five neighborhood service organizations for counseling, tu-

toring, or other services. Acceptance criteria include:

- The juvenile must be between the ages of 10 and 14 and must be accused of a "Impact Offense" such as assault, burglary, breaking and entering, larceny, purse snatching, or robbery.
- The offense must warrant formal court action (in other words, it cannot involve impact offenses that would have in all likelihood been screened out).
- The juvenile must not be involved in other pending charges before the juvenile court.
- The juvenile must not be currently on probation, nor ever have been on probation.
- The juvenile must show (by not only word but by conduct) that he or she will actively participate.
- The juvenile must live within one of the five community groups.
- The neighborhood service organization in the area in which the juvenile resides must have room for a participant (maximum for each organization is 30).
- If co-defendants are involved, all must be eligible for the program.

The individual who meets these initial criteria is referred to the community organization nearest his home. A two week assessment period follows to decide whether the child can benefit from the project's services. If the juvenile is found acceptable, the parents and the youth sign a "contract" agreeing to participate in the program for 90 days. (Although this agreement is called a contract, it does not correspond to this report's definition of a contract model, because a dismissal upon successful completion of the program cannot be guaranteed and in fact is not always given.)

During the 90-day period, the youth is involved in a number of activities: counseling at least once a week, vocational training, tutoring, and recreational activities. If the juvenile successfully completes the program, the project recommends that the charges be dismissed. This request may not be granted. If the juvenile is unfavorably terminated, the case is reprocessed by the intake officer and some form of traditional action is taken.

3. *Implications.* Both programs raise internal questions that are worth raising on a broader policy level and are discussed at length in the *Alternatives Report*. The issues considered include the problem

of monitoring the kinds and amounts of services that should be offered, and the clients who should be served.

An important issue for the juvenile justice system is whether a juvenile has the right to counsel at intake proceedings. The Supreme Court left the question partially open in its decision *In re Gault* 387 U.S. 1 (1967), which provides for counsel at juvenile hearings where commitment could result. Because the requirements of counsel usually specify that one should be provided at critical stages of the proceedings, there is a valid argument for providing one at intake.

The example of the Baltimore program seems to support the argument for right to counsel at intake. The accused becomes a participant in this program for 90 days; if the accused successfully completes the program, a recommendation for dismissal is submitted to the juvenile court. The judge, however, still has the discretion to order proceedings brought against the youth. If the juvenile is adjudged delinquent, the child may still receive a traditional juvenile sentence of detention in a juvenile "home" or some form of probation. To ensure that juveniles and their parents are fully aware of these options, there is a strong case to support the presence of counsel at intake proceedings.

The arguments against having counsel at intake are based on the costs involved and on the unique nature of an intake "hearing."

Whether or not the policies bearing on juvenile diversion are also relevant to adult programs depends on three basic considerations: 1) who should act as the comparable adult intake officer—a prosecutor who performs as a screener or a more neutral magistrate type? 2) does the non-serious nature of many juvenile offenses and their probable outcomes such as call, warn, and release, preclude applicability of these programs to adults? and 3) should the adult programs strive to divert individuals as quickly as the juvenile programs—e.g., is it wise to remove an adult from processing as quickly as in juvenile diversion? Some of the arguments presented in response to these questions are discussed in the *Alternatives Report*.

Although these questions need serious consideration in program design, it would seem that much can be done with many present adult programs to speed up removal from the criminal justice system by the use of early screening procedures, and that the successes of the two programs (especially the

older Sacramento program) suggest that the near-immediate removal of individuals in adult projects should be tried more frequently.

G. Appellate Courts

1. *Review of prosecutorial discretion.* Appellate court rulings can limit or control prosecutorial discretion to levy formal charges based on specified, alleged, or suspected conduct and result from formal requests to so rule on appeal by defendants or potential defendants.

Although all of the limitations discussed in trial court case-review intervention apply, the limitations are more significant here. An appellate challenge generally necessitates that the moving party take the position not only that the prosecutor has erred in failing to recognize or correct the alleged prosecutorial error.

Such cases ultimately depend on findings of fact. Since fact finding is itself a traditional discretionary function of the trial court, the litigant at the appellate level is faced, in effect, with the necessity of maintaining a dual challenge to the exercise of discretionary authority. A challenge must be made to both the prosecutorial and the judicial exercise of discretion at the trial court level.

Review of prosecutorial discretion is more practically imminent than review of police discretion because the court recognizes the critical importance of the quasi-judicial nature of prosecutorial discretion. Moreover, practical impediments that exist at the trial court level are absent here; the appellate court, by the very character of its work, maintains a leadership role as a policymaker.

As a result of U.S. Supreme Court decisions, the need for appellate review of prosecutorial discretion has been focused primarily upon preventing violations of equal protection rights in the prosecutorial charging functions. Two basic criteria are used in this determination: 1) the discrimination must be deliberate and purposeful (the defendant must show improper motives on the part of the prosecutor in the charging decision) and 2) the defendant must demonstrate "that the discrimination was based on a characteristic of class which separates it from those who were not prosecuted."²

²A recent case lowers the burden of proof required to raise the equal protection argument. See *United States v. Falk*, 479 F. 2d 616 (7th Cir. 1973). For a review of case

2. Standardization of plea bargaining.

a. *Discussion.* The setting of standards for the regulation of plea bargaining may derive from the rulemaking power inherent in an appellate court, or from pronouncements in appellate cases that are binding on the lower courts and which affect the defense as well as prosecutorial functions.

As a matter of law or practicality, appellate court rules governing plea bargaining are more limited as to potential coverage than rules made in a prosecutor's office, because the court probably could not effectively regulate the internal operations of an executive department. A court may not, for example, regulate screening in the prosecutor's office.

b. *Examples:* An example of a proposed court rule on plea bargaining is that prepared by the Arkansas Criminal Code Revision Commission and presented to the Arkansas Supreme Court in April, 1974. In the view of the Commission:

the "plea agreement" has an attractiveness independent of mere considerations of administrative convenience or expediency. It also serves to ensure and protect the quality and integrity of the administration of criminal justice.

To minimize abuses of the system, the Arkansas commission provided guidelines and standards covering 1) the court's receipt of a guilty plea, and 2) the nature of plea discussions and agreements. Under 1), the rules provide that:

- No defendant shall be required to enter any plea without first having an opportunity to retain counsel.
- A plea must generally be entered only by the defendant in open court.
- The court must explain to the defendant the nature and possible consequences of conviction on the charges.
- The plea must be voluntarily proffered and there must be a factual basis for the plea.
- The court must determine whether a tendered plea is the result of a plea agreement.
- A verbatim record must be made of any proceeding at which a defendant enters a plea of guilty.

law and the implications of the *Falk* case, see Comment, "The Ramifications of *U.S. v. Falk* on Equal Protection from Prosecutorial Discrimination," 65 *J. Cr. L. P.S. & Crim.* 62 (March, 1974).

- The defendant may waive venue and enter a guilty plea to any offense committed in the state.

The second set of rules is concerned with plea discussions and agreements. The first rule in this section provides that 1) plea agreements may be reached only through defense counsel, except where defendant waives this right; and 2) each defendant "shall be afforded equal opportunities for plea discussions and plea agreements." The next two rules specify, respectively, the role of attorney and defendant and the responsibilities of the trial judge. Judges are prohibited, in this latter rule, from participating in plea negotiations. The purpose of the second part of the rule is "to eliminate . . . the chance of a defendant misunderstanding the nature and consequences of the plea bargaining procedure."

Another example of an appellate court establishing standards for plea bargaining are pronouncements in the two appellate cases cited below.

In *Bryan v. United States*, 492 F.2d 775 (1974), the U.S. Court of Appeals for the 5th Circuit ruled in a case involving a broken plea bargain that all parties to a plea bargain must "disclose the existence and details of any agreement which relates to the plea tendered" in all Federal trial courts in the jurisdiction. The defendant claimed that the district attorney had deceived him and the court and had not carried out the state's part of the bargain. The court did not accept the defendant's challenge on the facts and denied him a postconviction evidentiary hearing. To prevent potential deceptions, however, the court provided for these practices or regulations as a means of ensuring that challenges of the kind presented in this case would be unnecessary.

In *United States v. Gallington*, 488 F.2d 637 (1973), the U.S. Court of Appeals for the 8th Circuit was asked by a defendant to adopt a rule stating:

. . . that a judge who conditionally accepts a guilty plea and later rejects it, is disqualified from subsequently trying the case. . . . [T]he argument is that a defendant is always denied due process if he is tried before a judge who has questioned him as to the factual basis for his guilty plea, conditionally accepted the plea bargain and then rejected it after having read the presentence investigation report.

The court denied this argument but did provide a series of guidelines for future cases:

- Prosecutors must avoid mischarging, overcharging, and threats of heavier sentences for those who do not plead guilty.
- Judges are to require the agreement to be disclosed in open court at the time the plea is offered and require that the reasons for reaching the agreement be set forth in detail.
- Judges are not to participate in the bargaining; their role is to be limited to acceptance or rejection of agreements, a thorough review of all relevant factors.
- Defendants must be given an opportunity to withdraw the plea if the bargain is rejected by the judge.

c. *Implications*. An initial question influencing the effectiveness of an appellate court rule or decision on plea bargaining is whether the parties affected are consulted in the process devising the rules.

Once adopted, a main advantage of judicial rules may be their flexibility and adaptability to change; they are capable of being rescinded once adopted. Rulemaking by nature tends to be less cumbersome and more representative and participatory in character than the legislative process, since appellate judges through advisory committees and regular contact with the criminal justice system officials are more experienced in the nuances and problems of plea bargaining procedure. An important issue, however, focuses on who is represented in this process, particularly defendants.

The rulemaking power is essentially supervisory in nature and used to check abuse. Successful rulemaking, in this regard, requires autonomy of the courts.

Rules are limited to what actors do in their capacity as officers of the court. Thus the court cannot proscribe or specify the context of the bargain itself, since this is not within the proper sphere of the court's jurisdiction. The court, however, may require oaths or transcripts and limit certain procedures within the bargaining process as impermissible. They may hold that, given specific conditions, a particular charging practice is coercive and thereby prohibited. Case decisions are less planned, systematic, and effective than rules because they are less well publicized.

3. Court rule authorizing intervention

a. *Discussion*. Appellate court rules can be used to authorize intervention when the legislature does not act to encourage or implement a program and

the structure of the program indicates that such authorization may be beneficial. Appellate courts may structure a program with a more detailed and sympathetic view towards the court system than would a program authorized by the legislature. There is a question, however, whether, in fact, the appellate courts have the inherent power to authorize intervention. Another concern with appellate court rules for intervention programs is the insulated nature of the rulemaking procedure and its lack of public input. It should be noted that, in most jurisdictions, legislatures have veto power over proposed rules, but generally this power is exercised infrequently, unless there is considerable controversy over a given change in procedure.

b. *Examples. Pennsylvania's Accelerated Rehabilitative Disposition Rule.* In 1972, the Pennsylvania Supreme Court promulgated rules for the implementation of Accelerated Rehabilitative Disposition (ARD). This action was taken as a result of the early successes of an ARD experimental program begun in Philadelphia in 1967. The rules provide very general guidelines for the implementation of ARD: 1) a basic outline of the prosecutor function, which, according to the rule is to propose clients for ARD participation; 2) instructions for ARD hearings in court; 3) the conditions for program participation (allowing a judge to impose probationary conditions on an ARD client); and 4) procedures for both successful and unsuccessful termination.

Out of these rules have come programs that differ significantly in their operation, both in procedure and substance. Two notable examples are the Erie and Pittsburgh ARD programs. The jurisdictions themselves are very different. Allegheny County (Pittsburgh) is a major urban center which has most of the criminal justice system problems associated with large cities; Erie County is a jurisdiction of approximately 200,000 persons with few big-city problems, such as meeting speedy trial deadlines, overcrowded jails, and large probation caseloads.

The two programs differ significantly in the time of entry. In Pittsburgh, client entry usually occurs after arraignment and before indictment. In Erie, an ARD client may enter at any time in the various phases of the court process (for example, one defendant won a motion for a new trial after conviction; he promptly petitioned for ARD participation, which was granted). This time difference is signifi-

cant because in Erie the defendant may raise whatever pretrial motions he wishes and yet not be barred from program participation if those motions are defeated. In Pittsburgh, this option is not available because the program coordinators have decided that caseload reduction in the system is a major goal of ARD.

Not only are there time differences in program entry, but the decision-making processes for entry also are radically different. Pittsburgh has centralized most of its decisions within the District Attorney's Office, whereas Erie has a separate ARD organization, similar to a probation department, which handles most of them. Thus an individual in Pittsburgh is told of the program by the district attorney, an initial interview is held, a citizen sponsor is found (this aspect of the Pittsburgh program will be discussed below), and when the defendant and his counsel approve, the petition is presented to the court which almost always approves it. In Erie, the defense counsel initially petitions for program participation. This is feasible in Erie because it has a comparatively small bar that is well acquainted with the ARD program. The petition is initially referred to the district attorney's office for a check of the defendant's past criminal record (both programs have similar offense and offender categories; only those first offenders who have committed certain enumerated non-violent crimes are accepted in the program). If the individual qualifies, he is referred to the ARD program for an interview. Based on this meeting, the program decides whether the individual will be allowed to participate, and refers the person to the district attorney's office again for a *pro forma* review. The district attorney presents the petition to the court, which almost always approves it.

The actual court hearings are dealt with in detail by the authorizing rules, so there are few differences at this stage of the programs, with one exception. In Erie the hearing is always open court; but in Pittsburgh the hearing is in the judge's chambers (the door is left open and anyone may enter to listen, since Rule 178 provides for an open court procedure).

What happens to program clients after the formal entry is also an area of significant divergence. In Erie, the ARD organization acts as a modified probation department; clients are given various levels of reporting times: maximum, moderate, or minimal. In addition, referrals may or may not be made to

social services. However, if the offense is drunken driving, the individual must participate in an in-house program of driver and alcohol education. The major difference between ARD and probation is one of atmosphere. The program attempts to deal with its clients in an informal manner.

Pittsburgh has developed a procedure that is radically different from Erie program participation. After entry, the client is sent to ARD probation for an interview. This probation system is nothing like the one mentioned above. The ARD probation department in Pittsburgh consists of four individuals who monitor 300 cases each. The purpose of this interview is to familiarize the client with reporting procedures. Responsibility of monitoring the client falls to the citizen sponsor, who reports monthly to ARD probation. A citizen sponsor is generally a member of a public service organization or public welfare agency such as a director of a youth league. The client is usually required to perform 16 hours a month of public service work for the agency to which he is assigned. Since neither the district attorney nor the ARD probation department has significant contact with these services, oftentimes the actual work requirement can be more or less. This internal monitoring problem has been severely criticized by many attorneys in Allegheny County, since there is little uniformity in the conditions of probation from agency to agency.

c. *Implications*. All these differences point to the significant issue in this sort of authorization of intervention by court rule. When general guidelines do not cover significant areas of program operation, the differences in organization may be such that defendants are denied equal protection. For example, if a defendant may raise pretrial motions in one program (Erie) but not in another (Pittsburgh) before petitioning for program entry, is he being denied equal protection? If there is a mandatory work requirement in one program but not in another, what is its legal significance?

It can be argued that the programs should be designed in such a manner that there is a relative degree of uniformity of treatment from county to county. In the recent case of *State v. Leonardis*, 363 A.2d 321 (1976), the New Jersey Supreme Court made it clear that a state's appellate judiciary must not defer to local officials whose actions have created "discrepancies" in the administration of an intervention program organized under the state-wide

authority of a court rule—and stressed that "discrepancies" involving differentials in program access from locality to locality require particularly close attention. And in the same decision, the New Jersey panel demonstrates how far judicial decision-making can go to give content to otherwise vague language in court rules authorizing intervention by striking down local program eligibility criteria creating *per se* bars against program entry for defendants charged with certain "heinous crimes." In concluding that such exclusion practices contravened the spirit of the authorizing rule, the Court reached a result which Constitutional equal protection analysis, standing alone, might well not have supported.

The argument against program uniformity is based on the demographic characteristics of each jurisdiction and the particular abilities and needs of that criminal justice system. Thus the flexibility of Pittsburgh's entry can be traced to the general strains on the court system. Since Erie County's court docket is rarely crowded, this flexibility is not a problem. But, it is argued, if Pittsburgh were to allow this flexibility, the jurisdiction would not be able to meet the speedy trial deadlines set by the Pennsylvania Supreme Court.

The criticisms of using court rules to authorize intervention in general should be addressed. It can be argued that this use of court rules is an entry into the legislature's sphere of authority and is a violation of the separation of powers. This argument has force by negative implication; since the legislature only authorized intervention in cases of minor drug possession, this was the limit which the legislature chose to implement. The argument against this is that appellate courts possess inherent supervisory powers over the administration of criminal justice.

Finally, the merits and pitfalls of having the appellate court propose intervention, as compared to the legislature, should be noted. Favoring appellate rules are these points: 1) the appellate courts are more likely to understand the particular problems of the criminal justice system than the legislature, and program design will reflect this understanding; and 2) rules are more flexible and can be amended easier and quicker than legislative actions. Points favoring legislative action are: 1) there is likely to be more public input with the legislative process, because public hearings probably will be held; 2) the legislature can also fund the programs with the authorization statute; and 3) the legislature might be as expert as the appellate court (since

most legislators are attorneys) in formulating programs. Its fact-finding process is more suitable for rulemaking than is the appellate process.

Thus the use of appellate court rules to implement pretrial intervention may be an effective means to achieve the goals of system planners. However, the ARD experiences in Pennsylvania suggest that appellate courts are probably no more competent than legislatures in the design of intervention programs, and their legal basis for doing so is on less firm ground.

4. Implementation of speedy trial right.

a. *Discussion.* Implementation of speedy-trial rules utilizes the power of appellate courts to formulate guidelines for time limitations, within which a defendant must be brought to trial or have the case dismissed. This is done either by rulemaking (some, but not all of the state's highest courts have exclusive or concurrent power to formulate speedy-trial rules) or by case decision.

b. *Examples.* Examples of these rules are recent actions by the Pennsylvania Supreme Court, the Florida Supreme Court, and the Iowa Supreme Court. The Pennsylvania Court Rules established a system that was implemented in two steps: between June 30, 1973, and June 30, 1974, trials were to commence within 270 days of the filing of the complaint; complaints filed after July 1, 1974 are to be processed within 180 days. The two-step plan gave Philadelphia and Pittsburgh the opportunity to prepare for the shorter time limit. As in most of the rules, the Pennsylvania Rules have specific provisions which extend the time limit:

- Defendant's or attorney's unavailability.
- Any continuance exceeding 30 days at the request of the defendant or his attorney.
- A continuance granted if the state can show good cause.

Florida's Supreme Court Rules are far more complex; there are provisions for speedy trials without demand, with demand, and special provisions for those incarcerated in Florida penal institutions. If a defendant is not brought to trial within 90 days from the time of charging for a misdemeanor, and within 180 days in the case of a felony, a dismissal is granted.

If a demand for a speedy trial is filed, the defendant must be brought to trial within 60 days for either a misdemeanor or felony, or the charge must be dismissed. The demand binds both the defendant

and the state to this accelerated rate; if the state is unprepared, a dismissal results; if the defendant is not ready for trial, he must proceed with the trial unless the state and court relent.

The Florida rule has a very stringent provision concerning circumstances in which any continuances will be granted. Those circumstances:

shall not include general congestion of the court's docket, lack of diligent preparation or failure to obtain available witnesses, or other avoidable or foreseeable delays.

Exceptional circumstances are defined as:

(i) the unexpected illness or unexpected incapacity or unforeseeable and unavoidable absence of a person whose presence or testimony is uniquely necessary for a full and adequate trial.

(ii) a showing by the State that the case is so unusual and so complex, due to the number of defendants or the nature of the prosecution or otherwise, that it is unreasonable to expect adequate investigation or preparation within the periods of time established by this rule.

(iii) a showing by the State that specific evidence or testimony is not available until a later time, provided not more than two continuances shall be granted on this ground.

(iv) a showing by the accused or the State of necessity for delay grounded on developments which could not have been anticipated and will materially affect the trial.

(v) a showing that a delay is necessary to accommodate a codefendant, where there is reason not to sever the cases in order to proceed promptly with the trial of the defendant.

(vi) a showing by the State that the accused has caused major delay or disruption of preparation of proceedings, as by preventing attendance of witnesses or otherwise.

Thus the Florida Supreme Court has promulgated fairly exacting standards for the granting of continuances. Their possible effect will be discussed below.

A decision by the Iowa Supreme Court provides an example of speedy-trial rules being enacted by case law. In *State v. Gorham*, 206 N.W.2d 908 (1973), the Iowa court made the 60-day rule that was in the Iowa Criminal Code a rule of general

application. Before this decision, the benefit of the statute was conferred on defendants only if a demand for a speedy trial was made by the defense. This was not contained in the statute, but was the result of a 30-year-old decision in *Pines v. District Court*, 10 N.W. 2d 574 (1943).

In overruling the *Pines* decision, the Iowa Supreme Court made the statute applicable to all defendants from the time of indictment (the triggering time). The statute provides:

If a defendant indicted for a public offense, whose trial has not been postponed upon his application, be not brought to trial within sixty days after the indictment is filed, the court must order it dismissed unless good cause to the contrary be shown.

As can be seen, this is a straightforward statute with a short time limit; it makes no distinction between misdemeanors and felonies, or between defendants who are incarcerated and defendants out on bail.

c. *Implications*. These two types of implementation (through rulemaking power and case law precedent) raise a number of questions which merit consideration:

- Are speedy-trial rules consistent with or do they conflict with other alternatives, such as pretrial intervention, bail reform, citation release, and others?
- What are the implications concerning triggering and tolling times for the rules?
- Should there be statewide implementation, or should there be some allowance for demographic variation?

While there are no startup costs for a program, there are potentially large secondary costs involved (increase of judges and court support personnel, increases of prosecutors and defense attorney, and modernization of recording procedures). Although all of these may occur without a speedy-trial rule, they generally will occur if the jurisdiction cannot meet the time limitations with its present operations.

The effects of speedy-trial rules on other alternatives may vary with the nature of the rule, but it is more likely to find itself in conflict with other proposals. In the area of pretrial intervention, the use of an intervention program may cause delay in a number of cases (especially those programs which cannot or will not guarantee a dismissal upon successful completion), thus partially reducing the stated goal of many jurisdictions: reduction of aver-

age case length from triggering to tolling time. In addition, if speedy-trial rules become effective, a jurisdiction may decide that it is more desirable to deliver services that are now being offered at the preadjudication period following adjudication.

Bail reform and citation release also may come into conflict with the goals of speedy-trial rules. Since more people are returned to their community, the opportunities of preparing a more adequate defense are greater than those of the incarcerated defendant. Thus bail reform and citation release may tend to slow the time for trial. It should be noted, however, that many statutes and court rules provide for distinctions between those in jail and those on the streets, an apparent recognition of the problem and the need for expediting trials of persons deprived of pretrial freedom.

Another problem to be dealt with is determining the point at which the speedy trial limitation should be measured. For example, certain offenses, such as drug sales, are often papered by the police through the use of undercover officers, but the actual charging of indictment may not take place until as much as ten or eleven months later. There is certainly justification from a police viewpoint; it keeps the undercover agent in the field for the maximum possible time without losing his cover. This delay, however, has an effect on the defendant's ability to prepare a defense when this period is not covered by rights to a speedy trial. The defendant is forced to recall events from memory that may have taken place long in the past, while the agent's ability is enhanced by use of police notes and reports.

Courts that have been deciding this issue on a case-by-case basis differ on the result. In *U.S. v. Marion* 404 U.S. 307 (1971), the court reversed a District Court ruling that three years from initial investigation to indictment was a denial of a right to speedy trial. However, the 8th Circuit Court in a recent opinion declared that an unreasonable delay from law enforcement knowledge to charging is a denial of due process under the Fifth or Fourteenth amendments, depending on whether the court is state or Federal (*U.S. v. Jackson*, 504 F.2d 337 (1974)). In an earlier case the District of Columbia Circuit Court reached the same result on similar facts (*Ross v. U.S.*, 349 F.2d 210 (1965)). Thus it appears that there is sufficient justification for an appellate court ruling on this issue if based on Fourteenth amendment grounds of the due process clause of a state constitution.

The final issue concerns the problem of demographic variation versus statewide implementation and the difficulties of uniform application. The Iowa experience provides an excellent example of what can occur if adequate preparations are not made. While Council Bluffs might have had an easy time adhering to speedy-trial time limits (because it probably already was in compliance) the effect on the Des Moines system of justice was described as "initially catastrophic." The guidelines caused a great deal more trouble before Des Moines could adjust.

Thus it is important that one of two things should occur: 1) if implementation is statewide, the time limit should be based on the reasonable limit for the largest trial jurisdiction in that state; or 2) a scheme of demographic rules could be set up imposing certain requirements on various types of counties (or cities) within the state. There might be good cause for having different time limits set by the character of a trial jurisdiction in either a rural, suburban, small city, or urban area.

CHAPTER XIII. DECISION TO RELEASE DEFENDANT PENDING TRIAL OR DISPOSITION

The "Decision to Release Defendant Pending Trial or Disposition" refers to the judicial or administrative determination of whether—and on what terms and conditions—an individual "charged" with a criminal offense will be permitted to remain in or return to the community during the period between first accusatory contact with the criminal justice system (e.g., arrest or submission to custody after indictment without preceding arrest) and the ultimate resolution of the case at the trial court level (e.g., dismissal, conviction and sentencing, or acquittal).

The release decision (the "bail decision"), made at least once for each person charged, may be repeatedly reconsidered by the original decision-maker or reviewed by other decision-makers during the time preceding disposition. Thus it represents a series or potential series of official choices, rather than a unique act, yet is not a continuous process.

Alternatives at this point refer to programs or procedures that 1) eliminate or decrease the overuse of detention, 2) help assure a defendant's appearance in court, and 3) help prevent future crimes from being committed. The purpose of such alternative mechanisms is to provide avenues for pre-trial release of other than, or in addition to, the mechanism of the professional surety bond.

In conventional practice, the decision-makers most often associated with this release determination are the magistrate and the first-level trial judge. The proceeding at which the decision most often occurs is known by various names in different jurisdictions, including first appearance, arraignment, and bail hearing.

However, with the exception of the defense bar, all major actors of the criminal justice process have opportunities to institute alternative processes at the point where a decision is made to release a defendant pending trial or disposition. These alternative actions may occur in the following ways:

- *Legislative* bail reform (by statute).
- *Police Department* station-house release.
- *Uniform Prosecutor Office Policy* on pretrial release.
- *Trial Court* options regarding reform procedures, to be used in the absence of an authorizing statute or rule.
- *Implementation* of bail reform by *Public Non-criminal Justice and Private Agencies* through bail eligibility investigation.
- *Citizens/volunteer* community bail funds and organized third-party custody arrangements.
- *Probation and Parole* bail eligibility investigation.
- *Appellate Court* bail reform through exercise of rule-making powers.

A. The Legislature: Statutory Bail Reform

1. *Discussion.* The development of statutory bail reform has been prompted by the deficiencies of the traditional system. Defendants already in prison are more likely to receive convictions than those out on bail; managing the backlog of cases in the court system is more difficult when detainees have two trial dates, one for jail and one for bail; and the cost of maintaining people in prison is extremely high and is a drain on the budgets of many cities.

Under the traditional money bond bail system, a quasi-judicial group of decision-makers has been created, bail bondsmen, who determine risk based upon their judgment and discretion, which may be idiosyncratic and inappropriate. Without any formal training or commitment to the values of the judicial system, they can make *de facto* judgments about defendants free from review. While statutory bail reform still involves judgments, they may be better and more visible.

Because of its unfairness and ineffectiveness, the traditional bail system tends to bring the entire

criminal process into disrepute. In addition, it encourages the belief that those in jail are more dangerous than those who have secured release.

2. Example: *Federal Bail Reform Act of 1966*. In 1965, the National Conference on Bail and Criminal Justice was held to examine defects of the bail system and to devise techniques that could remedy it, including a consideration of those used in the Manhattan Bail Project developed by the Vera Institute.

In June 1966, the Federal Bail Reform Act (FBRA) was passed. The emphasis of the FBRA is on the use of release on recognizance (R.O.R.)—the unsecured promise of the defendant to appear in court. The rationale for this approach is the belief that most of those accused in criminal cases have ties to their community and, if released on R.O.R., will return to stand trial.

The FBRA establishes and defines R.O.R. It also suggests criteria for investigations by decision-makers who set the conditions for R.O.R. No weighting system is suggested. The act also suggests a series of more onerous *conditional release* options to secure the appearance of defendants who are not releasable on R.O.R. The affirmative requirements might involve stipulations such as reporting requirements, finding a job, and receiving narcotics treatment. Prohibitive requirements may involve curfews, travel restrictions, and restrictions on living arrangements. This approach may be combined with R.O.R. The act only suggests possibilities; the judge must determine how to apply them. Although the act does not weight conditions for R.O.R., it does present criteria that rate the desirability of differing conditions.

Another method suggested by the FBRA is the *cash deposit bond*. Under this approach, an offender is required to promise payment if he does not appear, and he must pay 10 percent of the amount of the bond to the court as a deposit or down payment. Unlike the bondsman's fee under the traditional surety bond system, this 10 percent deposit is returned to the defendant upon appearance at trial. In some jurisdictions a small percentage of the defendant's cash deposit bond is retained as a service charge to defray costs of administering the system.

As of late 1974, approximately 31 states had adopted statutes with provisions for R.O.R. and 15 had established conditional release provisions.

3. *Implications*. Bail reform can be used in conjunction with other alternatives. If implemented with interviewing procedures, the Federal Bail Reform Act provides for a general, superficial screening of large numbers of defendants. The results of this screening could also be used for determining eligibility for other pretrial intervention programs where intensive interviewing is required. Service delivery and supervised release may itself be considered an alternative.

Implementation of bail reform, pushed to extremes, could conflict with other alternatives. Some defendants, for example, do not need very much supervision. If many are released without interviews, many will be released before information is collected on their needs, and this will inhibit the delivery of social services. On the other hand, quick release procedures minimize over-control problems. If the defendant is expected to appear at trial, he should be left alone.

B. Police Departments: Station-House Release

Station-house release is a procedure involving a full delegation of certain types of pretrial release decision-making by the legislature or the judiciary to the police. It is an administrative rather than a judicial decision. Its use shows what can be accomplished by delegation, whether to the police or to another criminal justice actor. Two models of station-house release can be identified: 1) master bond schedule and 2) station-house citation.

Master Bond Schedule is a police-implemented procedure that occurs in cooperation with a legislature, or by tacit approval of the trial court, that provides for the immediate release from custody after booking of persons preliminarily charged with specific offenses. The release is contingent upon payment of refundable cash deposits fixed in advance according to the offenses charged. If the judiciary disapproves of the practice, it cannot function unless the legislature approves it.

The method is similar to a money bond or to the 10 percent cash deposit described earlier. The defendant pays a small sum of money that is returned at the time of the court appearance. The sum becomes a fine if the defendant fails to appear in court. Police typically use this method for minor crimes, misdemeanors, and property offenses.

Its advantages are that it occurs early in the criminal justice process, that it requires only small sums of money, and that it eliminates the surety system (the bondsmen).

However, in 1970 a Florida District Court ruled in a class action suit that these bond schedules violated the due process clause of the Fourteenth Amendment and denied poor defendants their right to equal protection of the law, because plaintiffs were denied the opportunity to be heard in a formal hearing before being deprived of their liberty.

Station-House Citation is more intensive and burdensome than field-citation release, but it achieves a better practical accommodation between a defendant's liberty and effective law enforcement in mediating serious cases before release. In the station house, the officer may ask more questions in relation to risk, may implement superior verification procedures, and may coordinate these activities with booking, fingerprinting, and photographing.

C. Prosecutor Offices: Uniform Office Policy on Pretrial Release

1. *Rules to achieve consistency.* There are two types of rules promulgated by administrative or chief district attorneys, both of which are designed to achieve similar recommendations in similar cases. The first type stresses the criteria of comparability for determining similar cases. A point system may then be devised, weighting different characteristics or considerations. The second type involves the policy decisions of what should be recommended. Prosecutors generally do not participate in decisions that favor release because their traditional objective is to win and to convince the judge to be stringent. A more neutral system could be devised if the assistant district attorney would consider devising a set of criteria to be used when recommending bail for certain types of offenses.

Rulemaking will differ, depending on whether one prosecutor works with a case from beginning to end, or whether a special assistant is assigned to handle all bail hearing decisions. In most prosecutor systems, one prosecutor does not take a case all the way through the system. Most rules, then, will concern those individual assistants specializing in bail.

Rulemaking at this stage assumes that the prosecutor dominates the pretrial release decision-making

process, even in reformed jurisdictions. Where a bail agency exists, the prosecutor recommendations may be accepted or rejected. In these jurisdictions, the prosecutor should devise a rule that sets out when it is appropriate to accept or to object to the agency's determination. The form of these rules obviously will differ in traditional and reform jurisdictions because the prosecutor has a larger role in the former.

2. *Guidelines emphasizing close scrutiny.* This alternative admonishes prosecutors to consider problems associated with the bail decision and to exercise good judgment by drawing their attention to certain information in specified cases. For example, if too many narcotics offenders are skipping, they should request higher bail for this offense or lower bail for petty misdemeanors.

The prosecutor might describe those types of cases that ought to be scrutinized—and achieve regularization of the procedure—by using a specialist who would exercise a quality control function in the pretrial release decision, now typically made by more junior people in the department.

This alternative requires new institutional patterns and a new understanding of the prosecutor's job at this stage of the criminal process. A broadening of the prosecutor's perspective must be assumed as he performs a quasi-judicial rather than purely adversarial function.

D. Trial Courts: Instituting Reform Procedures in the Absence of an Authorizing Statute or Rule

These reform procedures refer to the individual or collective election by trial judges to adopt pretrial release procedures similar in form or effect to procedures described in the Federal Bail Reform Act of 1966. There are three possibilities for judicial action:

- Rather than use bond alone, the judge may use bond with the addition of *conditional release* procedures.
- *Nominal bond* may be used where the judge desires R.O.R. in the absence of both an authorizing statute and a screening apparatus.
- In relatively non-serious cases, trial judges may possess the inherent power to release some defendants on pretrial R.O.R.

Generally, only activist judges will make use of these alternatives without specific authority, and those who have doubt about reformed bail systems will not desire to initiate change. This alternative, therefore, cannot eliminate the money bail system.

Even if the legislature authorizes resources for facilitating bail determinations under a reformed scheme, the existing staff must learn to behave in new ways and in new roles.

It is especially important in bail reform, not only that some defendants receive better treatment than under a traditional bail system, but that all defendants have the opportunity for better treatment. *Ad hoc* reform by individual judges under this alternative, however, means that outcomes will vary significantly between and within jurisdictions and over time.

Bail reform is not popular among many segments of the criminal justice system community, especially among the police. They often believe their efforts at apprehension are counteracted by attempts to increase the use of pretrial release. Bail reform without external authority, therefore, may be vulnerable to anti-reform political pressure.

It is also possible that this alternative may delay thorough-going reform. The necessary legislative confrontation required over the choice between bail reform and the old money bail system may never occur if judges initiate piecemeal reforms. This could remove the impetus for immediate change.

E. Public Non-criminal Justice and Private Agencies: Implementation of Bail Reform Through Bail Eligibility Investigation

The two main services necessary for bail reform to work are, first, interviewing and reporting to the court on findings immediately after arrest, and second, supervision to insure appearance at trial. Another support service that would aid bail reform is the delegation of authority to set conditions. The most important issue is who performs the services.

All three of these functions help judges perform their task by substituting an administrative for a judicial function. There are essentially three models for agencies that perform some or all of these functions: the *probation* model; the *independent agency* and its variations; and the *mixed* model (probation and independent agency).

1. The independent agency.

a. *Discussion.* An independent agency is one that is not an arm of the court. It may be public or private, and may formulate positions and policy subject to any source of direction other than to the bench.

b. *Examples:* (1) *Pretrial Services Agency, Brooklyn, New York (PTSA).* The Manhattan Bail Project in New York City originally was institutionalized within the city probation department. The Criminal Justice Coordinating Council and the Vera Institute determined that institutionalization was not working because the probation department was not doing enough: the followup was poor, and the department lacked the capability to handle a large volume of cases. The council and the institute did not believe that additional funding was the answer because, in their opinion, the probation officers lacked the commitment and motivation necessary for a successful pretrial services project, and it was proving difficult to hire the kind of staff necessary for an effective program under the Civil Service regulations. The council and the institute therefore conceived a separate, independent agency as an alternative.

Based on a survey, the recommendation was made to establish an independent bail agency as a semi-private corporation in the Borough of Brooklyn. This organization is the Pretrial Services Agency (PTSA). The project now reviews approximately 30,000 cases per year. Those accepted are divided into two groups: those to receive R.O.R. and those to receive supervised release.

Screening for R.O.R. Most defendants are interviewed in the criminal court lock-up before arraignment and after fingerprinting and booking. The interviewer uses standardized eligibility criteria, based on a point system. Of those interviewed, 42 percent are recommended and verified; 20 percent are qualified but not verified. Supervisors spot-check interviews and answer questions about project policy or definition of terms. A staff member (court supervisor) scans interviews in court for obvious errors. A quality control officer for the entire project checks one interviewer for one week to insure proper application of standards.

Recommendation for R.O.R., or no recommendation, is based on the point system and on verification of information. Verification may involve either phone calls or more detailed checks with family and friends. Charge has little to do with the quality of the verification procedure or the recommendation

received. An alternative procedure when verification cannot proceed is "Qualified for R.O.R. based on unverified information furnished by the defendant." No recommendations are given in cases where warrants are outstanding, prior criminal records are unavailable, or the defendant jumps bail. The court then releases, bails, or remands the defendant with consideration given the PTSA recommendation. If the court accepts the recommendation and releases the defendant, the notification of court date becomes the responsibility of PTSA. Released defendants are asked to maintain regular contact with the project.

In cases where pretrial release has not been obtained at arraignment or following the bail reevaluation, selected high-risk cases are reintroduced. Counselors screen the best of those previously recommended but not released. A special supervision plan, using community services, is proposed and individualized to the defendant's needs. The services typically include counseling and job training. The defense counsel must approve a new petition presented to the judge requesting release to PTSA, with the understanding that the services outlined in the petition will be rendered to the defendant but only so long as contact continues with PTSA.

(2) *The D.C. Bail Agency.* Almost immediately after the passage of the Federal Bail Reform Act, the D.C. Bail Agency was established as a permanent replacement for the D.C. Bail Project. The latter began with an approach based on the Vera Institute's Manhattan Bail Project. It interviewed defendants and—based on a point system using employment, verified address, and other weighted indicators—made its determination on releasability. The Agency subsequently dropped all conditions except verified address and abolished the point system. This institutionalized release approach opposes mechanical concepts of screening since gross distinctions and cutoffs with specified criteria are not essential. It reflects a change in philosophy: release is now advocated for everyone, except in egregious cases. Almost 90 percent of all cases are defined as releasable. Recognizing their responsibility to the court, the public, and the client, the Agency believes release is safe and necessary.

All defendants are interviewed initially in the lock-up. Background information is collected on employment, prior convictions, present address, references, narcotics problems, and so forth. Verification of prior criminal activity is made through the probation department. Probation also indicates if

they have any opposition to release. At arraignment, Agency representatives give copies of their report to the district attorney, the defense counsel, and the judge.

The reports to the court generally recommend R.O.R. The Agency seldom recommends specific conditions but rather 1) a reporting condition and 2) review of conditions after release by the Agency. In a sense, this means the Agency partially sets the conditions of non-monetary release, although the judge may add conditions. The Agency may suggest to the defendant that he should receive certain social services, or attempt to locate employment, but these conditions are rarely enforced. Although the Agency is required by statute to report all violations of court ordered release conditions, agreements have been made among the courts, prosecutors, and Bail Agency officials to screen out some purely technical violations (such as missing one "report-in" call out of five) in order to concentrate scarce resources on imposing sanctions for more serious violations (failure to stay away from a complaining witness, failure to comply with custody conditions, failure to appear, etc.). The history of a defendant's compliance or non-compliance with pretrial release conditions is forwarded upon request for use in preparing pre-sentence reports for those who are convicted.

Once the defendant is released and ordered to report to the Bail Agency, the project provides notice of conditions and a warning about violations. The Conditions of Supervision Unit attempts to refer to social services, offers personal and job counseling within its office, and has a job bank service available as well. Some individuals receive minimal supervision, so that those requiring intensive supervision can make best use of limited resources.

By statute, the agency must notify the U.S. Attorney's office and request a hearing, if the defendant violates the reporting conditions, although the agency retains a great deal of discretion over what constitutes a violation. Every method of obtaining compliance is tried before a violation is reported.

In certain situations (fewer than 1 percent of cases) the project recommends a preventive detention hearing. If the U.S. Attorney cannot prove dangerousness, then the project requests that conditions be set for release since a surety bond is illegal for reasons of dangerousness under the D.C. Bail Statute. A money bond may only be used where risk of flight can be demonstrated.

A judge may determine as a condition of release that a third party custodian be appointed when re-

lease on recognizance alone, with no additional conditions, is not satisfactory. Approximately five organizations exist in the District of Columbia for this purpose. These organizations have representatives in court each day. While the custodian must wait for a request from the judge, the Bail Agency may also request a custodian and monitor and evaluate its worth. A hearing is scheduled automatically if the defendant does not comply with the requirements of custody.

The Agency also prepares informational backup on citation-release cases from the station house when a request is made for a background and verification check. This is usually accomplished by telephone, using a point system, for all misdemeanants who are not arrested on warrants and who, in the police officer's judgment, do not represent a threat to the community.

c. *Implications*. A major issue is the extent to which the bail agency function should be integrated with pretrial intervention programs. This depends in part on the nature of the service model.

For example, where both a pretrial intervention unit and a bail agency exist, the advantages of merging the two units would include 1) avoiding duplication of effort since screening could be done for both at the same time; 2) allowing for greater tailoring of programs to meet individual needs; and 3) maintaining the continuation of services to a defendant who is terminated in a diversion project.

The disadvantages to integration are inherent in the nature of bureaucracy. Such an agency might become overburdened and be unable to function adequately as a result of trying to accomplish too many goals. Moreover, the independence of the Bail Agency might be compromised, since the addition of a diversion project might involve the district attorney as a monitoring agent, thereby inhibiting innovation. The form of bail agency which best supports the integration of pretrial intervention and bail, assuming the integration is a positive idea, is the independent agency.

2. *The mixed model: Probation department and independent agency*

Jurisdictions with limited funds and an existing probation department may find it feasible to divide responsibility by setting up a new organization to perform only some traditional probation functions, such as handling the hard cases that could not obtain R.O.R. The probation department would con-

tinue to handle "easy cases" where risk is minimal. The new independent agency would accept cases that probation is unwilling or unable to release. Special supervisory and social services might be offered by the new agency to ensure release.

Determination must be made as to how much delegation is appropriate to the bail agency. The major issue for the bail agency, however, is whether its goals can be met over the long term, particularly in view of continued pressures for overdetention.

F. *Citizens/Volunteers*

1. *Community bail funds*. A community bail fund is a system for indigent defendants in which private citizens voluntarily provide financial backing by obtaining cash, property, or commitments of credit from individuals who themselves act as sureties. These citizens also screen applicants because there are more people than funds.

There are essentially two types of community bail systems, both of which assume the existence of a fund. First, an organization may request to become a bondsman and promise to pay money to the court if the defendant skips. It performs the same function as the bondsman, but the defendant is not required to pay and he benefits from a non-forfeiture policy in a jurisdiction. Second, the individual may be provided directly with cash or property which may be used as a deposit to make bail without a formal surety arrangement.

The community agency must be concerned with individuals skipping as opposed to the bail agency which, because it matches people with categories, only requires a satisfactory gross skip rate. Under R.O.R., the defendants may be released if they fall within a low-risk category; they are given the benefit of the doubt. The community agency, working with a limited fund that may be depleted, must develop a different kind of screening because predictions of individual flight are more important. The community agency, however, tends to be more responsive and adaptive to individual defendants because it is not an official agency with direct responsibility to the court. This alternative, if supervised, is far superior to the bondsman.

The community bail system works well in reform jurisdictions to cover extraordinary cases. In non-reform small jurisdictions, it may function as a short-term, practical remedy for traditional bail problems. This approach may be an inhibiting factor

where more sweeping reform is necessary and anticipated. If it delays official action, its implementation should be reconsidered.

A more important question is the advisability of turning over this important official function to private organizations or to loosely organized citizen groups. Building in controls may be difficult and new inequities may be created; and, this system may limit coordination with more far-reaching intervention procedures by placing the screening and eligibility determination in a private organization.

2. *Organized third-party custody.* Organized third-party custody is a procedure organized by a private and often relatively loose-knit group, through which individual volunteers take third-party defendants not personally known to them and provide them with release assistance (and ensure their appearance in court).

Because only credibility is at stake, these organizations tend to work with higher risk cases. To function well, the organization must have ties with those agencies distributing clients; it probably would not thrive in non-reform jurisdictions. This alternative depends on an enlightened legislature or court in an urban setting, if substantial numbers of defendants are to make use of it; third-party custodians have always existed informally.

In Washington, D.C., the now defunct Quaker House Community Release Organization in the Adams-Morgan section of the city sponsored a program of third-party custody. It enlisted the aid of volunteers from the community. From September 1972 through April 1974, approximately 113 defendants were served by its program. Each day two volunteers examined a list of those arrested and held for arraignment in D.C. Superior Court. The D.C. Bail Agency provided the list. Two people are generally selected each week. The client and standby go over any conditions set by the judge, examine the client's job and personal situation, and review the dates for meetings with a lawyer or the next court date.

Many of the issues in this alternative bear essentially on the organization's relationship with the official bail agency.

G. Probation and Parole Officers: Bail Eligibility Investigation

Bail eligibility investigation by probation is an alternative because it is one method of coping with the dysfunctional character of money bail. The main issue is: Who should perform the screening investigation? Nominal bail reform or the use of a non-monetary system will not work well, as noted earlier, without an information system support. Some jurisdictions have statutory provisions for R.O.R., but no support service.

Postconviction information has been available for a long time to aid judges in making non-institutional dispositions. The need exists now, however, for information for the purpose of pretrial release/non-institutional dispositions. Whether or not this function should be performed by probation must be considered.

The advantages of probation are economy, privacy for the defendant (because only one agency collects information), and organizational efficiency, as it is inappropriate for more than one agency to do the same thing. There may be disadvantages, though, in using an apparently conservative, stagnant, entrenched, non-innovative organization.

H. Appellate Courts: Bail Reform Under Rulemaking Power

In those jurisdictions where the Federal Bail Reform Act of 1966 has not been adopted, a state's final appellate court may promulgate, in its rulemaking capacity, a system similar to that embodied in the 1966 act. The 1966 act is generally a formulation of judicial powers which, if adopted in a particular state, would enhance, add to, or alter in some manner pre-existing judicial powers.

In states with a reformed model based on the FBRA, a state's final appellate court may prescribe in more detail the particulars of implementation.

In July 1973, Pennsylvania adopted a series of court rules which contain all of the relevant features of the Federal Bail Reform Act of 1968, except that some provisions of the Pennsylvania rule are made optional rather than mandatory at the discretion of the locality. (R.O.R. is authorized only in special and narrow classes of cases.)

CHAPTER XIV. DECISION ON PRETRIAL MOTIONS AND APPLICATIONS

The "Decision on Pretrial Motions and Applications" refers to any one of a variety of judicial determinations made pursuant to a request for a ruling from one of the parties in a criminal case in which an indictment, final information or other formal accusatory instrument has been filed with the court. Typically, this will occur after filing of the accusatory pleading with the court by the state.

Alternatives in this column refer to two distinct classes of procedural innovations: 1) changes in or substitutions for conventional processes, and 2) new forms of pretrial judicial decision-making which respond to a range of system and defendant needs which may be effectively addressed by placing the pretrial period to new uses.

The following approaches can be applied at this point:

- *Legislative* authorization by statute for intervention.
- *Prosecutor* case-review intervention.
- *Trial Court* omnibus pretrial hearing.
- *Appellate Court* rule authorizing intervention and implementation of individual's right to a speedy trial.

A. Legislature: Statutory Authorization for Intervention

1. *Discussion.* Statutory authorization for intervention refers to the creation, by legislative act, of a statute allowing for the diversion from the criminal justice system of an offender and for the provision of some alternative treatment.

There are two broad categories—"permissive" and "mandatory"—into which these authorization statutes fall. The permissive model vests discretion for using the statute's provisions in an actor of the criminal justice system, either the prosecutor or the judge. In the mandatory model, however, the legis-

lature replaces the discretion of prosecutor or judge with the definitions and provisions of the statute. There are not many statutes of either model in existence and the vast majority of current intervention programs operate under the traditional discretionary functions of the principal actors in the criminal justice system.

2. *Examples.* U.S. Senate Bill 708, introduced in the 93rd Congress in 1973 and known as the "Community Supervision and Services Act," is an example of the permissive model of legislation. The target population is defined broadly as "any person who is charged with an offense against the United States and who is recommended for participation by the attorney for the government." The administrative head of a community supervision agency, under contract to the Attorney General, is to interview the candidate and help prepare a service plan. The final release may be ordered by any Federal judge or magistrate. The person is subject to return to the traditional process for failure to fulfill the obligations.

The Narcotic Addict Rehabilitation Act, and the California Drug diversion provisions under Penal Code Section 1000, are examples of mandatory model statutes which contain specific entrance criteria that the offender must meet, such as type of charge, prior record, and (less frequently) age. Under P.C. 1000 in California, for example, the offender must have no prior conviction record and must be charged with the violation of the specific drug laws enumerated in the statute. Offenders fulfilling these paper criteria must be referred by the prosecutor to the probation department as outlined in the statute. If the probation department finds the offender to be a good candidate, the prosecutor must convey this finding to the trial judge. The trial judge has the discretion to deny diversion to the defendant, but in practice and under the wording of the statute, this is not done absent a clear showing

that some public harm would result. Under a directive statute, an offender meeting the threshold criteria is in a position to predict the disposition of the case more accurately than is a peer under a permissive statute.

Even under a mandatory statute, however, discretion is so fundamental to the roles and self-concepts of criminal justice actors that it is applied wherever there is any ambiguity in the statutory language, and sometimes even when there is not.

3. Implications. While mandatory requirements produce a measure of certainty for the offender and perhaps uniformity of application throughout the jurisdiction, discretion may produce creativity and expansion. In a mandatory statute for first offenders, the prosecutor is wedded statutorily to the selection of first offenders and is forced to overlook second or third time repeaters who may appear genuinely to desire to change their behavior and are in all other respects "ideal" candidates for the program. Most programs, however, evolve from reliance on restrictive threshold criteria. In its twelve years of operation, the Extra Judicial Probation Program in Wichita Falls, Texas, (possibly the nation's oldest ongoing intervention program) has completely abandoned its original paper criteria in favor of the discretionary judgment of its director, the prosecutors, the judges, and members of the grand jury. Barring an amendment, this type of growth would be impossible under a statute mandating the selection of a certain class of offender.

There is a question of what latitude of discretion can be written into a statute before its sanction of diversity in implementation constitutes a denial of equal protection of the laws. This problem has not yet been resolved.

Perhaps the fundamental question that must be raised is whether legislation is a good way to provide for the diversion of offenders from the criminal justice system. The answer is, of course, essentially one of opinion. Legislation does provide an assurance that the opportunity for removal from the system will exist for many meeting the threshold criteria, and also makes intervention less vulnerable to the whim of the prosecutor or judge. However, through statutory language and court interpretation, legislative authorization defines the program's limits which the passage of time and the mechanism of *stare decisis* would tend to make increasingly rigid.

B. Prosecutor Offices: Prosecutor Case-Review Intervention (With Limited Judicial Participation)

1. Discussion. Prosecutor case-review intervention with limited judicial participation is an intervention in which the prosecutor controls who enters and exits from the program. In this model formal charges already have been filed with the court and therefore a continuance must be requested from the court. To the extent that the judge becomes actively involved by making more than the usual *pro forma* continuance decision, judicial control is increased. In the model of prosecutor case-review intervention discussed in Chapter XII, section C, sub-section 4, above, the intervention occurs at the precharge stage—the charges are not filed but are suspended until the defendant performs his obligations.

There are two possible influences on disposition: dismissal of charges, or a prosecution with a sentence recommendation to the judge. The program may be contract with service, contract without service, non-contract with service, or non-contract without service.

2. Example: Manhattan Court Employment Project. The Manhattan Court Employment Project (MCEP) in New York City, established by the Vera Institute of Justice, uses the contract with service model. As a result of funding cuts, the project ceased operations in the summer, 1976; in November, 1976, sufficient funds were restored to enable the project to continue. The following description is based on project operations prior to the funding cuts.

a. Intake. The eligibility criteria include male and female residents of New York City who are between the ages of 16 and 45; who are neither alcoholic nor addicted to drugs; who are unemployed or earning less than \$125 per week; who have served less than one year in a penal institution; and who are charged with a misdemeanor or felony (excluding homicide, rape, kidnapping, arson, restitutional or related offenses) or petty violations. Students are included as well as probationers with the consent of the probation officer. These criteria continue to be modified over time. The project has, for example, expanded eligibility criteria to include individuals charged with "more serious crimes, more priors, and having difficult problems to solve." Criteria were developed based on an analysis of those types

of individuals who could benefit most from such a program and who need the services, as well as on the "political realities of the court."

Potential project participants are selected and identified from the total weekday arraignment group in the criminal court. The clerk at arraignment provides a project screener with each defendant's criminal record, R.O.R. sheet, statement of the charges, details of the crime, and a sheet indicating if defendant is a narcotics addict. This is the first step in evaluation of a defendant's eligibility. The screener then checks this information against the project's criteria for admission. A second screener takes this information and enters the lockup to conduct an interview with those believed to be eligible; this determination is based in part on an analysis of the defendant's prior record. The screener explains the program and determines if the defendant expresses interest. Approximately 90 percent respond positively. The screener then proceeds to collect more information on prior record, employment, residency, and other characteristics.

Information is verified through phone contacts and through discussions with the arresting officer. The complaining witness technically must give written approval for the individual to enter the project. (The arresting officer and the complaining witness need not actually approve, but their consent aids the project in convincing the court.)

A screener decides if the defendant is eligible or should be rejected, or whether a decision can only be made after the defendant's next court appearance. This is done if information has not been verified or if the defendant is on probation.

While information collected by the screener is being verified, the project enters a motion to continue the case. Defense counsel is not necessarily present and no guilty plea is required. Upon final project approval of eligibility, there is an initial discussion between an assistant district attorney and a screener, but not for approval. The case is simply presented to the district attorney, who may 1) informally try to prevent the project from accepting the case, or 2) informally allow or support participation, particularly if he believes that the defendant, although guilty, will benefit from project services. A one-week continuance is requested for further interviews and evaluation following this discussion with the assistant district attorney. During this time, the project screening unit again examines the defendant.

An individual, rejected by the project, is returned to court without prejudice. When the project accepts a person, the case then proceeds to the assistant district attorney for final approval. A screener and a liaison person with the district attorney's office visit the assistant and review the case material. If the assistant has doubts but does not wish to reject, the case will have a further review with the project liaison. If the screener fails to convince the assistant district attorney to accept a defendant, the project liaison—more objective, less emotionally involved, and coming from a higher staff position—may be better able to influence him. If agreement still cannot be reached, the liaison takes the case to the chief of the Criminal Division. Ultimately the project always accepts the assistant district attorney's decision. Once the district attorney accepts, the screener requests a 90-day continuance from the judge for the client to receive services. A defense attorney is present. If the district attorney has agreed, the judge almost always grants the request. The assistant district attorney usually helps the screener convince the judge of the defendant's acceptability.

The project has now expanded from the criminal court, which generally handles only misdemeanors, to the supreme court, which handles felonies. These new cases may be more difficult for the project to retrieve because the case will have penetrated further into the system; the prosecutor at this stage has already prepared the indictment. Almost all cases are arraigned in criminal court. The advantages of this new procedure are the acceptance of more difficult cases (felonies) and a different type of relationship with the prosecutors, who tend to be more experienced and potentially more aware of the client's need for assistance.

b. *Participation.* MCEP offers two types of services: career development counseling, and identification and referral to social services. Career development consists of maintaining files on employment possibilities, identifying educational and vocational training needs, attempting to place the defendant with the appropriate agency, and preparing the defendant for job interview appointments. Counseling in individual and group sessions, by both professionals and nonprofessionals, includes discussion of job-related difficulties and other personal, social, and economic problems. Group counseling sessions are conducted once a week. Individual sessions are conducted at the defendant's home, with family members present, or in the project's offices. The

social services unit, in cooperation with the City's Department of Social Services, was established to handle defendants' immediate service needs, whether for financial assistance, housing, or health care. The social services unit functions as an "out station" of the Department of Social Services.

Each unit serving the client maintains a record of the client's progress, based on staff observations. The counseling and career units exchange evaluative information. Records are kept of referrals, placements, and attendance at counseling sessions. A final written summary is prepared only after completion of the 90-day participation period. Day-to-day operations are also evaluated by the project administrators with respect to intake rate and composition, dismissals and unsuccessful terminations, number of participants employed, and so forth.

c. *Termination.* After the 90-day period, the supervisor, assistant supervisor, and representative counselor prepare a written report providing one of the following recommendations to the court: 1) dismissal of the defendant's charges based on his favorable progress and completion; 2) further adjournment of 1, 2, or 3 months to permit additional counseling; or 3) termination of the defendant's participation in the project and the resumption of the prosecution of his case without prejudice (which also may occur at a prior time).

Success is defined in relation to the client's cooperation with the project. Does the participant, for example, meet appointments, attend school, and demonstrate responsibility? The counselor and a supervisor determine success in conjunction with an assistant supervisor. They present their recommendation to the court in the already mentioned report, which has been approved by the assistant district attorney and by the project liaison. A copy of this report also is sent to the screening unit and to the client's counsel.

A defendant will almost always receive a dismissal if he has not been rearrested and "when he has attended and become involved in all counseling sessions; and when he has made a satisfactory vocational adjustment." Unsuccessful termination may occur at any time for reasons other than arrest. No hearing occurs on the termination decision if the basis for termination is rearrest. The project requests another adjournment if it is believed that defendant requires more services. An unsuccessful termination, according to project staff, does not prejudice the case once returned to court.

3. *Implications.* This intervention program involves a cooperative relationship between prosecutors and judges. The working relationship may change with alterations in personnel, resulting in less predictability than with other models.

The model operates relatively openly and visibly, since its activities are a matter of public record. This may have negative consequences for the defendant by creating a stigma hidden under the more private form. However, it does allow for reviewability and checks on program operations, thereby endowing it with a level of legitimacy absent under the precharge intervention model.

Consideration should be given to whether the type of limited judicial participation inherent in this model might disqualify a judge in a particular case if the intervention fails and prosecution resumes. The cost of this method should also be weighed, as it may obviously increase judicial time and resources required. Critics of prosecutor case review intervention may welcome the potential for judicial supervision and participation that results when intervention occurs after the filing of the formal charging document.

C. Trial Courts: Omnibus Pretrial Hearing

The omnibus pretrial hearing is a procedural reform in which all pretrial motions in a criminal case can be considered by the court at one processing. See the discussion in Chapter XII, section D, sub-section 5.

D. Appellate Courts: Court Rule Authorizing Intervention; Implementation of Speedy Trial Right

Appellate court rules may be used to authorize intervention when the legislature does not act to encourage or implement a program and the structure of the program suggests that such rules may be desirable. Such rules are discussed in detail in Chapter XII, section G, sub-section 3.

Implementation of speedy-trial rules utilizes the power of appellate courts to formulate guidelines for time limitations within which a defendant must be brought to trial or have the case dismissed. This power is discussed in Chapter XII, section G, sub-section 4.

CHAPTER XV. DECISION TO TRY OR TO ACCEPT A PLEA

The use of alternatives at this stage can be exercised by legislatures through the creation of administrative tribunals; by trial courts, through courts of special jurisdiction; and by citizens/volunteers through community courts.

The "Decision to Try or to Accept Plea" refers to the means by which the issue of culpability raised by a pending criminal trial will be settled. In the conventional process, this decision involves the participation of a judicial officer and represents a choice between special modes of terminating a case—trial, plea, or dismissal. Some of the alternatives discussed in this guidebook can be conceptualized either as substitutes for the conventional plea of guilty or as new ways to make the guilty plea serve the interests of the justice system.

These alternatives are innovative options that may augment the range of choice associated with this decision or function as substitutes for particular options available in the conventional system. A number of these options have already been discussed at length (particularly the forms of innovation in negotiated justice described in column IV). This matrix column examines those new options which cannot usefully be associated as alternatives with a specific phase of the conventional criminal process preceding the "Decision to Try or to Accept Plea," and include new kinds and varieties of judicially administered courts, as well as dispositional forums operated by actors other than judicial officers.

A. The Legislature: Creation of Administrative Tribunals

Most manifestations of this alternative relate to the handling of traffic offenses. (New York City provides a good example). Beginning in 1970, the adjudication of minor moving and all parking violations in New York City and other large cities in the state was removed from the criminal courts and placed under an expanded Department of Motor Vehicles. Specially trained "referees" from the City

Department have jurisdiction over non-moving violations, and State Motor Vehicles "hearing officers" handle moving violations.

Guilty pleas are processed by the remittance of a fine without an appearance. Other pleas—not guilty and guilty with explanation, are discussed before the fact finder with the police officer, any witnesses, and the driver present. Procedure at the hearings is informal and non-adversary. Counsel is not present for either side and effort is made to concentrate on the facts and any extenuating circumstances rather than on "guilt" or "innocence" or burden of proof. No written transcript is made, but a tape recorder is present and a clerk makes notes.

Motorists found to have violated the Motor Vehicles Code can be fined or have their operating licenses suspended or revoked. In the case of some violations, the motorist can be compelled to attend driver-education classes or to take psychological examinations to retain their licenses. Because of the administrative nature of the hearing and the absence of counsel, imprisonment cannot be used as a penalty.

Appeals from decisions of the referees or examiners are made first to an Appeal Board within the Department of Motor Vehicles. This Board reviews any available documents and a written transcript of the proceedings prepared from the tapes and from the clerk's notes. Neither counsel nor the involved parties appear before the Board. Pursuant to Article 78 of the New York Civil Practice Law and Rules (Chapter 8 of the Consolidated Laws of New York), an avenue of review is open to the New York Supreme Court as with all decisions by administrative agencies in the State.

B. Trial Courts: Courts of Special Jurisdiction

This alternative refers to the operation of courts whose jurisdiction is limited to cases that meet certain requirements based upon the type of offense

alleged or upon some characteristic of the offender and to which individual judges are assigned on a permanent or long-term basis. Common examples are courts restricted to cases involving narcotics, traffic offenses or shoplifting, and juvenile or family courts. Special courts are created either formally by legislation or informally by general order of the Chief Justice of a court system under the assignment power.

Historically, courts designed to handle a class of offenders, such as juvenile court, were ostensibly created to provide the class with special treatment not available in the general courts system. However, the ability of special courts to provide these benefits has been seriously questioned in recent years. Other problems also have been raised, such as whether permanent judicial assignment develops judicial expertise or causes judicial atrophy.

The court system of Cook County, Illinois (including the city of Chicago) is the largest in the nation and the first to create courts of special jurisdiction. The nation's first juvenile court was established there in 1889. The court system also contains a Youth Court (for boys over 17 but under 25) established in 1914, and Women's Court, established in 1908, as an offender-model court. It also has a Narcotics Court (1951), Domestic Relations Court (1911), Paternity Court (1911), Traffic Court (1911), Auto Theft Court (circa 1920), and Shoplifting Court (1973), which are also offense-model courts.

The majority of these courts were established by order of Chief Justice Harry Olson of the Superior Court (1906-1932). In the Chicago model, judges are assigned to divisions of courts for unspecified terms; they may request assignment to a particular court if they have interest or expertise in the area. Because of this long-term assignment, the defendant and his lawyer know as soon as a charge is processed which judge will hear the request for bail, the petition for ROR, and ultimately the case. The lawyer and even the defendant may have appeared before this judge before, know what he "likes to hear" and what he doesn't. The judges themselves get to know repeat offenders and develop a "feel" for the type of treatment and/or sanction to impose on a defendant.

In these courts, such as the one for narcotics cases, there is a variety of referral services and treatment programs available to the judge to use as alternatives to incarceration or probation. The expertise of a judge who has worked in the area

for many years may be the difference between assigning a defendant to a program that will help him or one so unsuited to his needs that he would surely fail. The judges in Narcotics Court obtain a great deal of "street knowledge" about drug treatment and use from talking to the daily parade of offenders who come before them.

Unlike the juvenile courts, where the division was first made in answer to the need for special treatment and application of the law for younger offenders, the establishment of special courts by offense is usually in response to the need to organize the docket and permit greater centralization of prosecution decision-making. In New York and Chicago, for example, all adults arrested on a charge concerning illegal activity with a controlled substance are processed through a single branch of the court.

The Special Narcotics Court of the New York Supreme Court was created at the urging of then-Governor Nelson Rockefeller as part of the state's attempt to "get tough" with drug offenders. Because narcotics arrests were not top priority in processing for trial under the old court structure, the system was redesigned to provide a court where drug cases would receive top priority, so that evidence would be presented quickly to the grand jury and the case assigned to a judge, who would handle all aspects of the case from preliminary motions to sentencing. Vertical assignment of cases was also planned for the prosecutor's office, so that one single assistant district attorney would handle the case from arraignment to disposition. Criticisms include the fact that the special court has not ended the practices of plea bargaining and that district attorneys fail to institute unified prosecution procedures in felony cases.

C. Citizens/Volunteers: Community Courts

1. *Discussion.* Community courts refer to the creation of lay bodies made up of members of a defined community functioning as a court to make determinations of fact and to sanction the behavior of a member of the community against another member or against the community as a whole. The community court obtains jurisdiction over a set schedule of offenses either by formal statutory authorization, or by the informal discretionary divesting of that authority by the criminal justice system and the tacit approval of its functioning in place of the official adjudicative agency.

Primarily, the sanctions of the community court would be carried out by the community and the offender. There is a threat of bringing to bear the formal criminal justice process for dealing with the offense if the offender does not comply with the decision of the community court, but this is more in the nature of ceding jurisdiction back to the regular criminal courts system rather than the community tribunal enforcing its own decision.

Community courts are informal adjudicative bodies that derive their jurisdiction over members of the community from those very shared values or common interests and goals that create the community. There are two models: the customary community court that functions by virtue of *de facto* recognition by the formal criminal justice system; and the statutory community court that is authorized and defined by legislative enactment.

2. *Examples.* Domestic examples of customary community courts exist in the context of a well-defined community—a university, labor union, or prison—where both membership and territorial limits can be easily ascertained. These courts are formally authorized by a legislative body of the “community,” such as the University Senate, and are given jurisdiction over offenses against special community rules that may or may not also be violations of the criminal law.

For example, the Provisional Student Code (1973) of Boston University established a court procedure and imposes discipline for a variety of offenses such as damaging university property, obstructing university activities, and academic misconduct. Clearly, the last-mentioned is only under the jurisdiction of the University Judicial Committee; however, a student who throws a brick through a window on the campus has violated the Provisional Student Code and also the law of Massachusetts. The student is subject to the jurisdiction of both judicial systems. By custom, unless the crime is a serious offense threatening citizens not connected with the university, the municipal law enforcement authorities will not assert jurisdiction and in some cases will not even enter the campus area unless requested to do so by the administration of the school. By this courtesy, the law enforcement authority has granted (*de facto*) recognition of the exclusive jurisdiction of the community court. This is done on a case-by-case basis and is completely within the discretion of the law enforcement authority, but the practice is so widespread that in

a majority of universities the community courts represent the only sanctioning authority regarding minor criminal activity committed on the campus.

Most community courts of this model consist of a panel of judges drawn from groups within the community: students, faculty, and administration for university courts. Proceedings usually assure at least a modicum of due process, such as notice of the alleged offense, an impartial judicial body, cross-examination of witnesses, protection against self-incrimination, a reasoned decision, and, perhaps, a written record and the right to counsel. The sanctions that may be imposed range from a reprimand and warning to expulsion from the community. Jurisdiction is obtained over the person because he or she views membership in the community as desirable and wishes to defend against possible expulsion. Theoretically, there is always the additional threat that the criminal justice system will once again assert jurisdiction in the case.

This customary model of a community court depends upon the following factors:

- A readily definable community.
- The belief on the part of the local law enforcement agency that the conduct is contained within the community.
- The ability of the community to protect itself by its internal judicial system. (A severe breakdown of this third factor occurred during the spring 1970 and 1971 campus riots, resulting in the ceding of jurisdiction by many universities to the local police and courts).

There are a number of foreign examples of statutory community courts operating today using lay-citizen judges. These are located in communist and socialist countries: the U.S.S.R., the People's Republic of China, Cuba, many eastern European countries, and Burma. The stated emphasis of these courts is to employ community action to “correct the offender and bring him back into harmony with the group.” Jurisdiction of the court is based upon a visible subdivision of the population: a farming collective, a factory, an apartment complex. Hearings are held after working hours and are widely publicized to allow for the greatest possible attendance. The primary sanctions are ostracism and collective pressure.

3. *Implications.*

a. *Authorization for jurisdiction.* An independent community court requires legislative authorization

(or, in some states, court rule authorization would be sufficient). For example, a county ordinance might set up a community court in an apartment development with jurisdiction over acts of vandalism or theft resulting in damages of under \$200.

b. *Due process requirements.* From the outset, basic due process would be applicable, extending to the offender the rights 1) to be given notice of the "charges" against him, 2) to confront witnesses, 3) to be free from self-incrimination, and perhaps 4) to be represented by counsel or another lay member of the community.

c. *Right of appeal.* An issue would be the rela-

tionship of the community court to formal courts within the criminal justice system. An appeal could take the form of a trial *de novo* by a trial court, which would be a retrial of the facts and issues. Alternatively, an appeal could be to an appellate court as any other decision of a trial court.

In addition, there is the concern that a neighborhood court modeled after community courts in communist and socialist countries could become the instrument of undesirable social pressure adjudicating not only crime but moral behavior. However, this concern could be largely dispelled by restrictions on jurisdiction, due process rights, and right of appeal.

CHAPTER XVI. THE DECISION TO SENTENCE

The "Decision to Sentence" refers to the choice among remedies, penalties or sanctions available for imposition by a presiding judicial officer upon a convicted defendant.

The choice has a *qualitative dimension* that refers to the kind of sentence that will be imposed, and a *quantitative dimension* which measures how much of the sentencing alternative selected is imposed—whether in days, dollars or some other terms.

The conventional system of case processing vests ultimate broad discretion, along both dimensions, in the sentencing judge. Nevertheless, these sentencing decisions are, as a matter of institutional design, strongly influenced by the positions of other criminal justice system actors.

Alternatives to the "Decision to Sentence" refer to: 1) the devising or providing of qualitatively new and innovative sentencing options, as well as 2) the employment of existing qualitative and quantitative options in cases not conventionally associated with their use, either because of the nature of the offense or the characteristics of the defendant.

This definition embraces new kinds of sentences; the use of old sentencing modes in new situations; and all instances of sentencing, whether innovative or conventional, in which the sentence is assessed by an actor not conventionally charged with that function. The alternatives which are significant because of the sentencing decision-maker's identity include both 1) a complete substitution of decision-makers, and 2) participation by those actors who conventionally influence sentencing but with a radical readjustment in their relative influence.

A. Legislatures

i. Statutory provision for non-custodial sentencing.

a. *Discussion.* Statutory provision for alternatives to custodial sentencing refers to legislative action which has the direct or indirect effect of encourag-

ing sentencing authorities to exercise their discretion in favor of disposition in criminal cases that impose supervised postconviction release rather than prolonged or medium terms of incarceration as the primary tool for continued social control of offenders.

Although probation is widely used as a sentence, it is not used widely enough. Many people are incarcerated after conviction for non-serious offenses; others, incarcerated for offenses such as manslaughter may not be amenable to rehabilitation. Judges with the authority to use probation ignore its use even though it seems the most appropriate sanction.

b. *Examples.* In many states there is a growing trend toward the use of probation as a sentence. California has established the Probation Subsidy Program, in which the state provides payments to counties for each person sentenced to probation who could have been sentenced to a state institution. This, naturally, has resulted in the increased use of probation and is an example of legislation to aid probation. The counties in question use their monies in part to hire new probation officers to reduce caseloads. Probation is thereby upgraded as money is spent where most needed.

Some statutes allow for special probation conditional on the participation of the defendant in a program dispensing special services. In Ohio, for example, pretrial intervention defendants and those ineligible for pretrial intervention may receive special sentencing to outpatient treatment programs. This is, therefore, a form of probation with an added requirement.

The concept of deferred entry of judgment is also a special form or special condition of probation and can be considered postcorrective intervention. A rule in Florida and a statute in Iowa permit the suspension of an entry of conviction in marginally serious cases if certain requirements are met by the defendant under supervision. This aspect is similar to probation. Unlike probation, however, completion of supervised service eliminates or modifies the record of conviction. In this sense, it compares with

some forms of intervention by recognizing the adverse effects of a criminal record.

Another type of special probation is "shock probation" which usually occurs at judicial initiative and involves the split sentence. This plan operates on the theory that defendants will not appreciate a concession without the experience of some custodial incarceration. After serving some period of time in an institution, the defendant comes under the jurisdiction of the probation department rather than parole officer. Conventional statutes generally do not provide for a mix of custody and probation.

c. *Implications*. These sentencing options are not simple choices for or against probation or the extension of probation, but must take into account both the existing probation system and the variety of approaches judges use to sentence to institutions. Since the concern of this alternative is in *encouraging* the use of probation, the problems of the judges who implement it are examined and treated at length in the *Alternatives Report*. Moreover, the sentencing plan must be related to broader decisions about correctional policy. The legislature cannot make decisions about probation without making explicit or implicit decisions affecting pretrial intervention. If additional resources are allocated to probation, the resources available for pretrial intervention are reduced. Probation must be considered in relation both to pretrial programs and to postconviction treatment.

Although the legislature can influence rates of probation, it is difficult to legislate the quality of probation. Aiding probation may not succeed without measures that deal with the external aspect of probation, such as salaries and caseload.

In helping probation, the legislature will be forced to choose among options that may increase rather than diminish interjurisdictional discrepancies in treatment. Since localities usually retain options on implementation, a county may not have to accept the legislature's offer. While equalizing subsidies is desirable, it is not always clear that uniformity either produces equitability or is by definition better than a system whereby local jurisdictions evaluate their own needs.

2. Restitution, victim compensation, and mixed restitution/victim compensation statutes.

a. *Description and examples*. These alternatives are the only ones discussed whose primary emphasis is not on the defendant, but which have potential,

however, for large-scale secondary effects on the sentences given to defendants. If one or more of the following plans are enacted by a legislature a more rational and systematic sentencing policy might be achieved. The alternatives here are, in fact, reintroductions into modern society of concepts that are as old as codified law itself. As the common law became more formalized and the distinctions between civil and criminal solidified, the victim's restitution was replaced by a fine, since the state considered itself to be the wronged party. The victim was left a civil remedy in tort.

The extent to which victims are alienated by the criminal justice system points to a secondary reason for adopting compensation programs: a hope that when the victim has a financial stake in the bringing of an offender to trial, the victim will be more likely to report the crime, cooperate with police, and testify at trial if the offender is apprehended.

1) *Restitution* refers to the payment of damages by the offender to the victim of a crime. This approach avoids the costly and time-consuming process of the victim's suing in the civil court, and gives the court the possibility of reimposing sentence as a stronger sanction than those civil sanctions resulting from non-payment by the offender. Two types of legislative approaches can be used: 1) permissive, allowing the implementation of restitution or one of the options available to the sentencing authority; and 2) mandatory, the forced imposition of restitution in certain crimes. Presently only permissive restitution is in use in states which allow for it at all.

2) *Victim compensation* refers to a state legislative decision to use state funds for the compensation of individuals who suffer injury (or death) as a result of a violent crime. This is distinguished from restitution by the fact that the offender is not involved in the process; in fact, the offender is often not known or apprehended. Thus, rather than a direct payment to the victim by the offender, the state assumes the role of offender, reimbursing the victim for the harm caused. The concept of victim compensation was introduced in Great Britain, New Zealand, and other Commonwealth countries. In the U.S., California was the first to pass victim compensation legislation in 1965, followed by New York in 1966, Hawaii and Massachusetts in 1967, and Maryland in 1968.

Under the New York compensation plan, an independent administrative agency called the Crime Victim Compensation Board reviews all claims for

compensation. Only violent crimes are currently included in New York's compensation scheme (as in all other plans) since it is believed that the inclusion of property crimes would open the door for many fraudulent claims. To pursue a successful claim, the victim must show that there was a crime committed against him (the crime must be one in the penal code), and that the loss was at least \$100 or two week's earnings or support. The offender committing the crime must not be a member of the victim's household (or someone having sexual relations with the victim). The most controversial requirement is that "serious financial hardship" must be shown by the victim. This is a feature of about half the present plans, and is the major reason for denial of claims. In addition, the crime must be reported within 48 hours (not necessarily by the victim, and waived upon a showing of good cause), and a claim must be filed with the board within 90 days (once again, if good cause is shown, the period is extended to one year).

In New York, the normal time for investigating a claim is three months. The purpose of the intensive investigation is not so much to detect fraud as to make sure compensation is not available elsewhere. About half the claims are granted; about 20 percent are filed and pursued by attorneys. If a claim is granted, there are limitations on the amount of damages available to the victim. Medical expenses have no limit, but there is a \$15,000 maximum limit for loss of earnings due to injuries, and there is no recovery (except in Hawaii) for pain and suffering.

The programs are generally not used to a great extent; probably less than 5 percent of eligible victims file claims with the Compensation Board. This is mainly attributed to a lack of knowledge on the part of victims of the program's existence, and possibly the belief that processing a claim would be a waste of time.

3) *Mixed restitution/victim compensation* refers to a mix of the preceding alternatives in one general program; it consists of a fund into which both offenders (with the ability to pay) and the state would contribute to the compensation of victims. This type of program does not have a direct restitution component; rather, the offender contributes to the general fund and victims are compensated by an agency (as in present victim compensation).

The program keeps the concept of rehabilitation in restitution, and the beneficial aspects of victim compensation. There is no need to identify or con-

vict the offender, and there is a review by a separate agency removed from the pressures of the criminal justice system.

This plan is in very limited use in California, where an individual convicted of a violent crime can be ordered to pay restitution of up to \$10,000 into the victim compensation fund, based on his ability to pay. In Maryland, everyone convicted of an offense (excluding minor traffic violations) is assessed a \$5 court cost to be paid into the victim compensation fund.

b. *Implications.* Wide-scale implementations of restitution poses a number of problems: 1) design of a system so that all offenders have the opportunity to make restitution; 2) the need for standards to determine the relationship between types of crimes and amount and reason for restitution; and 3) the relationship of restitution to prosecutorial discretion (plea bargaining, for example). If restitution is available only for those cases that result in conviction, there may be many victims excluded from a restitutive payment whose cases are potentially eligible for trial, but excluded through prosecutorial discretion.

It might be possible to design a system in which additional evidence is submitted to show that the defendant committed an act against a victim that did not result in a formal charge. However, it is obvious that the difficulties involved are many: setting the standards, dividing the money equitably, and protecting defendants' rights.

The mixed system plan has a number of advantages, both social and legal. It eases the transition into victim compensation as social insurance with a lesser degree of reallocation of state resources, since the state would share the financial burden with the offender. This also partially alleviates the problem of the societal decision that crime is a day-to-day reality and a societal responsibility, since the offender's input financially is an admission of the individual's responsibility in the causes of crime. The primary legal issue that is effectively eliminated with this plan is the problem of plea bargaining. If victim compensation is not dependent upon an admission of guilt by the defendant, or upon a conviction, the pressure to include all possible charges in the trial or to not bargain for a guilty plea is removed, since compensation is not a matter of due process.

The plan has some of the same problems that exist with the two separate alternatives. First, it

forces the agency to become a bill collector if restitutionary payments are not met. Second, the state has to decide whether this combination of alternatives would allow the elimination of the restrictions which cause limited use of present programs, such as limits on maximum awards, disqualifying family relationships, exclusion of damages for pain and suffering, and the requirement for showing financial need. There is a possibility that this alternative might be a rational way to expand the use of victim compensation without causing massive reallocation of resources; it also appears to be a feasible way to make victims whole.

B. Prosecutor Offices: Uniform Policies on Sentencing Recommendation

This alternative refers to rules or guidelines promulgated by the administrative or chief district attorney to increase the fairness of approach and the consistency of performance of assistant prosecutors participating in sentencing recommendations. These rules are potentially of two types: 1) criteria for comparability of sentencing, and 2) policy decisions as to what should be recommended.

Some unresolved questions remain about the types of problems to which rules should be addressed, e.g., should credit be given for a guilty plea? Should defendants who take the stand and lie during the course of a trial be penalized? Could a system be devised that gives credit to the defendant for time served in jail? Prosecutors may consider essentially two types of rules: those that relate to all defendants, and those designed to give weight to or evaluate individual characteristics of specific defendants.

C. Trial Courts

1. *Innovative non-statutory sentencing.* Innovative non-statutory sentencing refers to the judicial use of unusual or unique sentences without statutory authority. These alternatives primarily involve special types of probation for defendants.

a. *Restitution.* Non-statutory restitution refers to the judicial imposition of a sentence requiring the defendant to pay the victim of his crime. An issue in the use of restitution without statutory authorization is its legality—whether it is within the trial judge's discretion to impose restitution when there

is no statute. Proponents note that restitution has broad historical roots in the common law. The standard used by judges to decide the amount owed by a defendant is also open to criticism. If the extent of the damages is the standard used, a poor defendant might argue discrimination upon the basis of wealth. Courts are attempting to deal with this problem with the intelligent use of time or installment payments. Another standard is to combine ability to pay with the extent of damage. The Swedish day-fine system incorporates such a standard for traditional money fines. A number of days is assigned to reflect the seriousness of harm. The fine per day varies with the ability to pay of the defendant. Absent statutory guidelines, restitution can be arbitrarily used—an abuse of judicial discretion rather than an enlightened sentencing policy.

b. *Sentencing to public services.* Sentencing to public services involves the judicial imposition of a period of work by the defendant in a private non-profit or public social service agency. This is usually done in cases where the offense is not against a victim, but is a minor crime against the public order.

An example is the *Portland Alternative Community Service Program*. Portland has a project which sentences misdemeanor offenders to volunteer work in various social service agencies. This project is known as the Alternative Community Service Program. After consulting with the defendant and his attorney, the judge decides whether or not to offer the program. An effort is usually made by both parties to decide where the defendant's particular skills could be put to use, although some sentences to agency work are made without specific defendant consent to that agency. Most of the matching (defendant and agency) is done by a program coordinator. When agreement is reached, a specific number of hours of service (between 24 and 80 usually) are also agreed to. This completed, the defendant and the judge sign an agreement of participation. (Although this is a form of contract sentencing, it is more aptly viewed in this matrix submodel because of its very limited scope.)

The Portland program, by its mutuality of agreement provisions, avoids many of the issues that might arise under this sentencing procedure—for example, the question of whether this is involuntary servitude. One problem, however, which occurs in all of these sentences to public services is the public nature of the sentence, which may be reported in the press. When a person is sentenced to work at a

public service agency, the visibility of the sentence is increased, highlighting the fact that the individual is a convicted defendant.

c. *Special Probation to Services.* Special probation to services involves a sentence imposed by the trial court which, as a condition of probation, requires the offender to participate in a particular program of rehabilitation. This occurs most often in cases where the defendant could benefit from alcohol or drug treatment, but is sometimes used when the individual needs educational and vocational training.

An example is the *Miami, Florida, TASC Program*. In the Miami TASC Program (Treatment Alternatives to Street Crime), a defendant may enter the program in many different phases of the criminal system, although the majority of the participants enter as a result of special conditions of probation. The program deals exclusively with drug addicts and operates mainly as a referral service to various types of treatment available in Dade County. In addition, vocational and educational opportunities are available to those defendants who show signs of being able to rehabilitate themselves effectively.

Probably the most difficult issue in these treatment programs is the availability of services in the jurisdiction. Each jurisdiction will have to face the problem of deciding what types of rehabilitative programs deserve priority.

The reporting system for offenders placed on special probation can become a thorn in the side of probation departments. When the probation officer is sharing reporting responsibility with a social service agency, or is allowing the agency to have primary control of reporting, this can become an even greater problem. Thus, before the court makes referrals to specific programs or referral agencies, reporting procedures, interagency monitoring, and lines of communication should be well established.

d. *Unusual sanctions.* Unusual sanctions refer to those sentences handed down by trial courts which generally are considered amusing curiosities rather than the result of judicial logic. Some are symbolic punishments, humiliating punishments, corporal punishments, or other exercises of judicial whimsy. Some show rational judicial thought; others are retributive and probably illegal. As an example of the first type, a physician convicted of attempted manslaughter was sentenced to work for two years in the medical clinic of a New York jail while also being allowed to keep his private practice. In

another example, a white man fired a rifle into an interracial couple's house. He was sentenced to probation with the condition that he attend the weekly breakfast and prayer sessions of a predominantly black church.

These types of sanctions can be useful if they can be imposed as educational tools for particular cases, but their potential for abuse is so strong that they should be well thought out by sentencing authorities before imposition.

2. *Contract sentencing.* Contract sentencing refers to an agreement by the defendant and the trial judge regarding the goals and conditions of the defendant's sentence. (A written document would probably be signed by the judge and defendant to impress upon the defendant the mutuality of the sentencing decision.) This sentencing plan is not in formal operation in any state, but such sentencing patterns are, however, a part of everyday activities in trial courts. Many defendants are able to obtain lighter sanctions as a result of the defendant's suggestion that he participate in some rehabilitative program. This, unfortunately, is most often effective for a defendant with privately retained counsel who is knowledgeable about the availability of programs. A contract sentencing program envisions a broader usage, available to a greater number of defendants.

Criteria should be established to decide availability to defendants. To avoid controversial equal access questions, clear guidelines should be set for those offenders and offenses which will be automatically excluded, those which would be excluded as a result of the sentencing authority's discretion, and those generally included. In addition, to encourage rational usage of the proposal by trial courts, there should be a brief judicial statement for the record about why a defendant under discretionary criteria was excluded from participating.

Service availability must exist for both rich and poor defendants. Contract sentencing would remove the need for adversary sentencing procedures. The role of the prosecutor to make non-binding recommendations to the judge would be curtailed. (This aspect of the program may cause considerable prosecutor resistance.) Another question concerns the nature of the judge's role in this process: is it proper to reduce that role from complete decision-maker to a bargaining party?

The costs of a contract sentencing program would include additional services. To function properly as a bargainer, the judge would need a different type

of presentence report which would deal with specific programs and goals proposed by the defendant and the advisability of his participation in them.

This alternative might involve considerable changes in the present structure of sentencing in the criminal justice system, but the direct benefits of defendant's participation in deciding their own rehabilitation plan (as shown by the successes in contract parole) might outweigh the changes necessary to implement the project. In addition, those who are not allowed to participate (under the guidelines) could probably benefit indirectly by increased judicial knowledge of the rehabilitative possibilities available.

3. *Sentencing boards (Lay participation).* Sentencing boards refer to the participation of selected non-criminal justice persons in the post-adjudication disposition of a criminal case. The board is composed of experts and professionals—such as psychiatrists, doctors, psychologists, and sociologists—or members of the defendant's community, or a combination of the two groups. The board submits its opinion to the trial judge, who retains ultimate legal authority for sentencing unless there is statutory provision granting this function to the board. The judge may be a member of the board and participate in its deliberations. Depending upon statute and custom, the board may render an advisory opinion, (which may be freely disregarded by the judge), or an opinion that is binding upon the outcome of the case. Without statute, the latter would most likely occur where the judge was a participant on the board with an equal or perhaps weighted vote.

The presence of non-criminal justice personnel increases the ability of the criminal justice system to arrive at a disposition that would make a meaningful change in the life of an offender. The inclusion of medical personnel on the Sentencing Board is perhaps the next logical step from the extensive, psychologically oriented presentence report increasingly in use. The inclusion of members of the defendant's community on the Sentencing Board gives the judge and other sentencing decision-makers an indication of how the community from which the defendant came—and in which usually he committed the crime—feels about his behavior.

While the involvement of community members in a Sentencing Board is a less radical alternative than the establishment of a "court" using lay persons as

"prosecutors" and "judges", it achieves many of the same results.

4. *Sentencing panels (Multi-judge).* Sentencing panels represent a shift in the sentencing function from the single judge who presided at the trial to a multi-judge panel. This panel, usually consisting of three members, is concerned with making the initial decision on the final disposition of the case and is not a tool for judicial review of trial judge sentences. The Sentencing Panel differs from the Sentencing Board both in composition and authority. Because it is composed of judges rather than lay advisors, it has the same ultimate authority to designate sanctions as does the single trial judge, and its decisions are not subject to his veto (although this right may be accorded to him as a courtesy). Almost without exception, the trial judge is a member of the panel, but his membership is not a prerequisite for vesting legal authority to act in the panel. The Sentencing Panel attempts to deal with the problem of unfair sentencing practices before the need to review has arisen.

Sentencing panels were first tried in the Federal District Court for the Eastern District of Michigan in 1966, and although well supported as a significant method of reducing disparity in sentencing, they are virtually nonexistent in practice.

The procedure for a Sentencing Panel is relatively simple. Each participating member is given a copy of the defendant's presentence report and any other pertinent documents. After studying the documents, each judge makes a notation on an attached worksheet of an appropriate penalty. During the panel meetings, each judge discusses his suggestion and explains why he believes it to be desirable. At the end of the meeting, each enters another opinion on the worksheet, which may or may not be the same as the one made prior to the meeting. Frequently, a consensus is reached. When it is not, the ultimate responsibility for sentence continues to rest with the trial judge.

In addition to reducing disparity, sentencing panels are proposed as a method of internal "policing" of the judicial community. An additional benefit is the increased dissemination of material and information about community rehabilitative facilities.

The major argument against sentencing panels is that they entail an additional expenditure of manpower and money, by an arm of the criminal justice

system whose major problem is a backlog of cases brought on by a lack of these resources. As with any allocation of a limited commodity, priorities must be determined. It requires consideration of how widespread and serious the problem of sentence disparity is and whether the goal of uniformity justifies the scarce judicial time that is required.

D. Defense Bar: Organized Defense Planning For Sentence

1. *Discussion.* Organized defense planning for sentence refers to a systematic program or procedure by which defense attorneys prepare their clients for the eventuality of conviction by planning or even instituting rehabilitative measures. Typically, this planning operates through a special unit within a public defender's office.

There may be two components of such a program. The first involves the preparation of presentence reports to the judge detailing the defendant's background and history, including a recommendation for a noncustodial sentence and usually also including a specification of the need for services. The second is a voluntary service rehabilitation program.

An assumption of responsibility for the preparation of a *presentence report* involves the defense in a function conventionally performed by the probation department. A presentation of an objective summary of critical facts concerning the convicted defendant's personal history and criminal career is made to the court. This summary may, under certain conditions, be accompanied by a recommendation to the court of an appropriate sentence or range of sentences. Such a report may include information on the defendant's performance in any pretrial rehabilitation program to which he has been referred, but need not do so.

The second approach of a *voluntary service rehabilitation program* is a method of insuring that the defendant receives services concurrent with the processing of his case while awaiting final disposition, even if this requires a special adjournment so that release may be given to receive such services. The defendant's performance in these plans is usually included in presentence reports and is influential upon the final disposition particularly when the defendant has performed favorably.

2. Examples

a. *The New York City Legal Aid Society Di-*

version Project. The objectives of the Criminal Defense Division's Diversion Project of the Legal Aid Society of New York are 1) to have a positive impact on sentencing for those defendants who plan to plead guilty or to go to trial while awaiting final disposition; and 2) to rehabilitate or aid the defendant. Its target population includes defendants of at least 16 years of age, excluding those with minor charges and violations whose counsel is supplied by Legal Aid.

The screening process begins with defense counsel's decision to refer the defendant, based on whether there is a belief that the client will receive a jail term if convicted without intervention of the program. This decision is made directly after arraignment. If counsel decides the client probably will receive a jail term, a social worker and a case aide conduct an hour-long interview with the defendant (in or out of jail) and collect information on background, employment history, and family. Immediate needs and motivation are considered to determine if the project can work with the defendant. The decision is not reviewed unless there are special problems.

An adjournment is requested when necessary (usually 50 percent of the time) so that appropriate agencies in the community can interview the defendant and determine if he should be referred to them prior to the resumption of proceedings. The program requests permission to have him paroled to receive services. If the defendant is out on bail, the choice of programs is greater, and the social worker may visit him in his family environment.

The defendant continues through the criminal justice process and if, after conviction, he has demonstrated progress in the interim, a presentence report of the positive effect is prepared for the judge. If there are negative results, no report is filed. The presentence report itself usually consists of a psychological workup; employment, family and school history; and present environmental conditions. The report typically recommends a sentence to probation and the type of service needed.

If the defendant does not appear for services, or if the staff cannot work with him, he may be terminated from the project. When the report of the probation department conflicts or differs with the Legal Aid profile, a conference is held. Legal Aid usually elicits and collects more information.

b. *Offender Rehabilitation Division of the Public Defender Service, Washington, D.C.* The Offender

Rehabilitation Service (ORS) began operations as a project funded through Georgetown University Law School in 1967, and became a unit of the Public Defender Service in fiscal 1968. It has three principal functions: 1) to provide offenders with interim social services (in cooperation with community agencies) from the point of arraignment to sentencing; 2) to provide the defense attorney with social background data and activities of the offender to aid in the preparation of sentencing recommendations to the judge; and 3) to aid the defense attorney in pretrial negotiations with prosecutors.

The use of ORS is restricted to public defender clients or those with court-appointed counsel (20 percent of cases) who may receive a sentence of six months or more in prison.

A public defender attorney decides to refer a case to ORS, usually at the time of arraignment, if he believes that the individual definitely will be sentenced to jail if service is not provided, and that the project could assist his client and increase the possibility of a probationary sentence.

The defendant is then assigned to a caseworker who develops a plan of services for him, based on individual need. The caseworker maintains a record of the defendant's character and subsequent behavior from this point forward. (The probation office prepares other historical workup material for use by the court, independent of the project.) Each caseworker handles approximately 35 cases and may continue to assist the client until six months after disposition. This time period may decrease, however, as the probation office increases its level of service and assumes work that the ORS would normally do. (In the future, the project hopes to obtain caseworkers with more direct experience in the criminal justice system who may immediately handle the problems of serious offenders without going through a long period of trial and error to gain that experience.)

The attorneys in the public defender's office perform a screening function. They do not refer cases that will probably be dismissed; cases that will definitely result in a prison sentence, regardless of the project's assistance; or cases that will result in probation without service. ORS does not accept cases diverted (pretrial) out of the criminal justice system. No formal criteria exist for selecting defendants except that they are preferably not in jail, are accessible, and are not in danger of having their parole revoked on pending charges. Except in cases

of bond motions, the project requires at least 30 days to develop adequate services for the individual.

Most ORS cases (80 percent) are felonies, since this type of offender tends to have serious problems requiring social services, and is likely to receive a prison sentence. Approximately 5 percent of all cases are referred to ORS by a judge. In some instances, the project requests permission to intervene with services in cases not handled by public defender attorneys. Total cases handled equal 27 percent of the total caseload eligible for public defender service, processed through the Superior and District Courts each year. Of the 6,000 cases handled annually by the Public Defender Service, 500 are adult cases, 300 are juvenile cases, and 450 cases exclusively involve requests for job training.

The ORS has a working relationship with most social services agencies in the District of Columbia and refers clients to those agencies having the most adequate resources to meet needs of the client. The project itself does not provide any services to clients except routine counseling and psychiatric referrals. Generally, cooperation with social service agencies is good, except for minor disagreements over eligibility criteria; some organizations reject ORS clients because they do not meet agency criteria. Services are offered at the pretrial stage and at probation.

c. *Presentence Counseling Project of Seattle-King County, Washington.* The Presentence Counseling Project is a public defender program that assists the attorneys of indigent clients by preparing presentence reports on convicted felons pursuant to local court rules. The rules require that these reports be submitted by "the Prosecutor, the Defense, and the Probation Department in every felony case which results in a plea or finding of guilt."

Upon determination of indigency, the Public Defender's Office or the attorney handling the case may request help from the project director, who then assigns the case to a counselor. The counselor must then develop an amicable relationship with the client, ascertain his problems and interests, ascertain applicable community resources, prepare a recommended rehabilitative program, review the program with the client for approval, and submit recommendations to the defense attorney. The working relationship of the client, counselor and attorney is a close one which enjoys the privilege of confidentiality. The counselor is regarded as part of the defense.

d. *Alternatives Program of the Metropolitan Public Defender, Portland, Oregon.* The Alternatives Program of the Metropolitan Public Defender serves those individuals whose assigned public defender refers them for services and a presentence alternatives report. There are no restrictions with regard to age, sex, or prior record on the clientele. The stated goals of the project are: 1) to acquaint defendants with resources within the community and to build the defendants' confidence in their ability to seek and to use those resources in the future; and 2) to influence the sentencing for those defendants who are convicted so that commitments to penal institutions and to mental hospitals are reduced. The rationale for this is that people remaining in the community setting as opposed to institutional setting, have a much better chance of avoiding recidivism.

The alternatives program does not have a formal screening and intake process; its client population is simply determined by all those people who are served by the public defender. Some individuals screen themselves out of the service in the sense that they refuse to participate in any service development activity. All other people, however, are served by the alternatives staff, even if the defendant openly professes that his only interest in obtaining services is to make a good impression on the judge and thereby avoid incarceration.

A small minority of cases are terminated early under the Civil Compromise provisions of Oregon statutes. In these instances, the victim agrees to drop charges provided the defendant either makes restitution, participates in a specified program of services, or in some other way satisfies the demands of the victim. For the remainder of the program's clients, a plan is developed for referral to resources existing in the community. The plan is presented at the point of sentencing to encourage a sentence of probation and later to parole or mental institution personnel to obtain early release of former clients. The program can obtain as much as a 24-hour release for defendants during the pretrial period if that is necessary to interview for jobs, to take tests, or in some other way to develop an alternative plan which is presented at sentencing. The report with the referral plan for the individual is given to the judge 24 hours in advance of the sentencing hearing. The recommendations in the plan are worked up between the alternatives program staff and the defendant, and include services that the alternative staff member believes the defendant will respond to. These serv-

ices include drug, alcohol, mental health, family counseling and referrals, both inpatient and outpatient education services, pure academic training, vocational training, some employment, and job development.

When an individual's alternative plan is accepted at the time of sentencing, he is actually on probation with conditions. Once the individual goes on the alternative plan, there is no formal feedback from probation to the alternative project. The only way the staff can find out that someone did not successfully complete or go through the program and remain out on probation is if a particular public defender is notified by the judge that his client has violated his conditions of probation and is subject to having probation revoked.

In some selected cases, the project takes on the function of the probation department in the preparation of presentence reports; it must present negative information if the information-gathering suggests, for example, that the defendant may not do well with a sentence to probation. As part of its regular function, the project attempts to have the client placed in a service program; the alternatives project acts as liaison with the service agency.

3. *Implications.* The appropriateness of this alternative depends on how well it maintains the adversary character of the defense role where the defense strategy entails the assertion of complete innocence in fact.

The defense may have to resolve some serious ethical questions, depending on the nature of the planning process for sentence. If presentence reports are prepared by defense only for defendants participating in a voluntary service project, the defendant may have the circumstances explained to him. He may make a pragmatic choice about whether to participate once he understands the risks of participation; success results in a lighter sentence or sentence to probation, while failure may mean a harsher sentence than if the defendant never entered the program.

There is a more serious systemic ethical problem if the defense presents favorable recommendations on everyone, regardless of participation in a program. The defendant takes a serious risk in failing in a program, since probation may discover the failure even if it never appears in the defense report. More important, if only favorable reports are given, a judge may make a negative assumption by implication if no reports are made.

The value of linking the services of all agencies providing services to the defendant both pretrial, posttrial, and postconviction should also be weighed. In many cases, services provided by or through the bail agency, without coordination, are duplicated at later stages, or cause unnecessary conflict of purpose, transition problems, and discontinuities in the form and level of services received. The defendant will be helped best if services can be provided all the way through the processing of a case by one agency with the cooperation of the bail agency and the probation departments.

Given the ethical problems arising from their advocacy role, thought must also be given as to whether the public defender agency should provide presentence reports. Another question that should be asked is whether this alternative may conflict with pretrial intervention. The two methods may compete for the same defendants.

E. Public Non-criminal Justice and Private Agencies

1. Voluntary service rehabilitation program.

a. *Discussion.* Voluntary service rehabilitation programs involve personal or employment counseling, or other services operated by a private, non-criminal justice system agency in which participation by the defendant is voluntary and not supervised by the court. The client joins the program while on pretrial release; at the time of sentencing, evidence of the defendant's record in the program is presented to the court to be considered along with other pertinent data (the presentence report and any mitigating circumstances of the case) by the judge in reaching the ultimate sentencing decision.

Two major factors separate this process from the intervention models discussed in other matrix cells. First, the intake decision is not made by a member of the criminal justice system, and second, there is no guaranteed outcome or effect on case disposition that results from successful performance in the program.

There is still a significant difference in the final outcome to the defendant when the impact of program participation comes at the sentencing phase, rather than prior to a final adjudication of the case. His record continues to reflect a conviction. Nevertheless, program participation may provide a very real benefit by including those defendants who would be screened out of a pretrial program under the

paper criteria and by offering an alternative to a sentence of incarceration.

b. *Example: Volunteer Opportunities, Inc.* Volunteer Opportunities, Inc., under the supervision of the Vera Institute, began in New York City in 1969, using as clients persons qualifying and recommended for supervised release under the criteria of the ROR pretrial release program. It accepted both preadjudication candidates and those placed on supervised probation. Defense attorneys usually requested an adjournment of one to six months before sentence was passed. During that time, the defendant would participate (or continue, if he had joined the program earlier) in the program of the VOI referral agency. At the end of the adjournment period, VOI made a recommendation to the court of 1) favorable termination, 2) further participation in the program, or 3) unfavorable termination. The recommendation was considered by the judge in rendering final sentence.

A similar model program could operate without the need for adjournment; the client's participation would begin at pretrial release and a recommendation would be made to the court at sentencing.

c. *Implications.* Since the major actor is not one of the traditional decision-makers, neither the agency making the decision nor the defendant has any power in the criminal justice system, and the outcome of an agreement between them is not binding upon a court. A client at entry can be given no assurances that his good performance will be reflected in the outcome of his case. Conversely, he takes the risk that poor performance reported to the court will have an adverse effect upon the final sentence. This risk should be explained clearly to the defendant before he consents to participate in the program. It might be possible in those programs where no adjournment is requested that the client be given a choice upon termination whether or not he wants to have a report of his participation submitted to the court at all.

In general, many of the same considerations of intelligent consent to entry, and protection of records, made by the agency that applied to entry in the prosecutor- and court-sponsored programs would also apply to the voluntary programs.

2. Presentence reports.

a. *Discussion.* The presentence reports referred to in this alternative are those developed by staff members of a criminal justice-oriented private agency or foundation—not a part of the formal

system—to provide an expanded program to cover defendants who are not being served by the present method of doing presentence workups, or to evolve a method of interviewing clients, tabulating data, and reporting findings to the judge that will expedite the use of such reports in the final decision to sentence. This agency's staff can function in addition to the regular probation department presentence report program, interviewing the same defendants but attempting to provide the court with additional information, or it can confine itself to defendants who have been excluded from probation department consideration. In some jurisdictions, the agency may provide the only presentence report available to the court.

b. *Example. Bronx Community Sentencing Project.* The Bronx Sentencing Project, which is no longer in existence, is an example of a non-criminal justice system, privately funded, presentence report program. It operated under the sponsorship of the Vera Institute of Justice. Its goal was to produce a short form presentence report on any defendant convicted of a misdemeanor (other than gambling or prostitution) who had not already been identified as a drug addict.

The short form presentence report designed by the project was developed to answer the dual need of supplying the trial judge with information found useful in sentencing and to do so in a *relatively short period of time*. In misdemeanor cases, sentence was frequently passed within minutes of a guilty plea or verdict. The project depended upon the defense counsel to request an adjournment for the preparation of a presentence report.

Staff members attempted to conduct the 30-minute interview on the same day as conviction and to verify the data received from the defendant on personal background, relationships within the community, and prior record as soon as possible. The verified data was codified by "scoring" the defendant's responses against a numerically weighed list of criteria developed by the project in consultation with trial judges. This score sheet was sent to the judge and to the defendant's attorney.

c. *Implications.* The major problem in the use of a non-criminal justice system agency to provide an expanded coverage of presentence reports is the question of whether the agency itself should be "institutionalized"—e.g., made a permanent part of the court's structure or perhaps put under contract to the probation department—or whether the agency

should be phased out after an experimental period and the functions taken over by the criminal justice system agency traditionally responsible. Any time that an outside group enters an existing structure as "innovators," some friction is bound to develop. If the agency adopts the attitude that it will enlighten or correct deficiencies in the probation department, it may undermine its own usefulness.

In light of the caseload carried by most probation departments merely trying to satisfy the need for presentence information in serious felony cases, the development of a non-criminal justice system agency on a permanent basis with the time and resources to provide data for more enlightened individualized sentences in the misdemeanor courts may be a desirable alternative.

F. Citizens/Volunteers: Community Presentence Investigation and Recommendation

The presentence reports referred to in this alternative are prepared by volunteers who usually are coordinated and supervised by the courts or the probation department. This alternative provides a manpower expedient in that lay volunteers supplement, augment, or even supplant the court staff previously assigned to the task. Generally, the implementation of a program of this type does not affect the traditional format of the presentence report, but rather the depth of evaluation and output of the office.

G. Probation and Parole Officers: Presentence Investigation and Sentence Investigation

A presentence investigation conducted by the probation department provides for increased intensity of the investigation to produce a sentence more tailored to the individual defendant. A long-form report—containing results of personality, aptitude and psychological tests, past record, and a write-up of private interviews between a probation officer and the defendant—can influence the decision of the trial judge to sentence in accord with the department's recommendations.

Providing such a detailed report on each defendant would represent an increase in the workload of the probation department. Whether this increased allocation of manpower and monetary resources

would be justified is still only a matter of speculation. However, there are persuasive factors in favor of widespread use of intensive reports: 1) the support of such reports by persons with day-to-day experience in probation work; and 2) the increasing belief that individual treatment and personal attention are more conducive to responsible growth and development than is the expectation of standardized behavior requirements.

H. Appellate Courts: Appellate Review of Sentencing Discretion

1. *Discussion.* Appellate review of sentencing decisions involves the appellate review powers of trial court decisions in the imposition of a sentence on an offender. Because of this increased usage, the concept is viewed as an alternative which may have an effect on sentencing policies of trial judges. If sentences have a clear basis for review, the likely result is more uniform and rational sentences imposed on offenders. Historically, exercise of this function has involved an extension of review powers, discussed in detail in the *Alternatives Report*.

2. *Examples.* The current standard of review—abuse of discretion—has been involved in cases where the sentences reflected no consideration of the defendant involved. This has occurred often in the Sixth Circuit in selective service cases. In three cases, *U.S. v. McKinney*, 427 F.2d 449 (1970), *U.S. v. Daniels*, 429 F.2d 1273 (1970), and *U.S. v. Griffin*, 434 F.2d 740 (1970), the court of appeals reviewed cases where the defendants were sentenced to the maximum terms in prison (five years) upon conviction. The Court of Appeals held that this inflexible policy of sentencing these defendants to maximum prison terms was not based on any rational standard for defendant conduct, but rather a decision based on the trial courts' feelings about this type of violation. Although the impositions were legal, they nonetheless were abuses of discretion, since defendants' presentence reports were obviously ignored.

The *Daniels* case is the most significant in its showing of abuse of discretion. Daniels was a Jehovah's Witness and a conscientious objector who refused to obey an order of his draft board to report to alternative service. His religious beliefs forbade him from doing so, but he would obey an order of

a judicial body. When Daniels was sentenced to the maximum, the sentence was reversed and remanded by the court of appeals. On remand, the district court reimposed the maximum on the basis of a policy decision to sentence all violators of this law to the maximum. On reappeal, the Sixth Circuit imposed its own sentence of probation—the sentence it had originally recommended.

3. *Implications.* This current approach has had considerable drawbacks, since to consider an appeal on the basis of abuse of discretion, there must be evidence of it. Thus a trial judge who wishes to have a sentencing policy based solely on his view of the offense need not state his reasons for sentencing (since he is not required to do so) on the record. This may eventually be discovered by inference on appeal, but considerable damage to defendants can be done before this occurs.

Many statutory plans have been enacted for appellate review of sentencing decisions, but the proposed Federal standard is one of the best examples. It allows for appellate review of all felony convictions which result in imprisonment or death. The standard for review would be that of "excessive sentence" and the court of appeals would have the power either to remand or impose its own sentence. In addition, the trial court judge would be required to make a statement of reasons for the imposition of this particular penalty. The review would be by certification.

This approach solves many problems currently associated with appellate review of sentencing. The requirement of a statement on the record by the trial court gives the court of appeals a clear basis for reviewing the lower court's decision. By giving a standard of excessive sentence to the court of appeals, Congress would make it clear that individualized sentences must be imposed. The powers of the appellate court to fix its own sentence resolves the dilemma in which the Sixth Circuit found itself in *Daniels*, by clearly allowing for this type of power to be exercised.

Increased review of sentencing decisions probably will proceed slowly as a result of the policy, manpower, and financial considerations which would have to be overcome to grant review in most sentencing decisions. It is likely, however, that the progress envisioned in the Federal proposal will occur either by statute or court rule in the near future.

PART 4
RESOURCE MATERIAL

APPENDIX A. EXAMPLES OF TEXT OF ALTERNATIVES ESTABLISHED THROUGH LEGISLATION AND/OR COURT RULE

A substantial body of material has been developed which bears upon aspects of alternative planning and programs. A number of states has enacted statutes and rules establishing alternative programs. Relevant national standards have been developed and considerable literature has been published, all of which can cast significant light upon the philosophical as well as practical dimensions of alternative efforts. Appendix A contains selections from these various sources which the reader may find of interest and help.

1. Oregon Revised Statutes

a. §§ 167.202 and 167.207: Marijuana Decriminalization

167.202 Definitions for ORS 167.202 to 167.252. As used in ORS 167.202 to 167.252, unless the context requires otherwise:

- (1) "Apothecary," "cocoa leaves," "dispense," "federal narcotic laws," "manufacturer," "marijuana," "narcotic drugs," "official written order," "opium" and "wholesaler" have the meaning provided for these terms in ORS 474.010.
- (2) "Dangerous drugs" means dangerous drugs as defined in ORS 475.010.
- (3) "Furnishes" means to sell, barter, exchange, give or dispose to another, or to offer or agree to do the same, and includes each such transaction made by any person, whether as principal, proprietor, agent, servant or employee.
- (4) "Unlawfully" means in violation of any provision of ORS chapter 474 or 475.

167.207 Criminal activity in drugs

- (1) A person commits the offense of criminal activity in drugs if he knowingly and unlawfully manufactures, cultivates, transports, possesses,

furnishes, prescribes, administers, dispenses or compounds a narcotic or dangerous drug.

(2) Except as provided in subsections (3) and (4) of this section, criminal activity in drugs is a Class B felony, or the court may, under the criteria set forth in ORS 161.705, enter judgment for a Class A misdemeanor and impose sentence accordingly.

(3) Notwithstanding subsection (2) of this section, if the conviction is for possession of less than one avoirdupois ounce of marijuana it is a violation punishable by a fine of not more than \$100.

(4) Notwithstanding subsection (2) of this section, if the defendant is 18 years of age or over and the conviction is for furnishing a narcotic or dangerous drug to a person under 18 years of age and who is at least three years younger than the defendant, criminal activity in drugs is a Class A felony.

b. Analysis of the Oregon Statutes

The following analysis is excerpted from "Marijuana: The Legal Question," *Consumer Reports*, April 1975. Copyright 1975 by Consumers Union of United States, Inc., Mount Vernon, NY 10550. Reprinted by permission from *Consumer Reports*:

But wouldn't marijuana be even more widely smoked in the absence of arrests and criminal penalties? Evidence on this issue comes from Oregon, which reformed its marijuana laws in October 1973. Possession of small amounts of marijuana was decriminalized; it became a civil "violation" rather than a crime. Those found in possession of an ounce or less are subjected to a civil fine not to exceed \$100. In lieu of being arrested they are given a traffic ticket, thus avoiding both an arrest record and a criminal record. They do not sit in jail awaiting bail or trial.

One year later, in October 1974, the results of decriminalization were checked through a series of interviews with 802 respondents—a cross-section of Oregon residents aged 18 and over. The study was commissioned by the Drug Abuse Council, a private agency funded by private foundations. Despite a year without criminal penalties, only 72 respondents (9 percent) reported being current marijuana smokers—and almost all of them reported that they had begun smoking marijuana before decriminalization. Indeed, only four respondents out of the 802 (0.5 percent) reported that they had started smoking following decriminalization. This is certainly not the "marijuana explosion" predicted by opponents of decriminalization.

The 91 percent of Oregon respondents who were not smoking marijuana a year after decriminalization reported various reasons for refraining: not interested, 53 percent; health danger, 23 percent; risk of prosecution, 4 percent; marijuana not available, 2 percent; other reasons, 9 percent; undecided, 9 percent.

Most nonusers of marijuana, in short, had enough persuasive reasons for not using it without the need to buttress their decisions with fear of criminal penalties.

But while Oregon's decriminalization of marijuana had little apparent effect on the number of users, it did have other readily visible effects, described in detail by J. Pat Horton, district attorney for Oregon's Lane County, which includes the city of Eugene.

"Decriminalization has, in fact, prioritized police work into areas of violent crime and crime against property," District Attorney Horton told a conference of the National Organization for the Reform of Marijuana Laws. "When possession of small amounts of marijuana was a crime, we found that police officers allocated a disproportionate amount of their time to the apprehension of those individuals. Currently, law enforcement officers spend more time in the area of violent crime and, thus, better serve the community . . . There is a growing recognition on behalf of the citizens in the state of Oregon that police are truly serving the interests of society rather than attempting to enforce unenforceable laws."

The relationship between young people and the police, Horton continued, "has improved substantially . . . The community leaders of

tomorrow no longer need fear the threat of criminal convictions on their record for engaging in behavior that is socially acceptable in many quarters."

Further, "The impact on the criminal courts has been significant, for [decriminalization] has removed approximately one-third of the total number of cases awaiting trial from the docket, thus freeing valuable space in our courtrooms to adjudicate matters which have a serious concern to the community. By the same token, the jail population now is made up of serious felons rather than young people accused of possession of small amounts of marijuana who usually had no other criminal history."

Legislators in other states still fear that if they vote for marijuana decriminalization, they may be defeated at the next election. That was not Oregon's experience. "Acceptance of the new legislation in Oregon has been overwhelmingly positive," Horton reported, "especially among middle-aged people who have children in grade, junior high, or the high school level. An attempt by a small number of people in the state to restore criminal penalties for possession was overwhelmingly defeated. Virtually every candidate for office and every incumbent in the state of Oregon, when questioned on the new decriminalization law, has indicated publicly that he favored such legislation and would vote legislatively to continue it."

"By all measurable standards, decriminalization was a comfortable transition, signifying fair play to the individual and widespread acceptance by our electorate."

CU's research for "Licit and Illicit Drugs" impelled us to be among the first national organizations to recommend marijuana decriminalization—that is, the removal of all criminal penalties for marijuana possession and personal use. (Our full position is spelled out in the book.) Other organizations that have come to the same conclusion include: American Bar Association; American Public Health Association; Governing Board of the American Medical Association; National Advisory Commission on Criminal Justice Standards and Goals; National Commission on Marijuana and Drug Abuse (The Shafer Commission); National Conference of Commissioners on Uniform State Laws; National Council of Churches; National Education Association.

Oregon's experience with the practical results of decriminalization buttresses our decision to remain on that list.

2. California Statutes

a. § 3200: Narcotic Addict Discharge Act

3200 Authority.

If at any time the Director of Corrections is of the opinion that a person committed pursuant to Article 3 of this chapter while in outpatient status has abstained from the use of narcotics for at least two consecutive years and has otherwise complied with the conditions of his release, or that an outpatient from the California Rehabilitation Center participating in a methadone program pursuant to Section 3154 has abstained from the use of narcotics for at least three consecutive years while on such program and has otherwise complied with the conditions of his release, he shall recommend to the Narcotic Addict Evaluation Authority that such person be discharged from the program. If the authority concurs in the opinion of the director, it shall discharge such person from the program.

If at any time the director is of the opinion that a person committed pursuant to Article 2 of this chapter while in outpatient status has abstained from the use of narcotics for at least two consecutive years and has otherwise complied with the conditions of his release, or that an outpatient from the California Rehabilitation Center participating in a methadone program pursuant to Section 3154 has abstained from the use of narcotics for at least three consecutive years while on such program and has otherwise complied with the conditions of its release, he shall so advise the Narcotic Addict Evaluation Authority. If the authority concurs in the opinion of the director it may file with the superior court of the county in which the person was committed a certificate alleging such facts and recommending to the court the discharge of the person from the program. The authority shall serve a copy of such certificate upon the district attorney of the county. Upon the filing of such certificate, the court shall discharge the person from the program and may dismiss the criminal charges of which such person was convicted. Where such person was certified to the superior court from a municipal or justice court, the person shall be returned to such court, which may dismiss the original charges. In any case where

the criminal charges are not dismissed and the person is sentenced thereon, time served while under commitment pursuant to Article 2 of this chapter shall be credited on such sentence. Such dismissal shall have the same force and effect as a dismissal under Section 1203.4 of the Penal Code, except the conviction is a prior conviction for purposes of Division 10 of the Health and Safety Code.

b. §§ 5900-5906: Registry of Narcotic and Drug Abuse Programs

5900 Coordinator.

As used in this part, "coordinator" means the county drug program coordinator designated pursuant to Section 5802.

5901 Narcotic and drug abuse program.

As used in this part, "Narcotic and drug abuse program" means any program which provides any service of care, treatment, rehabilitation, counseling, vocational training, self-improvement classes or courses, methadone maintenance treatment, methadone detoxification treatment, or other medication services for detoxification and treatment, and any other services which are provided either public or private, whether free of charge or for compensation, which are intended in any way to alleviate the problems of narcotic addiction or habituation or drug abuse addiction or habituation or any problems in whole or in part related to the problem of narcotics addiction or drug abuse, or any combination of such problems.

5901.5 Inclusion: facilities.

A narcotic and drug abuse program includes, but is not limited to:

(a) Halfway houses, which are those places which provide a residential setting and which provide such services as detoxification, counseling care, treatment, and rehabilitation in a live-in facility.

(b) Drop-in centers, which are any places which are established for the purpose of providing counseling, advice, or a social setting for one or more persons who are attempting to understand, alleviate or cope with their problems of narcotic addiction or drug abuse.

(c) Crisis lines, which are those services which provide a telephone answering service which provides, in whole or in part, a crisis intervention, counseling or referral or a source of general narcotics or drug abuse information.

(d) Free clinics, which are those places which are established for the purpose, either in whole or in part, of providing any medical or dental care or any social services or any treatment or referral to such services for those persons recognized as having a problem of narcotics addiction or drug abuse.

(e) Detoxification centers, which are those places established for the purpose of detoxification from narcotics or dangerous drugs, regardless of whether or not narcotics, restricted dangerous drugs, or other medications are administered in said detoxification and regardless of whether detoxification takes place in a live-in facility or on an outpatient basis.

(f) Methadone programs, which are any programs, whether inpatient or outpatient, which offer methadone maintenance, detoxification or other services in conjunction with such methadone maintenance or detoxification, and those programs which provide supportive services to such methadone maintenance or detoxification programs.

(g) Nonspecific drug programs, which are those programs not specifically mentioned above but which provide or offer to provide, in whole or in part, for counseling, therapy, referral, advice, care, treatment or rehabilitation as a service to those persons suffering from narcotics addiction, drug habituation or other narcotics and drug abuse related problems which are either physiological or psychological in nature.

5902 Registry; establishment; purpose.

The coordinator of each county shall establish and maintain a registry of all narcotics and drug abuse programs within the county in order to promote a coordination of effort in the county.

5903 Registration of programs; time.

Each narcotic and drug abuse program in a county shall register with the coordinator of the county not later than 90 days after the effective date of this section and shall register thereafter on or before July 1, 1973, and on or before July 1 of each year thereafter. Any narcotics and drug abuse program established after July 1, 1973, or after July 1 of any year thereafter shall register within 30 days after being established.

5904 Registration; required information.

Registration under this division shall include registration of all of the following information concerning the particular narcotic or drug abuse program registering:

(a) A description of the services, programs, or activities provided by the narcotic or drug abuse program and the types of patients served.

(b) The address of each facility at which the services, programs or activities are furnished.

(c) The names and addresses of the persons or agencies responsible for the direction and operation of the narcotic and drug abuse program.

5905 Disclaimer of approval or endorsement of programs.

Registration under this part does not constitute the approval or endorsement of the narcotic or drug abuse problem by any state or county officer, employee or agency.

5906 Exemptions from registration; education and law enforcement agencies.

For the purpose of this division, registration shall not be required for those programs that provide drug abuse education in public or private schools as a matter of and in conjunction with a general education of students. This division does not require registration of law enforcement agencies which provide drug abuse education in the course of their normal performance of duties. Nothing in this division shall prohibit registration of such programs of education or law enforcement if such law enforcement and education agencies so desire.

c. § 3051: Post-Conviction/Pre-Sentence Diversion for Narcotic Addicts

3051 (as amended)

Upon conviction of a defendant for any crime in any superior court, or following revocation or probation previously granted, whether or not sentence has been imposed, if it appears to the judge that the defendant may be addicted or by reason of repeated use of narcotics may be in imminent danger of becoming addicted to narcotics he shall adjourn the proceedings or suspend the imposition or execution of the sentence and order the district attorney to file a petition for commitment of the defendant to the Director of Corrections for confinement in the narcotic detention, treatment and rehabilitation facility or order pursuant to Section 3052.5 unless, in the opinion of the judge, the defendant's record and probation report indicate such a pattern of criminality that he does not constitute a fit subject for commitment under this section.

Upon the filing of such a petition, the court shall order the defendant to be examined by two physi-

cians: provided, that the examination may be waived by a defendant if the defendant has been examined in accordance with Section 1203.03 of the Penal Code and such examination encompassed whether defendant is addicted or is in imminent danger of addiction, and if the defendant is represented by counsel and competent to understand the effect of such waiver. At least one day before the time of the examination as fixed by the court order, a copy of the petition and order for examination shall be personally delivered to the defendant. A written report of the examination by the physicians shall be delivered to the court, and if the report is to the effect that the person is not addicted nor in imminent danger of addiction, it shall so certify and return the defendant to the department of the superior court which directed the filing of the petition for such further proceedings on the criminal charges as the judge of such department deems warranted. If the report is to the effect that the defendant is addicted or is by reason of the repeated use of narcotics in imminent danger of addiction, further proceedings shall be conducted in compliance with Sections 3104, 3105, 3106, and 3107.

If, after a hearing, the judge finds that the defendant is a narcotic addict, or is by reason of the repeated use of narcotics in imminent danger of becoming addicted to narcotics, he shall make an order pursuant to Section 3052.5 or an order committing such person to the custody of the Director of Corrections for confinement in the facility until such time as he is discharged pursuant to Article 5 (commencing with Section 3200) of this chapter, except as this chapter permits earlier discharge. In any case to which Section 3052 applies, the judge may request the district attorney to investigate the facts relevant to the advisability of commitment pursuant to this Section. In unusual cases, wherein the interest of justice would best be served the judge may, with the concurrence of the district attorney and defendant order commitment notwithstanding Section 3052. If, upon the hearing, the judge shall find that the defendant is not a narcotic addict and is not in imminent danger of becoming addicted to narcotics, he shall so certify and return the defendant to the department of the superior court which directed the filing of the petition for such further proceedings on the criminal charges as the judge of such department deems warranted.

If a person committed pursuant to this section is dissatisfied with the order of commitment, he may within 10 days after the making of such order

file a written demand for a jury trial in compliance with Section 3108.

3. Iowa Statutes

a. §§ 217.24–217.29: Community-Based Correctional Programs and Services

217.24 Definition.

As used in this division, unless the context otherwise requires:

“Community-based correctional programs and services” means locally administered correctional programs and services designed to rehabilitate persons charged with or convicted of a felony or indictable misdemeanor and persons on parole or probation as a result of a sentence for or conviction of these offenses.

217.25 Judicial districts.

Community-based correctional programs and services may be established to serve the judicial districts of the state.

217.26 Assistance by department.

The department of social services shall provide assistance, support and guidelines for the establishment and operation of community-based correctional programs and services.

217.27 State funds used.

The department of social services shall provide for the allocation of any state funds appropriated for the establishment, operation, maintenance, support and evaluation of community-based correctional programs and services. State funds shall not be allocated unless the department has reviewed and approved the programs and services for compliance with state guidelines.

If community-based correctional programs and services are not established in a judicial district, or if established are designed to serve only part of the judicial district, the department of social services may provide community-based correctional programs and services for the judicial district or the parts of the judicial district not served by an established program.

217.28 Guidelines.

The guidelines established by the department of social services shall include, but not necessarily be limited to:

1. Providing for the utilization of existing facilities with a minimum of capital expenditure for acquisition, renovation and repair.
2. Providing for the maximum utilization of existing local rehabilitative resources, such as, but not limited to: employment; job training; general, special and remedial education; psychiatric and marriage counseling; alcohol and drug abuse treatment.
3. Providing for pretrial release, presentence investigation, probation and parole services and residential treatment centers.
4. Providing for locating community-based correctional programs and services in or near municipalities providing a substantial number of rehabilitation resources.
5. Providing for practices and procedures which maximize the availability of federal funding.
6. Providing for gathering and evaluating performance data.

217.29 Rules and guidelines—review.

Rules and guidelines issued pursuant to the authority granted in this division shall be confined to programs and services authorized by this division and supported by state funds. Notwithstanding any other provisions of the Code, any rules, regulations or guidelines issued under provisions of this division shall be subject to approval by the departmental rules review committee and the attorney general.

b. §§ 220.1–220.7: Comprehensive Alcoholism Project

220.1 Establishment.

There is hereby established the Iowa comprehensive alcoholism project, hereinafter referred to as I.C.A.P.

220.2 Program and service centers.

The I.C.A.P. shall develop and carry on a statewide program to combat alcoholism, in cooperation with the federal office of economic opportunity and the federal vocational rehabilitation administration. The I.C.A.P. shall establish a system of coordination and interagency cooperation, at all levels of state government, to stimulate the development of services for alcoholics; an interagency system for the provision and expansion of services to the alcoholic at the community level; and a community-based support staff of subprofessional alcoholism aides.

The I.C.A.P. also shall establish community

service centers which shall serve the basic purposes of acting as catalyst for local planning, programming and coordination in the respective geographical areas; and providing direct services to the indigent alcoholic through assessment, referral, intensive follow-through, follow-up, and residential care. The project also shall establish, as may be found necessary, residential settings to provide the transition between existing facilities and the community.

The policy of the state of Iowa hereby is declared to be the development of maximum services to alcoholics through the coordination and full utilization, of all state and local, public and private agencies; and the I.C.A.P. is authorized and directed to co-operate fully with all appropriate agencies and the furtherance of this policy.

220.3 Reports of progress.

The I.C.A.P. during the continuance of its operations, shall file periodic reports of its progress with the governor, board of welfare, board of control, alcohol study commission and as shall be required by such federal agencies as may be cooperating with the project in its operations and activities, and shall report to the next regular session of the Iowa general assembly.

220.4 Funds accepted.

The director may accept funds, property, or services from any source, for the project and all revenue received by the I.C.A.P. in any manner, including gifts, grants in aid, reimbursement, or sale of articles or services is hereby appropriated and shall be used in carrying out the provisions of this chapter. Expenditure of any funds available to the I.C.A.P. shall be made upon vouchers signed by the director.

To the extent any federal grants accepted by authority of this chapter require the return to the federal government of any unexpended portion thereof, I.C.A.P. is hereby authorized to return said funds at the time and in the manner required.

220.5 Director.

The I.C.A.P. shall be administered by a director, who shall be appointed by the governor, with the approval of two-thirds of the members of the senate. The director's salary shall be fixed by the governor at a level consistent with the policy of this state with regard to compensation for such services, and with the regulations and policies of the federal agencies cooperating with I.C.A.P. in its activities, but not to exceed twenty thousand dollars per annum. The director shall serve until June 30, 1969, or until the governor shall determine that the work

of the I.C.A.P. is complete and direct its termination, but not beyond June 30, 1969.

220.6 Approval of governor.

With the approval of the governor, the director shall organize the work of the project, establish programs consistent with the purposes herein declared, arrange for such quarters, supplies and facilities as may be necessary, and employ such personnel as may be needed, but not to exceed one hundred persons, and provide for their compensation at a level consistent with the policy of this state with regard to compensation for such services and with the regulations and policies of the federal agencies cooperating with I.C.A.P. in its activities.

220.7 Appropriation.

Such funds as may be needed for the purpose of matching federal grants, are hereby appropriated from the revenue derived from the operations of the Iowa state liquor commission, but not to exceed fifty thousand dollars.

4. Pennsylvania Supreme Court Rules 175-185: Accelerated Rehabilitation Disposition

PENNSYLVANIA RULES OF CRIMINAL PROCEDURE

ACCELERATED REHABILITATIVE DISPOSITION

RULE 175. MOTION FOR ACCELERATED REHABILITATIVE DISPOSITION, PRE-INDICTMENT.

After a defendant is held for court by an issuing authority, the attorney for the Commonwealth, upon his own motion or upon request of the defendant's attorney, may submit the transcript returned by the issuing authority to a judge empowered to try cases on indictment and may move that the case be considered for accelerated rehabilitative disposition.

NOTE: Approved May 24, 1972; effective immediately.

RULE 176. MOTION FOR ACCELERATED REHABILITATIVE DISPOSITION, POST-INDICTMENT.

After an indictment is returned, the attorney for the Commonwealth upon his own motion or upon request of the defendant's attorney, may submit the indictment to a judge empowered to try cases on

indictment, and may move that the case be considered for accelerated rehabilitative disposition.

NOTE: Approved May 24, 1972; effective immediately.

RULE 177. NOTICE OF MOTION BY ATTORNEY FOR THE COMMON- WEALTH.

When accelerated rehabilitative disposition proceedings are initiated, the attorney for the Commonwealth shall advise the defendant and his attorney of his intention to present the case to an appropriate judge. Notice of the proceedings shall be sent also to any victim or victims of the offense charged.

NOTE: Approved May 24, 1972; effective immediately.

COMMENT: A form of Notice which has been used in Philadelphia is as follows:

TO THE DEFENDANT IN THIS CASE:

You will note from the subpoena attached to this letter that you have been ordered to appear in Room _____. This means that your case has been selected by the District Attorney's office as a proper case for the Accelerated Rehabilitative Program. Be sure to contact your lawyer so you understand what this program is and how it works.

As you know, you were arrested and charged with a serious crime. You have the right to a trial and the Commonwealth must prove your guilt beyond a reasonable doubt. However, because there are reasons in your case to believe that you could be helped more by being placed on probation than by being convicted and sentenced to jail, your case has been chosen for the Accelerated Rehabilitative Program. Instead of being tried, after appearing in Room _____, you might be placed into this program immediately. If you stay out of trouble during the period of this program, these charges will be discharged. If you violate the conditions, you will be tried as if you never had been in this program.

If you want to be in this program, you must waive the appropriate statute of limitations as well as your right to a speedy trial on these charges while you are in this program, so that you will never be able to complain later that you should have received a trial now. You must also agree to abide by whatever conditions the Judge in this program imposes on you. Generally, the period of this program is six months, one year, or two years.

I am sure you can understand that this program offers you a very good opportunity. If you have any questions about it, consult your attorney. Be sure to appear in Room _____ with your attorney on the date on the attached subpoena. If you do not appear, you may miss forever your chance for being included in this program and you will be tried on the charges against you and run the risk of conviction and a jail sentence.

Very truly yours,

Attachment (subpoena)

Re:

Charge:

Hearing Date:

Dear [Name of Victim]:

On May 24, 1972, the Supreme Court of Pennsylvania adopted a Rule authorizing the Courts of this County to institute a unique program for non-violent offenders. The purpose of this program is to take offenders who have not yet made crime a way of life and encourage them to make a new start under the supervision of this program and by offering them the possibility of restoring a clean record by completing this program successfully. Removing these first offenders from the criminal courts will, in turn, make those facilities available for the trial and rehabilitation of habitual or violent criminals.

The defendant in this case has been chosen for the purpose of Accelerated Rehabilitative Disposition. To qualify, he had to have a record free from criminal convictions and, in addition, not be accused of a crime of serious violence. Normally, to qualify for this program the crime must be one in which the defendant hurt no one but himself.

In this case, however, you were the real victim of the crime, for that reason, although the Accelerated Rehabilitative Disposition program seems indicated both because of the defendant's record and the non-violent nature of the crime, this office does not want to permit the defendant to go into this program without giving you a chance to be heard. If you have anything to say about this defendant, would you please be at his hearing at Room _____, City Hall, at _____ m. on the date noted above, or write to me so that I can be sure that your thoughts and feelings are considered.

Very truly yours,

RULE 178. HEARING, EXPLANATION OF PROGRAM.

Hearing on a motion for accelerated rehabilitative disposition shall be in open court in the presence of the defendant, his attorney, the attorney for the Commonwealth, and any victims who attend. At such hearing, the defendant shall be asked on the record whether he understands that:

- (1) Acceptance into and satisfactory completion of the accelerated rehabilitative disposition program offers him an opportunity to earn a dismissal of the charges pending against him;
- (2) Should he fail to complete the program satisfactorily he may be indicted, or if already indicted, tried as provided by law;
- (3) He must agree that if he is accepted into the program he waives the appropriate statute of limitations and his right to a speedy trial under any applicable Federal or State Constitutional provisions, statutes or rules of court during the period of enrollment in the program.

NOTE: Approved May 24, 1972; effectively immediately.

RULE 179. HEARING, MANNER OF PROCEEDING.

(a) When the defendant, with the advice and agreement of his attorney, indicates his understanding of these proceedings, requests that he be accepted into the program, and agrees to the terms set forth in Rule 178, the stenographer shall close the record.

(b) The judge thereupon shall hear the facts of the case as presented by the attorney for the Commonwealth, and such information as the defendant or his attorney may present, and shall hear from any victim present; but no statement presented by the defendant shall be used against him for any purpose in any criminal or civil proceeding.

(c) After hearing the facts of the case, if the judge believes that it warrants accelerated rehabilitative disposition, he shall order the stenographer to reopen the record and he shall state to the parties the conditions of the program.

(d) The defendant shall thereupon state to the judge whether he accepts the conditions and agrees to comply. If his statement is in the affirmative, the judge may grant the motion for accelerated rehabilitative disposition and shall enter an appropriate

order as set forth in Rule 180 and 184. If the defendant answers in the negative, the judge shall proceed as set forth in Rule 184(c).

NOTE: Approved May 24, 1972; effective immediately.

RULE 180. DEFERRING GRAND JURY ACTION UPON ADMISSION TO PRE-INDICTMENT PROGRAM.

When an unindicted defendant is accepted into the program of accelerated rehabilitative disposition, the judge shall order that no bill of indictment shall be presented to the Grand Jury on the charges contained in the transcript during the term of the program.

NOTE: Approved May 24, 1972; effective immediately.

RULE 181. DEFERRING ADJUDICATION OF THE CHARGES UPON ADMISSION TO POST-INDICTMENT PROGRAM.

When an indicted defendant is accepted into the program of accelerated rehabilitative disposition, the judge shall order that further proceedings on the charges contained in the indictment shall be postponed during the term of the program.

NOTE: Approved May 24, 1972; effective immediately.

RULE 182. CONDITIONS OF THE PROGRAM.

(a) The conditions of the program may be such as may be imposed with respect to probation after conviction of a crime, including restitution and costs, and may include other conditions agreed to by the parties, except that a fine may not be imposed.

(b) The period of such program for any defendant shall not exceed two years.

NOTE: Approved May 24, 1972; effective immediately.

RULE 183. CONDITIONS.

If a defendant refuses to accept the conditions required by the judge, the judge shall deny the motion for accelerated rehabilitative disposition. In such event, the case shall proceed in the same manner as if these proceedings had not taken place.

NOTE: Approved May 24, 1972; effective immediately.

RULE 184. PROCEDURE ON CHARGE OF VIOLATION OF CONDITIONS.

(a) If the attorney for the Commonwealth files a motion alleging that the defendant during the period of the program has violated a condition thereof, or objects to the defendant's request for an order of discharge, the judge who entered the order for A.R.D. may issue such process as is necessary to bring the defendant before the Court.

(b) A motion alleging such violation filed pursuant to paragraph (a) must be filed during the period of the program or, if filed thereafter, must be filed within a reasonable time after the alleged violation was committed.

(c) When the defendant is brought before the Court, the judge shall afford him an opportunity to be heard. If the judge finds that the defendant has committed a violation of a condition of the program, he may order, when appropriate, that the program be terminated, and that the attorney for the Commonwealth shall proceed on the charges as provided by law. No appeal shall be allowed from such order.

NOTE: Approved May 24, 1972; effective immediately.

RULE 185. PROCEDURE FOR OBTAINING ORDER UPON SUCCESSFUL COMPLETION OF THE PROGRAM.

When the defendant shall have completed satisfactorily the program prescribed for him and compiled with its conditions, he may make an application to the court for an order dismissing the charges against him. This application shall be supported by affidavit of the defendant and by certification of the agency or person charged with supervising his program, if any. Notice of filing such application shall be served on the attorney for the Commonwealth who shall within thirty days advise the judge of any objections to the application, serving a copy of such objections on the defendant and his attorney. If there are no objections filed within the thirty-day period, the judge shall thereafter dismiss the charges against the defendant. If there are objections filed, the judge shall proceed as set forth in Rule 184.

NOTE: Approved May 24, 1972; effective immediately.

COMMENT: Rules 175 through 185, inclusive, are based upon the presently existing practice in

Philadelphia County where a program of pre-indictment accelerated rehabilitative disposition exists under an Order of the Supreme Court of Pennsylvania entered January 6, 1971. The purpose of this program is to eliminate the need for lengthy motions, trials and other court proceedings, in cases which are relatively minor or which involve social or behavioral problems which can best be solved by programs and treatments rather than by punishment. In many cases, legal defenses may be available which result in acquittal or delaying disposition of the charges. When immediate treatment is needed, however, defendant and counsel may be willing to have defendant undergo such treatment without an adjudication of guilt. Because of the rehabilitative purpose of the program, and because the program permits prompt disposition of the charges, this descriptive title has been selected rather than such terms as "pre-indictment probation" or "deferred disposition", commonly used in Philadelphia or elsewhere.

5. New Jersey Rule 3:28 (Pretrial Intervention)

3:28 Rules Governing Criminal Practice

With respect to municipal court proceedings, note further that irrespective of whatever right to assigned counsel an indigent may have, the Miranda is, nevertheless, not applicable to such non-testimonial examination and inspection as fingerprinting, photographing, physical examination, drunkometer, and blood tests. *State v. Macuk*, 57 N.J. 1 (1970).

3:28. Pretrial Intervention Programs

(a) In counties where a pretrial intervention program is approved by the Supreme Court for operation under this rule, the Assignment Judge shall designate a judge or judges to act on all matters pertaining to the program, with the exception, however, that the Assignment Judge shall him or herself act on all such matters involving treason, murder, kidnapping, manslaughter, sodomy, rape, armed robbery, or sale or dispensing of narcotic drugs by persons not drug-dependent.

(b) Where a defendant charged with a penal or criminal offense has been accepted by the program, the designated judge may, on the recommendation of the Trial Court Administrator for the county, the Chief Probation Officer for the county, or such

other person approved by the Supreme Court as program director, and with the consent of the prosecuting attorney and the defendant, postpone all further proceedings against said defendant on such charges for a period not to exceed 3 months.

(c) At the conclusion of such 3-month period, the designated judge shall make one of the following dispositions:

(1) On recommendation of the program director and with the consent of the prosecuting attorney and the defendant, dismiss the complaint, indictment or accusation against the defendant, such as dismissal to be designated "matter adjusted—complaint (or indictment or accusation) dismissed"; or

(2) On recommendation of the program director and with the consent of the prosecuting attorney and the defendant, further postpone all proceedings against such defendant on such charges for an additional period not to exceed 3 months; or

(3) On the written recommendation of the program director or the prosecuting attorney or on the court's own motion order the prosecution of the defendant to proceed in the ordinary course. Where a recommendation for such an order is made by the program director or the prosecuting attorney, such person shall, before submitting such recommendation to the designated judge, provide the defendant or his or her attorney with a copy of such recommendation, shall advise the defendant of his or her opportunity to be heard thereon and the designated judge shall afford the defendant such a hearing.

(4) During the conduct of hearings subsequent to an order returning the defendant to prosecution in the ordinary course, no program records, investigative reports, reports made for a court or prosecuting attorney, or statements made by the defendant to program staff shall be admissible in evidence against such defendant. No such hearing with respect to such defendant shall be conducted by the designated judge who issued the order returning the defendant to prosecution in the ordinary course.

(d) Where proceedings have been postponed against a defendant for a second period of 3 months as provided in paragraph (c)(2), at the conclusion of such additional 3-month period the designated judge may—not again postpone proceedings but shall make a disposition in accordance with paragraph (c)(1) or (3), provided however that in cases involving defendants who are dependent upon a controlled dangerous substance the designated judge may, upon recommendation of the program director and with the consent of the prose-

cuting attorney and the defendant, grant such further postponements as he or she deems necessary to make an informed decision, but the aggregate of postponement periods under this rule shall in no case exceed one year.

Note: Adopted October 7, 1970 effective immediately. Paragraphs (a)(b)(c)(d) amended June 29, 1973 to be effective September 10, 1973; caption and paragraphs (a)(b)(c)(d) amended April 1, 1974 effective immediately.

Publisher's Note: The guidelines, adopted by the Supreme Court September 8, 1976 for application to New Jersey PTI programs, approved under R. 3:28, have not been included pending the disposition of the reargument of State v. Leonardis, 71 N.J. 85 (1976).

COMMENT

This rule was initially adopted in October, 1970, as authority for the vocational-service pretrial intervention program operated by the Newark Defendants Employment Project. See further Editorial, A Right to Rehabilitation, 93 N.J.L.J. Index Page 792 (1970). The rule was further amended, effective September 10, 1973, on the recommendation of the Supreme Court Committee on Criminal Procedure to make clear its application to drug and alcoholic detoxification programs. See report, 96 N.J.L.J. Index Page 449, 462 (1973). Thus paragraph (a) was amended to expressly include the drug and alcoholic programs, and subparagraph (d) was amended to provide that in drug detoxification cases, the court may continue the postponement for such additional period as it regards necessary. Note further that subparagraphs (b) and (c) were also amended effective September 10, 1973, to substitute the phrase "prosecuting attorney" for the word "prosecutor". The rule was further and extensively amended, effective April 1, 1974, and recaptioned "Pretrial Intervention Programs," having been originally entitled "Defendants' Diversionary Programs." The intention of the amendment is to expand the scope of the program providing greater flexibility for the disposition and supervision of the accused during the adjustment period. In anticipation of increased resort to approved programs, para-

graph (c)(3) was substantially revised in order to give an opportunity to the accused to be heard, with counsel, on a recommendation that prosecution proceed. Paragraph (c)(4) was added to provide for the inadmissibility at trial of admissions and statements made by the defendant during the course of his enrollment and participation in the program as well as the inadmissibility of all program reports. Cf. R. 1:38. As of November, 1975, the Supreme Court has approved programs for Bergen, Camden, Essex, Hudson, Mercer, Middlesex, Morris and Union Counties.

The Supreme Court, in State v. Leonardis, 71 N.J. 85 (1976), dealt comprehensively with eligibility standards for pretrial intervention program participation, concluding first that the nature of the crime should not be dispositive and, more significantly, that the county programs be administered pursuant to state-wide Court-promulgated guidelines. Subsequent to the Court's adoption of such guidelines, see 99 N.J.L.J. Index Page 865 (1976), it ordered reargument of Leonardis, and further Comment is withheld pending disposition.

It should be noted that prior to Leonardis and the ensuing uniform guidelines, it had been held that admission to a program could not be denied simply because the accused was a non-resident. See State v. Nolfi, 141 N.J. Super. 528 (Law Div. 1976).

Note further that defendant's acceptance into a pretrial intervention program by one county will bar his prosecution in another county for charges arising out of the same episode. State v. Singleton, 143 N.J. Super. 65 (Law Div. 1976).

Note that failure of a defendant participating in a work release program to return to the institution after the working day may be guilty of the crime of escape. State v. Walker, 131 N.J. Super. 547 (App. Div. 1974).

As to the continuing obligations of a bail surety where defendant is placed in a pretrial diversionary program, see State v. Rice, 137 N.J. Super. 593 (Law Div. 1975).

APPENDIX B. NATIONAL STANDARDS RELEVANT TO ALTERNATIVES PLANNING

National standards relating to alternative programs have been developed as guidelines for planners. They must not, however, be considered absolute rules. The standards included in this section were developed by the National Advisory Commission on Criminal Justice Standards and Goals and published in the Commission's *Courts* and *Corrections* reports. The interested reader may want to supplement these standards with those developed by other organizations, such as the American Bar Association.

1. Summary of National Advisory Commission Standards Relating to Alternative Programs Included in this Section

Courts

Screening:

- 1.1: Criteria for Screening
- 1.2: Procedure for Screening

Diversion:

- 2.1: General Criteria for Diversion
- 2.2: Procedure for Diversion Programs

The Negotiated Plea

- 3.1: Abolition of Plea Negotiation
- 3.2: Record of Plea and Agreement
- 3.3: Uniform Plea Negotiation Policies and Practices
- 3.4: Time Limit on Plea Negotiations
- 3.5: Representation by Counsel During Plea Negotiation
- 3.6: Prohibited Prosecutorial Inducements to Enter a Plea of Guilty
- 3.7: Acceptability of a Negotiated Guilty Plea
- 3.8: Effect of the Method of Disposition on Sentencing

The Litigated Case

- 4.2: Citation and Summons in Lieu of Arrest

Corrections

Diversion:

- 3.1: Use of Diversion

Pretrial Process:

- 4.1: Comprehensive Pretrial Process Planning
- 4.3: Alternatives to Arrest
- 4.4: Alternatives to Pretrial Detention
- 4.5: Procedures Relating to Pretrial Release and Detention Decisions
- 4.6: Organization of Pretrial Services

2. Relevant Standards Proposed by The National Advisory Commission

Courts

Chapter 1: Screening

Screening, in a broad sense, means any removal of a person from the criminal justice system. Thus the police officer who makes an investigatory stop and decides not to arrest the subject screens, as does a jury that decides to acquit a defendant. But here the term will be used in a more restricted sense. Screening, in the meaning of this chapter, is the discretionary decision to stop, prior to trial or plea, all formal proceedings against a person who has become involved in the criminal justice system. It must be distinguished from diversion, the subject of the next chapter. Diversion involves a decision to encourage an individual to participate in some specific program or activity by express or implied threat of further formal criminal prosecution. Screening involves no such effort; it involves abandoning all efforts to apply any coercive or semi-coercive measures upon a defendant. Police screening occurs before the accused enters the court system and becomes a defendant.

Diversion, as defined in the Police, Corrections, and Community Crime Prevention Reports, includes

screening, most particularly when screening is performed in situations where it is likely that a conviction would be obtained.

In those reports, diversion refers to formally acknowledged and organized efforts to utilize alternatives to initial or continued processing into the justice system. To qualify as diversion, such efforts must be undertaken prior to adjudication and after a legally proscribed action has occurred or is alleged to have occurred. The Commission feels that the difference in definition is justified because screening has acquired a meaning in the legal literature that is separate and distinct from diversion. The reader should refer to the chapter on diversion in the Corrections Report and to the standard on diversion in the Police Report for more information.

Because the focus of the Commission's attention in this report is the courts, the present chapter deals primarily with screening as a function of the participants—primarily the prosecutor—in the court processing of offenders.

There is no doubt that such screening is widely practiced. Of the adults apprehended for index crimes in 1965, only about 40 percent were formally charged. (President's Commission on Law Enforcement and Administration of Justice. *The Challenge of Crime in a Free Society*, p. 262 (1967).) Some of those not charged undoubtedly were diverted into noncriminal programs; the information necessary to determine the size of this group is not available.

1.1: Criteria for Screening

The need to halt formal or informal action concerning some individuals who become involved in the criminal justice system should be openly recognized. This need may arise in a particular case because there is insufficient evidence to justify further proceedings or because—despite the availability of adequate evidence—further proceedings would not adequately further the interests of the criminal justice system.

An accused should be screened out of the criminal justice system if there is not a reasonable likelihood that the evidence admissible against him would be sufficient to obtain a conviction and sustain it on appeal. In screening on this basis, that prosecutor should consider the value of a conviction in reducing future offenses, as well as the probability of conviction and affirmance of that conviction on appeal.

An accused should be screened out of the criminal justice system when the benefits to be derived from

prosecution or diversion would be outweighed by the costs of such action. Among the factors to be considered in making this determination are the following:

1. Any doubt as to the accused's guilt;
2. The impact of further proceedings upon the accused and those close to him, especially the likelihood and seriousness of financial hardship or family life disruption;
3. The value of further proceedings in preventing future offenses by other persons, considering the extent to which subjecting the accused to further proceedings could be expected to have an impact upon others who might commit such offenses, as well as the seriousness of those offenses;
4. The value of further proceedings in preventing future offenses by the offender, in light of the offender's commitment to criminal activity as a way of life; the seriousness of his past criminal activity, which he might reasonably be expected to continue; the possibility that further proceedings might have a tendency to create or reinforce commitment on the part of the accused to criminal activity as a way of life; and the likelihood that programs available as diversion or sentencing alternatives may reduce the likelihood of future criminal activity;
5. The value of further proceedings in fostering the community's sense of security and confidence in the criminal justice system;
6. The direct cost of prosecution, in terms of prosecutorial time, court time, and similar factors;
7. Any improper motives of the complainant;
8. Prolonged nonenforcement of the statute on which the case is based;
9. The likelihood of prosecution and conviction of the offender by another jurisdiction; and
10. Any assistance rendered by the accused in apprehension or conviction of other offenders, in the prevention of offenses by others, in the reduction of the impact of offenses committed by himself or others upon the victims, and any other socially beneficial activity engaged in by the accused that might be encouraged in others by not prosecuting the offender.

1.2: Procedure for Screening

Police, in consultation with the prosecutor, should develop guidelines for the taking of persons into custody. Those guidelines should embody the factors set out in Standard 1.1. After a person has been taken into custody, the decision to proceed with formal prosecution should rest with the prosecutor.

No complaint should be filed or arrest warrant issued without the formal approval of the prosecutor. Where feasible, the decision whether to screen a case should be made before such approval is granted. Once a decision has been made to pursue formal proceedings, further consideration should be given to screening an accused as further information concerning the accused and the case becomes available. Final responsibility for making a screening decision should be placed specifically upon an experienced member of the prosecutor's staff.

The prosecutor's office should formulate written guidelines to be applied in screening that embody those factors set out in Standard 1.1. Where possible, such guidelines, as well as the guidelines promulgated by the police, should be more detailed. The guidelines should identify as specifically as possible those factors that will be considered in identifying cases in which the accused will not be taken into custody or in which formal proceedings will not be pursued. They should reflect local conditions and attitudes, and should be readily available to the public as well as to those charged with offenses, and to their lawyers. They should be subjected to periodic reevaluation by the police and by the prosecutor.

When a defendant is screened after being taken into custody, a written statement of the prosecutor's reasons should be prepared and kept on file in the prosecutor's office. Screening practices in a prosecutor's office should be reviewed periodically by the prosecutor himself to assure that the written guidelines are being followed.

The decision to continue formal proceedings should be a discretionary one on the part of the prosecutor and should not be subject to judicial review, except to the extent that pretrial procedures provide for judicial determination of the sufficiency of evidence to subject a defendant to trial. Alleged failure of the prosecutor to adhere to stated guidelines or general principles of screening should not be the basis for attack upon a criminal charge or conviction.

If the prosecutor screens a defendant, the police or the private complainant should have recourse to the court. If the court determines that the decision not to prosecute constituted an abuse of discretion, it should order the prosecutor to pursue formal proceedings.

Chapter 2: Diversion

The term, "diversion," as used in this report,

refers to halting or suspending before conviction formal criminal proceedings against a person on the condition or assumption that he will do something in return. Screening, on the other hand, involves the cessation of formal criminal proceedings and removal of the individual from the criminal justice system. Action taken after conviction is not diversion, because at that point the criminal prosecution already has been permitted to proceed to its conclusion, the determination of criminal guilt.

Diversion is defined more broadly in the Police, Corrections, and Community Crime Prevention Reports and refers to formally acknowledged and organized efforts to utilize alternatives to initial or continued processing into the justice system. To qualify as diversion, such efforts must be undertaken prior to adjudication and after legally proscribed action has occurred or is alleged to have occurred. This definition incorporates screening, as discussed in Chapter 1 of this report. The Commission feels that the difference in definition is justified because screening has acquired a meaning in the legal literature that is separate and distinct from diversion.

Diversion uses the threat or possibility of conviction of a criminal offense to encourage an accused to agree to do something: he may agree to participate in a rehabilitation program designed to change his behavior, or he simply may agree to make restitution to the victim of the offense. This agreement may not be entirely voluntary, as the accused often agrees to participate in a diversion program only because he fears formal criminal prosecution.

2.1: General Criteria for Diversion

In appropriate cases offenders should be diverted into noncriminal programs before formal trial or conviction.

Such diversion is appropriate where there is a substantial likelihood that conviction could be obtained and the benefits to society from channeling an offender into an available noncriminal diversion program outweigh any harm done to society by abandoning criminal prosecution. Among the factors that should be considered favorable to diversion are: (1) the relative youth of the offender; (2) the willingness of the victim to have no conviction sought; (3) any likelihood that the offender suffers from a mental illness or psychological abnormality which was related to his crime and for which treatment is available; (4) any likelihood that the crime was significantly related to any other condition or situation such as unemployment or family problems

that would be subject to change by participation in a diversion program.

Among the factors that should be considered unfavorable to diversion are: (1) any history of the use of physical violence toward others; (2) involvement with syndicated crime; (3) a history of antisocial conduct indicating that such conduct has become an ingrained part of the defendant's lifestyle and would be particularly resistant to change; and (4) any special need to pursue criminal prosecution as a means of discouraging others from committing similar offenses.

Another factor to be considered in evaluating the cost to society is that the limited contact a diverted offender has with the criminal justice system may have the desired deterrent effect.

2.2: Procedure for Diversion Programs

The appropriate authority should make the decision to divert as soon as adequate information can be obtained.

Guidelines for making diversion decisions should be established and made public. Where it is contemplated that the diversion decision will be made by police officers or similar individuals, the guidelines should be promulgated by the police or other agency concerned after consultation with the prosecutor and after giving all suggestions due consideration. Where the diversion decision is to be made by the prosecutor's office, the guidelines should be promulgated by that office.

When a defendant is diverted in a manner not involving a diversion agreement between the defendant and the prosecution, a written statement of the fact of, and reason for, the diversion should be made and retained. When a defendant who comes under a category of offenders for whom diversion regularly is considered is not diverted, a written statement of the reasons should be retained.

Where the diversion program involves significant deprivation of an offender's liberty, diversion should be permitted only under a court-approved diversion agreement providing for suspension of criminal proceedings on the condition that the defendant participate in the diversion program. Procedures should be developed for the formulation of such agreements and their approval by the court. These procedures should contain the following features:

1. Emphasis should be placed on the offender's right to be represented by counsel during negotiations for diversion and entry and approval of the agreement.

2. Suspension of criminal prosecution for longer than one year should not be permitted.

3. An agreement that provides for a substantial period of institutionalization should not be approved unless the court specifically finds that the defendant is subject to nonvoluntary detention in the institution under noncriminal statutory authorizations for such institutionalization.

4. The agreement submitted to the court should contain a full statement of those things expected of the defendant and the reason for diverting the defendant.

5. The court should approve an offered agreement only if it would be approved under the applicable criteria if it were a negotiated plea of guilty.

6. Upon expiration of the agreement, the court should dismiss the prosecution and no future prosecution based on the conduct underlying the initial charge should be permitted.

7. For the duration of the agreement, the prosecutor should have the discretionary authority to determine whether the offender is performing his duties adequately under the agreement and, if he determines that the offender is not, to reinstate the prosecution.

Whenever a diversion decision is made by the prosecutor's office, the staff member making it should specify in writing the basis for the decision, whether or not the defendant is diverted. These statements, as well as those made in cases not requiring a formal agreement for diversion, should be collected and subjected to periodic review by the prosecutor's office to insure that diversion programs are operating as intended.

The decision by the prosecutor not to divert a particular defendant should not be subject to judicial review.

Chapter 3: The Negotiated Plea

In many courts, more than 90 percent of criminal convictions are not obtained by the verdict of a jury or the decision of a judge. Rather, they are based upon the defendant's own plea of guilty. Such a plea functions not only as an admission of guilt but also as a surrender of the entire array of constitutional rights designed to protect a criminal defendant against unjustified conviction, including the right to remain silent, the right to confront witnesses against him, the right to trial by jury, and the right to be proven guilty by proof beyond a reasonable doubt.

A system that encourages the waiver of such fundamental rights is defensible only if it deals justly

with the person waiving those rights. On the other hand, plea bargaining also affects the police, who have accumulated evidence of guilt; the victim, who has suffered at the hands of the offender; and the public at large, who demand protection against future offenses. These interests also must be dealt with justly in the plea negotiation process, or the process is as indefensible as if it violated the rights of the offender.

Some guilty pleas are the result of an express agreement between the defendant and the prosecution, often arrived at after a process of bargaining in which each side endeavors to secure the best arrangement possible. Some are not. There is no reliable evidence as to how the proportions compare.

3.1: Abolition of Plea Negotiation

As soon as possible, but in no event later than 1978, negotiations between prosecutors and defendants—either personally or through their attorneys—concerning concessions to be made in return for guilty pleas should be prohibited. In the event that the prosecution makes a recommendation as to sentence, it should not be affected by the willingness of the defendant to plead guilty to some or all of the offenses with which he is charged. A plea of guilty should not be considered by the court in determining the sentence to be imposed.

Until plea negotiations are eliminated as recommended in this standard, such negotiations and the entry of pleas pursuant to the resulting agreements should be permitted only under a procedure embodying the safeguards contained in the remaining standards in this chapter.

3.2: Record of Plea and Agreement

Where a negotiated guilty plea is offered, the agreement upon which it is based should be presented to the judge in open court for his acceptance or rejection. In each case in which such a plea is offered, the record should contain a full statement of the terms of the underlying agreement and the judge's reasons for accepting or rejecting the plea.

3.3: Uniform Plea Negotiation Policies and Practices

Each prosecutor's office should formulate a written statement of policies and practices governing all members of the staff in plea negotiations.

This written statement should provide for consideration of the following factors by prosecuting attorneys engaged in plea negotiations:

1. The impact that a formal trial would have on the offender and those close to him, especially the likelihood and seriousness of financial hardship and family disruption;
2. The role that a plea and negotiated agreement may play in rehabilitating the offender;
3. The value of a trial in fostering the community's sense of security and confidence in law enforcement agencies; and
4. The assistance rendered by the offender:
 - a. in the apprehension or conviction of other offenders;
 - b. in the prevention of crimes by others;
 - c. in the reduction of the impact of the offense on the victim; or
 - d. in any other socially beneficial activity.

The statement of policies should provide that weaknesses in the prosecution's case may not be considered in determining whether to permit a defendant to plead guilty to any offense other than that charged.

The statement of policies should be made available to the public.

The statement should direct that before finalizing any plea negotiations, a prosecutor's staff attorney should obtain full information on the offense and the offender. This should include information concerning the impact of the offense upon the victims, the impact of the offense (and of a plea of guilty to a crime less than the most serious that appropriately could be charged) upon the community, the amount of police resources expended in investigating the offense and apprehending the defendant, any relationship between the defendant and organized crime, and similar matters. This information should be considered by the attorney in deciding whether to enter into an agreement with the defendant.

The statement should be an internal, intra-office standard only. Neither the statement of policies nor its applications should be subject to judicial review. The prosecutor's office should assign an experienced prosecutor to review negotiated pleas to insure that the guidelines are applied properly.

3.4: Time Limit on Plea Negotiations

Each jurisdiction should set a time limit after which plea negotiations may no longer be conducted. The sole purpose of this limitation should be to insure the maintenance of a trial docket that lists only cases that will go to trial. After the specified time has elapsed, only pleas to the official charge should be

allowed, except in unusual circumstances and with the approval of the judge and the prosecutor.

3.5: Representation by Counsel During Plea Negotiations

No plea negotiations should be conducted until a defendant has been afforded an opportunity to be represented by counsel. If the defendant is represented by counsel, the negotiations should be conducted only in the presence of and with the assistance of counsel.

3.6: Prohibited Prosecutorial Inducements to Enter a Plea of Guilty

No prosecutor should, in connection with plea negotiations, engage in, perform, or condone any of the following:

1. Charging or threatening to charge the defendant with offenses for which the admissible evidence available to the prosecutor is insufficient to support a guilty verdict.

2. Charging or threatening to charge the defendant with a crime not ordinarily charged in the jurisdiction for the conduct allegedly engaged in by him.

3. Threatening the defendant that if he pleads not guilty, his sentence may be more severe than that which ordinarily is imposed in the jurisdiction in similar cases on defendants who plead not guilty.

4. Failing to grant full disclosure before the disposition negotiations of all exculpatory evidence material to guilt or punishment.

3.7: Acceptability of a Negotiated Guilty Plea

The court should not participate in plea negotiations. It should, however, inquire as to the existence of any agreement whenever a plea of guilty is offered and carefully review any negotiated plea agreement underlying an offered guilty plea. It should make specific determinations relating to the acceptability of a plea before accepting it.

Before accepting a plea of guilty, the court should require the defendant to make a detailed statement concerning the commission of the offense to which he is pleading guilty and any offenses of which he has been convicted previously. In the event that the plea is not accepted, this statement and any evidence obtained through use of it should not be admissible against the defendant in any subsequent criminal prosecution.

The review of the guilty plea and its underlying negotiated agreement should be comprehensive. If any of the following circumstances is found and can-

not be corrected by the court, the court should not accept the plea:

1. Counsel was not present during the plea negotiations but should have been;

2. The defendant is not competent or does not understand the nature of the charges and proceedings against him;

3. The defendant was reasonably mistaken or ignorant as to law or facts related to his case and this affected his decision to enter into the agreement;

4. The defendant does not know his constitutional rights and how the guilty plea will affect those rights; rights that expressly should be waived upon the entry of a guilty plea include:

a. Right to the privilege against compulsory self-incrimination (which includes the right to plead not guilty);

b. Right to trial in which the government must prove the defendant's guilt beyond a reasonable doubt;

c. Right to a jury trial;

d. Right to confrontation of one's accusers;

e. Right to compulsory process to obtain favorable witnesses; and

f. Right to effective assistance of counsel at trial.

5. During plea negotiations the defendant was denied a constitutional or significant substantive right that he did not waive;

6. The defendant did not know at the time he entered into the agreement the mandatory minimum sentence, if any, and the maximum sentence that may be imposed for the offense to which he pleads, or the defendant was not aware of these facts at the time the plea was offered;

7. The defendant has been offered improper inducements to enter the guilty plea;

8. The admissible evidence is insufficient to support a guilty verdict on the offense for which the plea is offered, or a related greater offense;

9. The defendant continues to assert facts that, if true, establish that he is not guilty of the offense to which he seeks to plead; and

10. Accepting the plea would not serve the public interest. Acceptance of a plea of guilty would not serve the public interest if it:

a. places the safety of persons or valuable property in unreasonable jeopardy;

b. depreciates the seriousness of the defendant's activity or otherwise promotes disrespect for the criminal justice system;

- c. gives inadequate weight to the defendant's rehabilitative needs; or
- d. would result in conviction for an offense out of proportion to the seriousness with which the community would evaluate the defendant's conduct upon which the charge is based.

A representative of the police department should be present at the time a guilty plea is offered. He should insure that the court is aware of all available information before accepting the plea and imposing sentence.

When a guilty plea is offered and the court either accepts or rejects it, the record must contain a complete statement of the reasons for acceptance or rejection of the plea.

3.8: Effect of the Method of Disposition on Sentencing

The fact that a defendant has entered a plea of guilty to the charge or to a lesser offense than that initially charged should not be considered in determining sentence.

Chapter 4: The Litigated Case

4.2: Citation and Summons in Lieu of Arrest

Upon the apprehension, or following the charging, of a person for a misdemeanor or certain less serious felonies, citation or summons should be used in lieu of taking the person into custody.

All law enforcement officers should be authorized to issue a citation in lieu of continued custody following a lawful arrest for such offenses. All judicial officers should be given authority to issue a summons rather than an arrest warrant in all cases alleging these offenses in which a complaint-information or indictment is filed or returned against a person not already in custody.

Summons should be served upon the accused in the same manner as a civil summons.

1. Situations in Which Citation or Summons Is Not Appropriate. Use of citation or summons would not be appropriate under the following situations:

- a. The behavior or past conduct of the accused indicates that his release presents a danger to individuals or to the community;
- b. The accused is under lawful arrest and fails to identify himself satisfactorily;
- c. The accused refuses to sign the citation;
- d. The accused has no ties to the jurisdiction reasonably sufficient to assure his appearance; or

- e. The accused has previously failed to appear in response to a citation or summons.

2. Procedure for Issuance and Content of Citation and Summons. Whether issued by a law enforcement officer or a court, the citation or summons should:

- a. Inform the accused of the offense with which he is charged;
- b. Specify the date, time, and exact location of trials in misdemeanors or the preliminary hearing in felonies;
- c. Advise the accused of all of his rights applicable to his arrest and trial and of the consequences of failing to appear;
- d. Explain the law concerning representation by and provision of counsel, and contain a form for advising the court (within three days after service of citation or summons) of the name of his counsel or of the desire to have the court appoint an attorney to defend him; and
- e. State that in misdemeanor cases all motions and a election of nonjury trial must be filed within seven days after appointment of counsel with copies provided to the prosecutor.

Upon the receipt of the notice that the accused desires counsel or if such notice is not filed, the court should take appropriate action to assure that counsel is provided within 24 hours after receipt of notice—or within 96 hours after arrest.

Corrections

Chapter 3: Diversion

3.1: Use of Diversion

Each local jurisdiction, in cooperation with related State agencies, should develop and implement by 1975 formally organized programs of diversion that can be applied in the criminal justice process from the time an illegal act occurs to adjudication.

1. The planning process and the identification of diversion services to be provided should follow generally and be associated with "total system planning" as outlined in Standard 9.1.

- a. With planning data available, the responsible authorities at each step in the criminal justice process where diversion may occur should develop priorities, lines of responsibility, courses of procedure, and other policies to serve as guidelines to its use.
- b. Mechanisms for review and evaluation of policies and practices should be established.
- c. Criminal justice agencies should seek the cooperation and resources of other community

agencies to which persons can be diverted for services relating to their problems and needs.

2. Each diversion program should operate under a set of written guidelines that insure periodic review of policies and decisions. The guidelines should specify:

- a. The objectives of the program and the types of cases to which it is to apply.
- b. The means to be used to evaluate the outcome of diversion decisions.
- c. A requirement that the official making the diversion decision state in writing the basis for his determination denying or approving diversion in the case of each offender.
- d. A requirement that the agency operating diversion programs maintain a current and complete listing of various resource dispositions available to diversion decisionmakers.

3. The factors to be used in determining whether an offender, following arrest but prior to adjudication, should be selected for diversion to a noncriminal program, should include the following:

- a. Prosecution toward conviction may cause undue harm to the defendant or exacerbate the social problems that led to his criminal acts.
- b. Services to meet the offender's needs and problems are unavailable within the criminal justice system or may be provided more effectively outside the system.
- c. The arrest has already served as a desired deterrent.
- d. The needs and interests of the victim and society are served better by diversion than by official processing.
- e. The offender does not present a substantial danger to others.
- f. The offender voluntarily accepts the offered alternative to further justice system processing.
- g. The facts of the case sufficiently establish that the defendant committed the alleged act.

Chapter 4: Pretrial Process

4.1: Comprehensive Pretrial Process Planning

Each criminal justice jurisdiction immediately should begin to develop a comprehensive plan for improving the pretrial process. In the planning process, the following information should be collected:

1. The extent of pretrial detention, including the number of detainees, the number of man-days of detention, and the range of detention by time periods.

2. The cost of pretrial release programs and detention.

3. The disposition of persons awaiting trial, including the number released on bail, released on non-financial conditions, and detained.

4. The disposition of such persons after trial including, for each form of pretrial release or detention, the number of persons who were convicted, who were sentenced to the various available sentencing alternatives, and whose cases were dismissed.

5. Effectiveness of pretrial conditions, including the number of releases who (a) failed to appear, (b) violated conditions of their release, (c) were arrested during the period of their release, or (d) were convicted during the period of their release.

6. Conditions of local detention facilities, including the extent to which they meet the standards recommended herein.

7. Conditions of treatment of and rules governing persons awaiting trial, including the extent to which such treatment and rules meet the recommendations in Standards 4.8 and 4.9.

8. The need for and availability of resources that could be effectively utilized for persons awaiting trial, including the number of arrested persons suffering from problems relating to alcohol, narcotic addiction, or physical or mental disease or defects, and the extent to which community treatment programs are available.

9. The length of time required for bringing a criminal case to trial and, where such delay is found to be excessive, the factors causing such delay.

The comprehensive plan for the pretrial process should include the following:

1. Assessment of the status of programs and facilities relating to pretrial release and detention.

2. A plan for improving the programs and facilities relating to pretrial release and detention, including priorities for implementation of the recommendations in this chapter.

3. A means of implementing the plan and of discouraging the expenditure of funds for, or the continuation of, programs inconsistent with it.

4. A method of evaluating the extent and success of implementation of the improvements.

5. A strategy for processing large numbers of persons awaiting trial during mass disturbances, including a means of utilizing additional resources on a temporary basis.

The comprehensive plan for the pretrial process should be conducted by a group representing all major components of the criminal justice system that

operate in the pretrial area. Included should be representatives of the police, sheriffs, prosecution, public defender, private defense bar, judiciary, court management, probation, corrections, and the community.

4.3: Alternatives to Arrest

Each criminal justice jurisdiction, State or local as appropriate, should immediately develop a policy, and seek enabling legislation where necessary, to encourage the use of citations in lieu of arrest and detention. This policy should provide:

1. Enumeration of minor offenses for which a police officer should be required to issue a citation in lieu of making an arrest or detaining the accused unless:
 - a. The accused fails to identify himself or supply required information;
 - b. The accused refuses to sign the citation;
 - c. The officer has reason to believe that the continued liberty of the accused constitutes an unreasonable risk of bodily injury to himself or others;
 - d. Arrest and detention are necessary to carry out additional legitimate investigative action;
 - e. The accused has no ties to the jurisdiction reasonably sufficient to assure his appearance, and there is a substantial risk that he will refuse to respond to the citation; or
 - f. It appears the accused has previously failed to respond to a citation or a summons or has violated the conditions of any pretrial release program.
2. Discretionary authority for police officers to issue a citation in lieu of arrest in all cases where the officer has reason to believe that the accused will respond to the citation and does not represent a clear threat to himself or others.
3. A requirement that a police officer making an arrest rather than issuing a citation specify the reason for doing so in writing. Superior officers should be authorized to reevaluate a decision to arrest and to issue a citation at the police station in lieu of detention.
4. Criminal penalties for willful failure to respond to a citation.
5. Authority to make lawful search incident to an arrest where a citation is issued in lieu of arrest.

Similar steps should be taken to establish policy encouraging the issuance of summons in lieu of arrest warrants where an accused is not in police custody.

This policy should provide:

1. An enumeration of minor offenses for which a judicial officer should be required to issue a summons in lieu of an arrest warrant unless he finds that:
 - a. The accused has previously willfully failed to respond to a citation or summons or has violated the conditions of any pretrial release program.
 - b. The accused has no ties to the community and there is a reasonable likelihood that he will fail to respond to a summons.
 - c. The whereabouts of the accused is unknown or the arrest warrant is necessary to subject him to the jurisdiction of the court.
 - d. Arrest and detention are necessary to carry out additional legitimate investigative action.
 2. Discretionary authority for judicial officers to issue a summons in lieu of an arrest warrant in all cases where the officer has reason to believe that the accused will respond to the summons.
 3. A requirement that a judicial officer issuing a warrant instead of a summons state his reason for doing so in writing.
 4. Criminal penalties for willful failure to respond to a summons.
- To facilitate the use of citations and summons in lieu of arrests, police agencies should:
1. Develop through administrative rules specific criteria for police officers for determining whether to issue citations or to request issuance of a summons in lieu of arrest.
 2. Develop training programs to instruct their officers in the need for and use of the citation and summons in lieu of arrest.
 3. Develop a method of quickly verifying factual information given to police officers which if true would justify the issuance of a citation in lieu of arrest.
 4. Develop a method of conducting a reasonable investigation concerning the defendant's ties to the community to present to the judicial officer at the time of application for a summons or an arrest.

4.4: Alternatives to Pretrial Detention

Each criminal justice jurisdiction, State or local as appropriate, should immediately seek enabling legislation and develop, authorize, and encourage the use of a variety of alternatives to the detention of persons awaiting trial. The use of these alternatives should be governed by the following:

a. Release on recognizance without further considerations.

b. Release on the execution of an unsecured appearance bond in an amount specified.

c. Release into the care of a qualified person or organization reasonably capable of assisting the accused to appear at trial.

d. Release with imposition or restriction on activities, associations, movements, and residence reasonably related to securing the appearance of the accused.

e. Release to the supervision of a probation officer or some other public official.

f. Release on the basis of financial security to be provided by the accused.

g. Imposition of any other restrictions other than detention reasonably related to securing the appearance of the accused.

h. Detention, with release during certain hours for specified purposes.

i. Detention of the accused.

2. Judicial officers in selecting the form of pretrial release should consider the nature and circumstances of the offense charged, the weight of the evidence against the accused, his ties to the community, his record of convictions, if any, and his record of appearance at court proceedings or of flight to avoid prosecution.

3. No person should be allowed to act as surety for compensation.

4. Willful failure to appear before any court or judicial officer as required should be made a criminal offense.

4.5: Procedures Relating to Pretrial Release and Detention Decisions

Each criminal justice jurisdiction, State or local as appropriate, should immediately develop procedures governing pretrial release and detention decisions, as follows:

1. A person in the physical custody of a law enforcement agency on the basis of an arrest, with or without a warrant, should be taken before a judicial officer without unnecessary delay. In no case should the delay exceed six hours.

2. When a law enforcement agency decides to take a person accused of crime into custody, it should immediately notify the appropriate judicial officer or agency designated by him. An investigation should commence immediately to gather information relevant to the pretrial release or detention decision. The nature of the investigation should be flexible and gen-

erally exploratory in nature and should provide information about the accused including:

a. Current employment status and employment history.

b. Present residence and length of stay at such address.

c. Extent and nature of family relationships.

d. General reputation and character references.

e. Present charges against the accused and penalties possible upon conviction.

f. Likelihood of guilt or weight of evidence against the accused.

g. Prior criminal record.

h. Prior record of compliance with or violation of pretrial release conditions.

i. Other facts relevant to the likelihood that he will appear for trial.

3. Pretrial detention or conditions substantially infringing on liberty should not be imposed on a person accused of crime unless:

a. The accused is granted a hearing, as soon as possible, before a judicial officer and is accorded the right to be represented by counsel (appointed counsel if he is indigent), to present evidence on his own behalf, to subpoena witnesses, and to confront and cross-examine the witnesses against him.

b. The judicial officer finds substantial evidence that confinement or restrictive conditions are necessary to insure the presence of the accused for trial.

c. The judicial officer provides the defendant with a written statement of his findings of fact, the reasons for imposing detention or conditions, and the evidence relied upon.

4. Where a defendant is detained prior to trial or where conditions substantially infringing on his liberty are imposed, the defendant should be authorized to seek periodic review of that decision by the judicial officer making the original decision. The defendant also should be authorized to seek appellate review of such a decision.

5. Whenever a defendant is released pending trial subject to conditions, his release should not be revoked unless:

a. A judicial officer finds after a hearing that there is substantial evidence of a willful violation of one of the conditions of his release or a court or grand jury has found probable cause to believe the defendant has committed a serious crime while on release.

- b. The violation of conditions is of a nature that involves a risk of nonappearance or of criminal activity.
 - c. The defendant is granted notice of the alleged violation, access to official records regarding his case, the right to be represented by counsel (appointed counsel if he is indigent), to subpoena witnesses in his own behalf, and to confront and cross-examine witnesses against him.
 - d. The judicial officer provides the defendant a written statement of the findings of fact, the reasons for the revocation, and the evidence relied upon.
6. The defendant should be authorized to obtain judicial review of a decision revoking his release while awaiting trial.
7. The judicial officer or the reviewing court should be authorized to impose different or additional conditions in lieu of revoking the release and detaining the defendant.

4.6: Organization of Pretrial Services

Each State should enact by 1975 legislation specifically establishing the administrative authority over and responsibility for persons awaiting trial. Such legislation should provide as follows:

- 1. The decision to detain a person prior to trial should be made by a judicial officer.
- 2. Information-gathering services for the judicial officer in making the decision should be provided in the first instance by the law enforcement agency and verified and supplemented by the agency that develops presentence reports.
- 3. Courts should be authorized to exercise continuing jurisdiction over persons awaiting trial in the same manner and to the same extent as recommended for persons serving sentences after conviction. See Standard 5.9.
- 4. By 1983, facilities, programs, and services for those awaiting trial should be administered by the State correctional agency under a unified correctional system.

APPENDIX C. APPROACHES TO PRETRIAL DETENTION THROUGH LEGISLATION AND COURT RULE

1. DISTRICT OF COLUMBIA BAIL ACT

SUBCHAPTER II.—RELEASE AND PRETRIAL DETENTION

- 23-1321. Release in noncapital cases prior to trial.
- 23-1322. Detention prior to trial.
- 23-1323. Detention of addict.
- 23-1324. Appeal from conditions of release.
- 23-1325. Release in capital cases or after conviction.
- 23-1326. Release of material witnesses.
- 23-1327. Penalties for failure to appear.
- 23-1328. Penalties for offenses committed during release.
- 23-1329. Penalties for violation of conditions of release.
- 23-1330. Contempt.
- 23-1331. Definitions.
- 23-1332. Applicability of subchapter.

§ 23-1321. Release in noncapital cases prior to trial

(a) Any person charged with an offense, other than an offense punishable by death, shall, at his appearance before a judicial officer, be ordered released pending trial on his personal recognizance or upon the execution of an unsecured appearance bond in an amount specified by the judicial officer, unless the officer determines, in the exercise of his discretion, that such a release will not reasonably assure the appearance of the person as required or the safety of any other person or the community. When such a determination is made, the judicial officer shall, either in lieu of or in addition to the above methods of release, impose the first of the following conditions of release which will reasonably assure the appearance of the person for trial or the safety of any other person or the community, or, if no single condition gives that assurance, any combination of the following conditions:

(1) Place the person in the custody of a designated person or organization agreeing to supervise him.

(2) Place restrictions on the travel, association, or place of abode of the person during the period of release.

(3) Require the execution of an appearance bond in a specified amount and the deposit in the registry of the court, in cash or other security as directed, of a sum not to exceed 10 per centum of the amount of the bond, such deposit to be returned upon the performance of the conditions of release.

(4) Require the execution of a bail bond with sufficient solvent sureties, or the deposit of cash in lieu thereof.

(5) Impose any other condition, including a condition requiring that the person return to custody after specified hours of release for employment or other limited purposes.

No financial condition may be imposed to assure the safety of any other person or the community.

(b) In determining which conditions of release, if any, will reasonably assure the appearance of a person as required or the safety of any other person or the community, the judicial officer shall, on the basis of available information, take into account such matters as the nature and circumstances of the offense charged, the weight of the evidence against such person, his family ties, employment, financial resources, character and mental conditions, past conduct, length of residence in the community, record of convictions, and any record of appearance at court proceedings, flight to avoid prosecution, or failure to appear at court proceedings.

(c) A judicial officer authorizing the release of a person under this section shall issue an appropriate order containing a statement of the conditions imposed, if any, shall inform such person of the penalties applicable to violations of the conditions of his release, shall advise him that a warrant for his arrest will be issued immediately upon any such violation, and shall warn such person of the penalties provided in section 23-1328.

(d) A person for whom conditions of release are imposed and who, after twenty-four hours from the time of the release hearing, continues to be detained as a result of his inability to meet the conditions of release, shall, upon application, be entitled to have the conditions reviewed by the judicial officer who imposed them. Unless the conditions of release are amended and the person is thereupon released, the judicial officer shall set forth in writing the reasons for requiring the conditions imposed. A person who is ordered released on a condition which requires that he return to custody after specified hours shall, upon application, be entitled to a review by the judicial officer who imposed the condition. Unless the requirement is removed and the person is thereupon released on another condition, the judicial officer shall set forth in writing the reasons for continuing the requirement. In the event that the judicial officer who imposed conditions of release is not available,

any other judicial officer may review such conditions.

(e) A judicial officer ordering the release of a person on any condition specified in this section may at any time amend his order to impose additional or different conditions of release, except that if the imposition of such additional or different conditions results in the detention of the person as a result of his inability to meet such conditions or in the release of the person on a condition requiring him to return to custody after specified hours, the provisions of subsection (d) shall apply.

(f) Information stated in, or offered in connection with, any order entered pursuant to this section need not conform to the rules pertaining to the admissibility of evidence in a court of law.

(g) Nothing contained in this section shall be construed to prevent the disposition of any case or class of cases by forfeiture of collateral security where such disposition is authorized by the court.

(h) The following shall be applicable to any person detained pursuant to this subchapter:

(1) The person shall be confined, to the extent practicable, in facilities separate from convicted persons awaiting or serving sentences or being held in custody pending appeal.

(2) The person shall be afforded reasonable opportunity for private consultation with counsel and, for good cause shown, shall be released upon order of the judicial officer in the custody of the United States marshal or other appropriate person for limited periods of time to prepare defenses or for other proper reasons.

(July 29, 1970, Pub. L. 91-358, § 210(a), title II, 84 Stat. 642.)

§ 23-1322. Detention prior to trial

(a) Subject to the provisions of this section, a judicial officer may order pretrial detention of—

(1) a person charged with a dangerous crime, as defined in section 23-1331(3), if the Government certifies by motion that based on such person's pattern of behavior consisting of his past and present conduct, and on the other factors set out in section 23-1321(b), there is no condition or combination of conditions which will reasonably assure the safety of the community;

(2) a person charged with a crime of violence, as defined in section 23-1331(4), if (i) the person has been convicted of a crime of violence within the ten-year period immediately preceding the alleged crime of violence for which he is presently charged; or (ii) the crime of violence was allegedly committed while the person was, with respect to another crime of violence, on bail or other release or on probation, parole, or mandatory release pending completion of a sentence; or

(3) a person charged with any offense if such person, for the purpose of obstructing or attempting to obstruct justice, threatens, intimidates, or attempts to threaten, injure, or intimidate any prospective witness or juror.

(b) No person described in subsection (a) of this section shall be ordered detained unless the judicial officer—

(1) holds a pretrial detention hearing in accordance with the provisions of subsection (c) of this section;

(2) finds—

(A) that there is clear and convincing evidence that the person is a person described in paragraph (1), (2), or (3) of subsection (a) of this section;

(B) that—

(i) in the case of a person described only in paragraph (1) of subsection (a), based on such person's pattern of behavior consisting of his past and present conduct, and on the other factors set out in section 23-1321(b), or

(ii) in the case of a person described in paragraph (2) or (3) of such subsection, based on the factors set out in section 23-1321(b), there is no condition or combination of conditions of release which will reasonably assure the safety of any other person or the community; and

(C) that, except with respect to a person described in paragraph (3) of subsection (a) of this section, on the basis of information presented by proffer or otherwise to the judicial officer there is a substantial probability that the person committed the offense for which he is present before the judicial officer; and

(3) issues an order of detention accompanied by written findings of fact and the reasons for its entry.

(c) The following procedures shall apply to pretrial detention hearings held pursuant to this section:

(1) Whenever the person is before a judicial officer, the hearing may be initiated on oral motion of the United States attorney.

(2) Whenever the person has been released pursuant to section 23-1321 and it subsequently appears that such person may be subject to pretrial detention, the United States attorney may initiate a pretrial detention hearing by ex parte written motion. Upon such motion the judicial officer may issue a warrant for the arrest of the person and if such person is outside the District of Columbia, he shall be brought before a judicial officer in the district where he is arrested and shall then be transferred to the District of Columbia for proceedings in accordance with the section.

(3) The pretrial detention hearing shall be held immediately upon the person being brought before the judicial officer for such hearing unless the person or the United States attorney moves for a continuance. A continuance granted on motion of the person shall not exceed five calendar days, unless there are extenuating circumstances. A continuance on motion of the United States attorney shall be granted upon good cause shown and shall not exceed three calendar days. The person may be detained pending the hearing.

(4) The person shall be entitled to representation by counsel and shall be entitled to present information by proffer or otherwise, to testify, and to present witnesses in his own behalf.

leased pursuant to section 23-1321(a). The appeal shall be determined promptly.

(c) In any case in which a judicial officer other than a judge of the court having original jurisdiction over the offense with which a person is charged orders his release with or without setting terms or conditions of release, or denies a motion for the pretrial detention of a person, the United States attorney may move the court having original jurisdiction over the offense to amend or revoke the order. Such motion shall be considered promptly.

(d) In any case in which—

(1) a person is released, with or without the setting of terms or conditions of release, or a motion for the pretrial detention of a person is denied, by a judge of the court having original jurisdiction over the offense with which the person is charged, or

(2) a judge of a court having such original jurisdiction does not grant the motion of the United States attorney filed pursuant to subsection (c), the United States attorney may appeal to the court having appellate jurisdiction over such court. Any order so appealed shall be affirmed if it is supported by the proceedings below. If the order is not so supported, (A) the court may remand the case for a further hearing, (B) with or without additional evidence, change the terms or conditions of release, or (C) in cases in which the United States attorney requested pretrial detention pursuant to sections 23-1322 and 23-1323, order such detention. (July 29, 1970, Pub. L. 91-358, § 210(a), title II, 84 Stat. 647.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 23-1322, 23-1325.

§ 23-1325. Release in capital cases or after conviction

(a) A person who is charged with an offense punishable by death shall be treated in accordance with the provisions of section 23-1321 unless the judicial officer has reason to believe that no one or more conditions of release will reasonably assure that the person will not flee or pose a danger to any other person or to the community. If such a risk of flight or danger is believed to exist, the person may be ordered detained.

(b) A person who has been convicted of an offense and is awaiting sentence shall be detained unless the judicial officer finds by clear and convincing evidence that he is not likely to flee or pose a danger to any other person or to the property of others. Upon such finding, the judicial officer shall treat the person in accordance with the provisions of section 23-1321.

(c) A person who has been convicted of an offense and sentenced to a term of confinement or imprisonment and has filed an appeal or a petition for a writ of certiorari shall be detained unless the judicial officer finds by clear and convincing evidence that (1) the person is not likely to flee or pose a danger to any other person or to the property of others, and (2) the appeal or petition for a writ of certiorari raises a substantial question of law or fact likely to result in a reversal or an order for new trial. Upon such findings, the judicial officer shall treat the person in accordance with the provisions of section 23-1321.

(d) The provisions of section 23-1324 shall apply to persons detained in accordance with this section, except that the finding of the judicial officer that the appeal or petition for writ of certiorari does not raise by clear and convincing evidence a substantial question of law or fact likely to result in a reversal or order for new trial shall receive de novo consideration in the court in which review is sought. (July 29, 1970, Pub. L. 91-358, § 210(a), title II, 84 Stat. 647.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 23-1322.

§ 23-1326. Release of material witnesses

If it appears by affidavit that the testimony of a person is material in any criminal proceeding, and if it is shown that it may become impracticable to secure his presence by subpoena, a judicial officer shall impose conditions of release pursuant to section 23-1321. No material witness shall be detained because of inability to comply with any condition of release if the testimony of such witness can adequately be secured by deposition, and further detention is not necessary to prevent a failure of justice. Release may be delayed for a reasonable period of time until the deposition of the witness can be taken pursuant to the Federal Rules of Criminal Procedure. (July 29, 1970, Pub. L. 91-358, § 210(a), title II, 84 Stat. 648.)

§ 23-1327. Penalties for failure to appear

(a) Whoever, having been released under this title prior to the commencement of his sentence, willfully fails to appear before any court or judicial officer as required, shall, subject to the provisions of the Federal Rules of Criminal Procedure, incur a forfeiture of any security which was given or pledged for his release, and, in addition, shall, (1) if he was released in connection with a charge of felony, or while awaiting sentence or pending appeal or certiorari prior to commencement of his sentence after conviction of any offense, be fined not more than \$5,000 and imprisoned not less than one year and not more than five years, (2) if he was released in connection with a charge of misdemeanor, be fined not more than the maximum provided for such misdemeanor and imprisoned for not less than ninety days and not more than one year, or (3) if he was released for appearance as a material witness, be fined not more than \$1,000 or imprisoned for not more than one year, or both.

(b) Any failure to appear after notice of the appearance date shall be prima facie evidence that such failure to appear is willful. Whether the person was warned when released of the penalties for failure to appear shall be a factor in determining whether such failure to appear was willful, but the giving of such warning shall not be a prerequisite to conviction under this section.

(c) The trier of facts may convict under this section even if the defendant has not received actual notice of the appearance date if (1) reasonable efforts to notify the defendant have been made, and (2) the defendant, by his own actions, has frustrated the receipt of actual notice.

(5) Information stated in, or offered in connection with, any order entered pursuant to this section need not conform to the rules pertaining to the admissibility of evidence in a court of law.

(6) Testimony of the person given during the hearing shall not be admissible on the issue of guilt in any other judicial proceeding, but such testimony shall be admissible in proceedings under sections 23-1327, 23-1328, and 23-1329, in perjury proceedings, and for the purposes of impeachment in any subsequent proceedings.

(7) Appeals from orders of detention may be taken pursuant to section 23-1324.

(d) The following shall be applicable to persons detained pursuant to this section:

(1) The case of such person shall be placed on an expedited calendar and, consistent with the sound administration of justice, his trial shall be given priority.

(2) Such person shall be treated in accordance with section 23-1321—

(A) upon the expiration of sixty calendar days, unless the trial is in progress or the trial has been delayed at the request of the person other than by the filing of timely motions (excluding motions for continuances); or

(B) whenever a judicial officer finds that a subsequent event has eliminated the basis for such detention.

(3) The person shall be deemed detained pursuant to section 23-1325 if he is convicted.

(e) The judicial officer may detain for a period not to exceed five calendar days a person who comes before him for a bail determination charged with any offense, if it appears that such person is presently on probation, parole, or mandatory release pending completion of sentence for any offense under State or Federal law and that such person may flee or pose a danger to any other person or the community if released. During the five-day period, the United States attorney or the Corporation Counsel for the District of Columbia shall notify the appropriate State or Federal probation or parole officials. If such officials fail or decline to take the person into custody during such period, the person shall be treated in accordance with section 23-1321, unless he is subject to detention under this section. If the person is subsequently convicted of the offense charged, he shall receive credit toward service of sentence for the time he was detained pursuant to this subsection. (July 29, 1970, Pub. L. 91-358, § 210 (a), title II, 84 Stat. 644.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 23-1323, 23-1324, 23-1329.

§ 23-1323. Detention of addict

(a) Whenever it appears that a person charged with a crime of violence, as defined in section 23-1331(4), may be an addict, as defined in section 23-1331(5), the judicial officer may, upon motion of the United States attorney, order such person detained in custody for a period not to exceed three calendar days, under medical supervision, to determine whether the person is an addict.

(b) Upon or before the expiration of three calendar days, the person shall be brought before a judicial officer and the results of the determination shall be presented to such judicial officer. The judicial officer thereupon (1) shall treat the person in accordance with section 23-1321, or (2) upon motion of the United States attorney, may (A) hold a hearing pursuant to section 23-1322, or (B) hold a hearing pursuant to subsection (c) of this section.

(c) A person who is an addict may be ordered detained in custody under medical supervision if the judicial officer—

(1) holds a pretrial detention hearing in accordance with subsection (c) of section 23-1322;

(2) finds that—

(A) there is clear and convincing evidence that the person is an addict;

(B) based on the factors set out in subsection

(b) of section 23-1321, there is no condition or combination of conditions of release which will reasonably assure the safety of any other person or the community; and

(C) on the basis of information presented to the judicial officer by proffer or otherwise, there is a substantial probability that the person committed the offense for which he is present before the judicial officer; and

(3) issues an order of detention accompanied by written findings of fact and the reasons for its entry.

(d) The provisions of subsection (d) of section 23-1322 shall apply to this section. (July 29, 1970, Pub. L. 91-358, § 210(a), title II, 84 Stat. 644.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 23-1324.

§ 23-1324. Appeal from conditions of release

(a) A person who is detained, or whose release on a condition requiring him to return to custody after specified hours is continued, after review of his application pursuant to section 23-1321(d) or section 23-1321(e) by a judicial officer, other than a judge of the court having original jurisdiction over the offense with which he is charged or a judge of a United States court of appeals or a Justice of the Supreme Court, may move the court having original jurisdiction over the offense with which he is charged to amend the order. Such motion shall be determined promptly.

(b) In any case in which a person is detained after (1) a court denies a motion under subsection (a) to amend an order imposing conditions of release, (2) conditions of release have been imposed or amended by a judge of the court having original jurisdiction over the offense charged, or (3) he is ordered detained or an order for his detention has been permitted to stand by a judge of the court having original jurisdiction over the offense charged, an appeal may be taken to the court having appellate jurisdiction over such court. Any order so appealed shall be affirmed if it is supported by the proceedings below. If the order is not so supported, the court may remand the case for a further hearing, or may, with or without additional evidence, order the person re-

(d) Any term of imprisonment imposed pursuant to this section shall be consecutive to any other sentence of imprisonment. (July 29, 1970, Pub. L. 91-358, § 210(a), title II, 84 Stat. 648.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 23-1303, 23-1322.

§ 23-1328. Penalties for offenses committed during release

(a) Any person convicted of an offense committed while released pursuant to section 23-1321 shall be subject to the following penalties in addition to any other applicable penalties:

(1) A term of imprisonment of not less than one year and not more than five years if convicted of committing a felony while so released; and

(2) A term of imprisonment of not less than ninety days and not more than one year if convicted of committing a misdemeanor while so released.

(b) The giving of a warning to the person when released of the penalties imposed by this section shall not be a prerequisite to the application of this section.

(c) Any term of imprisonment imposed pursuant to this section shall be consecutive to any other sentence of imprisonment. (July 29, 1970, Pub. L. 91-358, § 210(a), title II, 84 Stat. 649.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 23-1303, 23-1321, 23-1322.

§ 23-1329. Penalties for violation of conditions of release

(a) A person who has been conditionally released pursuant to section 23-1321 and who has violated a condition of release shall be subject to revocation of release, an order of detention, and prosecution for contempt of court.

(b) Proceedings for revocation of release may be initiated on motion of the United States attorney. A warrant for the arrest of a person charged with violating a condition of release may be issued by a judicial officer and if such person is outside the District of Columbia he shall be brought before a judicial officer in the district where he is arrested and shall then be transferred to the District of Columbia for proceedings in accordance with this section. No order of revocation and detention shall be entered unless, after a hearing, the judicial officer finds that—

(1) there is clear and convincing evidence that such person has violated a condition of his release; and

(2) based on the factors set out in subsection (b) of section 23-1321, there is no condition or combination of conditions of release which will reasonably assure that such person will not flee or pose a danger to any other person or the community.

The provisions of subsections (c) and (d) of section 23-1322 shall apply to this subsection.

(c) Contempt sanctions may be imposed if, upon a hearing and in accordance with principles applicable to proceedings for criminal contempt, it is estab-

lished that such person has intentionally violated a condition of his release. Such contempt proceedings shall be expedited and heard by the court without a jury. Any person found guilty of criminal contempt for violation of a condition of release shall be imprisoned for not more than six months, or fined not more than \$1,000, or both.

(d) Any warrant issued by a judge of the Superior Court for violation of release conditions or for contempt of court, for failure to appear as required, or pursuant to subsection (c)(2) of section 23-1322, may be executed at any place within the jurisdiction of the United States. Such warrants shall be executed by a United States marshal or by any other officer authorized by law. (July 29, 1970, Pub. L. 91-358, § 210(a), title II, 84 Stat. 649.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 23-1303, 23-1322.

§ 23-1330. Contempt

Nothing in this subchapter shall interfere with or prevent the exercise by any court of the United States of its power to punish for contempt. (July 29, 1970, Pub. L. 91-358, § 210(a), title II, 84 Stat. 649.)

CROSS REFERENCE

Contempt power of Superior Court, see § 11-944.

§ 23-1331. Definitions

As used in this subchapter:

(1) The term "judicial officer" means, unless otherwise indicated, any person or court in the District of Columbia authorized pursuant to section 3041 of title 18, United States Code, or the Federal Rules of Criminal Procedure, to bail or otherwise release a person before trial or sentencing or pending appeal in a court of the United States, and any judge of the Superior Court.

(2) The term "offense" means any criminal offense committed in the District of Columbia, other than an offense triable by court-martial, military commission, provost court, or other military tribunal, which is in violation of an Act of Congress.

(3) The term "dangerous crime" means (A) taking or attempting to take property from another by force or threat of force, (B) unlawfully entering or attempting to enter any premises adapted for overnight accommodation of persons or for carrying on business with the intent to commit an offense therein, (C) arson or attempted arson of any premises adaptable for overnight accommodation of persons or for carrying on business, (D) forcible rape, or assault with intent to commit forcible rape, or (E) unlawful sale or distribution of a narcotic or depressant or stimulant drug (as defined by any Act of Congress) if the offense is punishable by imprisonment for more than one year.

(4) The term "crime of violence" means murder, forcible rape, carnal knowledge of a female under the age of sixteen, taking or attempting to take immoral, improper, or indecent liberties with a child under the age of sixteen years, mayhem, kidnaping, robbery, burglary, voluntary man-

slaughter, extortion or blackmail accompanied by threats of violence, arson, assault with intent to commit any offense, assault with a dangerous weapon, or an attempt or conspiracy to commit any of the foregoing offenses as defined by any Act of Congress or any State law, if the offense is punishable by imprisonment for more than one year.

(5) The term "addict" means any individual who habitually uses any narcotic drug as defined by section 4731 of the Internal Revenue Code of 1954 so as to endanger the public morals, health, safety, or welfare.

(July 29, 1970, Pub. L. 91-358, § 2101(a), title II, 84 Stat. 650.)

2. Philadelphia Court Rule: Ten Percent Cash Deposit of Bail

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA IN THE MUNICIPAL COURT OF PHILADELPHIA

AND NOW, to wit, this day of 1972, the following rules pertaining to bail shall henceforth be applicable in the City of Philadelphia, when the jurisdiction of the crime charged is within the jurisdiction of the Municipal or Common Pleas Courts. In all cases where persons are admitted to bail, the provisions of these rules shall be applicable.

Rule 4006—Form of Undertaking

COMMONWEALTH OF PENNSYLVANIA

vs.

Charges

The undersigned, _____, his successors, heirs, assigns, is bound to pay the Commonwealth of Pennsylvania the sum of _____ dollars (\$_____.).

The conditions of this bond shall include the following:

The defendant _____ will:

(1) Appear before the Judges of the Court of Common Pleas and the Philadelphia Municipal Court at all times as his presence may be required, ordered or directed, until full and final disposition of the case, to plead, to answer and defend as ordered the aforesaid charge or charges;

(2) Submit himself to the orders and process of court;

(3) Follow such rules and regulations of the Court Bail Agency as may be required;

(4) Not depart this state;

(5) Give written notice to the court of any change in his address within a reasonable time;

(6) Obey such other conditions as the court may impose.

If defendant performs the conditions as set forth herein, then this bond is to be void; otherwise, the same shall remain in full force and this bond in the full sum thereof shall be forfeited.

And further, we do hereby empower any attorney of any court of record within the Commonwealth of Pennsylvania or elsewhere to appear for us at any time, and with or without declarations filed, and whether or not the said obligation be in default, to

confess judgment against us, and in favor of the Commonwealth of Pennsylvania for use of the County of Philadelphia and its assigns, as of any term or session of a court of record of the County of Philadelphia for the above sum and costs, with release of all errors, without stay of execution, and inquisition on and extension upon any levy or real estate is hereby waived, and condemnation agreed to, and the exemption of personal property from levy and sale on any execution hereon is also hereby expressly waived, and no benefit of exemption is claimed under and by virtue of any exemption law now in force or which may be passed hereafter.

And for so doing this shall be sufficient warrant. A copy of this bond and warrant being filed in said action, it shall not be necessary to file the original as a warrant of attorney, any law or rule of the court to the contrary notwithstanding.

Rule 4007.1—Pretrial Services Division; Release on Recognizance

For the administrative purposes of the Pretrial Services Division, any release on defendant's own recognizance shall be considered as release on nominal bail.

Where the bail has been set at nominal bail by the court or issuing authority, the Pretrial Services Division may be designated as surety for the defendant. In that event, the defendant shall be subject to the rules and regulations of the Pretrial Services Division. Where a defendant has failed to comply with the rules and regulations of the Pretrial Services Division, he may be brought before the court to determine if additional bail shall be set in his case.

Rule 4008—Deposit of Stocks or Bonds As Bail Security

(3) Stocks or bonds in which trustees are authorized to invest trust funds under the laws of this state. If the bail bond is secured by bearer bonds or stocks and bonds, the accused or sureties shall file with the bond a sworn schedule which shall be approved by the issuing authority and shall contain:

(1) A list of the stocks and bonds deposited describing each in sufficient detail that it may be identified;

(2) The market value of each stock and bond;

(3) The total market value of the stocks and bonds listed;

(4) A statement that the affiant is the sole owner of the stocks and bonds listed and they are not exempt from execution;

(5) A statement that such stocks and bonds have not previously been used or accepted as bail in this Commonwealth during the twelve months preceding the date of the bail bond; and

(6) A statement that such stocks and bonds are security for the appearance of the accused in accordance with the conditions of the bail bond.

Rule 4008.1—10% (Ten Percent) Deposit of Bail

Provided he executes a bail undertaking, the defendant or his private third party surety may furnish as bail with the issuing authority or clerk of court, a sum of money equal to 10% (ten percent) of the full amount of the bail, but in no event less than \$25 (twenty-five dollars). Only the person for whom bail has been set, or the private person acting as a third party surety shall execute the bond. No surety or fidelity company or professional bail bondsman, or an agent thereof, shall act as a private third party surety. The court may designate for retention a percentage fee as set by General Court Regulation. The court, also by General Court Regulation, may set a minimum figure for retention. Monies retained by the court shall be considered as collected at the time the bail undertaking is executed. No additional retention fee shall be collected in the event bail is reduced sometime after the defendant is released from custody.

Upon depositing a sum of money equal to 10% (ten percent) of the full amount of the bail, or \$25 (twenty-five dollars), whichever is greater, the person shall be released from custody subject to the conditions of the bail bond. Where the defendant or private surety has deposited an amount of bail equal to 10% (ten percent) of the amount of bail, the court or issuing authority may designate the Pretrial Services Division as surety for the defendant. In that event, the defendant shall be subject to the rules and regulations of the Pretrial Services Division. Where a defendant has failed to comply with the rules and regulations of the Pretrial Services Division, he may be brought before the court to determine if additional bail shall be set in his case.

Rule 4008.2—Waiver of Deposit of Money

If, after the amount of bail has been set, the court is of the opinion that the accused will appear as required, either before or after conviction, the defendant for whom bail has been set shall execute the bail bond and may be released on his own recognizance without the posting of a security deposit. If the accused does not comply with the conditions of the bail bond, any obligated sum fixed in the bail bond shall be forfeited and collected in accordance with Rule 4012. The court shall be guided by the standards set forth in Rule 4005, *supra*, in determining whether a defendant shall be released on his own recognizance. When the defendant has been released on his own recognition, the court may designate the Court Bail Agency to supervise the defendant. In that event, the defendant shall be subject to the rules and regulations of the Court Bail Agency. Where a defendant has failed to comply with the rules and regulations of the Court Bail Agency, he may be brought before the court to determine if additional bail shall be set in his case.

Rule 4009.1—Deposit Return

When a defendant or his private third party surety has deposited a sum of money equal to 10% (ten percent) of the bail, but in no event less than \$25 (twenty-five dollars), then upon full and final disposition of the case the deposit less the retention (in accordance with Rule 4008.1) shall be returned to the person who originally posted the money by the clerk of court or issuing authority. Notice of the full and final disposition shall be sent by the court to the person who originally posted the money at his address of record. Any monies not claimed within 180 days from the time of the full and final disposition of the case shall be deemed as fees and shall be forfeited to the court. Any interest on escrow funds shall be deemed as earned by the court as of the close of the day upon which they were on deposit.

Rule 4013—Court Bail Agency

a(3) The court may establish a Bail Agency to supervise certain defendants.

APPENDIX D. SELECTED LIST OF ALTERNATIVE PROJECTS

The following list of projects is included to suggest the potential diversity of alternative programs and applications. Each of the projects listed has been in operation at least six months. Since each project has been developed to meet the needs of both alternative program objectives as well as the specific jurisdiction it serves, the interested planner should explore both the program itself and the environment in which it operates in order to determine an appropriate approach in his own community.

Pima County Attorney's Diversion Program
Pima County Attorney
600 Administration Building
131 West Congress Street
Tucson, Arizona 85701

Deferred Prosecution Project (juvenile)
Probation Department of San Bernardino
175 West Fifth Street
San Bernardino, California 82415

San Francisco Bail Project
Room 304, Hall of Justice
850 Bryant Street
San Francisco, California 94103

Custody Classification Preprocessing Center (screening)
County of Santa Clara
70 West Hedding Street
San Jose, California 95110

Community Youth Responsibility Program
2220 University Avenue
East Palo Alto, California 94303

Adult Property Crime Deferred Prosecution Project
County of San Diego
Probation Department
P.O. Box 23096
San Diego, California 92123

Citation Release Project
San Francisco Police Department
850 Bryant Street
San Francisco, California 94103

Alcoholism Rehab. & Info.
Sun Street Center
8 Sun Street
Salinas, California 93901

Pre-Delinquent Diversion Project (juvenile)
County of Santa Clara
70 West Hedding Street
San Jose, California 95110

Detoxification Center (police referral)
2 Holcomb Street
Hartford, Connecticut 06112

Family & Youth Service Network
Family Counseling of Greater New Haven, Inc.
One State Street
New Haven, Connecticut 06511

Pretrial Intervention Program
Office of the State Attorney
6th Judicial Circuit Court
Court House
Clearwater, Florida 33516

Re-Entry Program of Orange County
Department of Community Affairs
43 East Central Boulevard
Orlando, Florida 32801

Pretrial Intervention Project
Office of the State Attorney
1351 N.W. 12th Street
Miami, Florida 33125

Atlanta Pretrial Intervention Project (17-28 years)
Georgia Training & Employment Serv.
322 Ivy Street, N.E.
Atlanta, Georgia 30303

Pretrial Release Program
Office of the Court Administrator
Cobb Judicial Building
Marietta, Georgia 30060

Deferred Prosecution & Deferred Acceptance of a
Guilty Plea
119 Merchant Street, Room 400
Honolulu, Hawaii 96813

Bail Reform Project
Indiana University-Purdue University
Indianapolis Law School
735 West New York Street
Indianapolis, Indiana 46202

Alternatives for the Drug Abuser
Office of the State's Attorney
Cook County
Wheaton, Illinois

Police Social Service Project
(Social Workers in Police Dept.)
Wheaton Police Department
119 North Wheaton Avenue
Wheaton, Illinois 60187

Pre-Trial Release with Supportive Services
Fifth Judicial Court
Administrative Office
610 College
Des Moines, Iowa 50314

Pretrial Release Program
Jefferson Parish Courthouse
Gretna, Louisiana 70053

Baltimore Pretrial Intervention Project
2500 Eutaw Place
Baltimore, Maryland 21215

Northwest Youth Serv. and Referral Bureau
5506 Park Heights Ave.
Baltimore, Maryland 21215

Pretrial Release Div. of the Supreme Bench of
Baltimore City
Equitable Building
Baltimore, Maryland 21202

Project FOUND (First Offenders Under New Direction)
State's Attorney of Baltimore
204 Court House
Baltimore, Maryland 21202

Paraprofessional Support Prog. (screening)
Montgomery County State's Attorney's Office
P.O. Box 151
Rockville, Maryland 20850

Boston Court Resource Project
(pretrial diversion 17-26 years)
14 Somerset Street
Boston, Massachusetts 02105

Pretrial Release Program
Probation Department
1207 City-County Building
2 Woodward Avenue
Detroit, Michigan 48226

Deferred Prosecution Authority
Office of Prosecuting Attorney
County of Berrien
Courthouse
St. Joseph, Michigan 49085

Chicago County Court Service
(diversion for juvenile, adult pretrial)
Box 201
Courthouse
Center City, Minnesota 55101

Cooperative Community Interaction Program
Central Parole Division
Kansas City Police Dept.
1120 Linwood Boulevard
Kansas City, Missouri 64109

Pretrial Diversion Court Employ. Project
1212 McGee Street
Suite 206
Kansas City, Missouri 64106

Special Probation Serv. Project
22nd Judicial Circuit
Juvenile Division
920 North Vandeventer
Saint Louis, Missouri 63108

Juvenile Court Deterrence
The Juvenile Court
Nashua District
Nashua, New Hampshire 03060

Pre-Prosecution Probation
Office of the District Attorney
Second Floor Court House
Albuquerque, New Mexico 87101

Pretrial Service Agency
56 Court Street
Brooklyn, New York 11201

Screening Unit
Office of the District Attorney
Syracuse, New York 13202

Madison County Jail Project
Court House
Wampsville, New York 13163

Court Referral Project of the Addiction Services Agency
325 Broadway
New York, New York 10007

Screening Program and Arbitration Program
Office of the District Attorney
Civic Center Plaza
Rochester, New York 14614

Legal Aid Society
Juvenile Rights Division
189 Montague Street
Brooklyn, New York 11201

The Pretrial Release Prog.
65 Broad Street
Room 513
Rochester, New York

Case Screening Project
Office of the District Attorney of Niagara County
Court House
Lockport, New York 14094

Pretrial Evaluation Release Agency
MICU Planning Agency
825 East Fourth Street
Charlotte, North Carolina 28202

Night Prosecutor Program
(Citizens dispute settlement)
Department of Law
90 West Broad Street
Columbus, Ohio 43215

Defendant Diversion Program
Toledo Municipal Court
Probation and Correctional Serv. Department
Room 109
Safety Building
Toledo, Ohio 43624

Pretrial Release Project
Miami Valley Council of Govt.
333 West First Street
Suite 444
Dayton, Ohio 45402

New Day Pretrial Release Project
17 West 8th
Tulsa, Oklahoma 74119

Multnomah County District Attorney High Impact Prog.
(reduction of plea bargaining)
600 County Court House
Portland, Oregon 97204

Alternatives
Metropolitan Public Defender
620 Southwest Fifth
Suite 408
Portland, Oregon 97204

Crossroads Center (alcoholism diversion)
331 State Street
Erie, Pennsylvania 16507

Accelerated Rehabilitative Disposition Program (ARD)
District Attorney's Office
666 City Hall
Philadelphia, Pennsylvania 19107

Pretrial Intervention Project
1311 Marion Street
Columbia, South Carolina 29201

Pretrial Release Program
Memphis-Shelby County
140 Adams Avenue
Room 9-B
Memphis, Tennessee 38103

Pretrial Release Program
Knox County
315 Main Avenue
Room 302
Knoxville, Tennessee 37902

Pretrial Release Project
West Texas Regional Adult Probation Department
Room 513
City Court Building
El Paso, Texas 79901

Laredo Juvenile Diversion Youth Development Program
South Texas Development Council
1104 Victoria St.
Laredo, Texas 78040

Family Court Services
Wichita County
Court House
Wichita Falls, Texas 76301

Harris County Pretrial Release Agency
807 Criminal Court Building
301 San Jacinto Street
Houston, Texas 77002

Project Uplift (16-22 years, male, enrolled in vocational
training)
3317 Montrose — Suite 320
Houston, Texas 77006

Legal Aid (bail release prog.)
Bexar County Legal Aid Association
203 West Nueva Street
San Antonio, Texas 78207

Pretrial Release Office
Room 612
Dallas County Courthouse
Dallas, Texas 78207

Pretrial Release Program
Ogden City Court
Municipal Building
P.O. Box 1639
Ogden, Utah 84402

Pretrial Diversion Program
Municipal Court of Seattle
Public Safety Building
Room 120
Seattle, Washington 98104

Superior Court of Narcotics Diversion Project
613 G Street, N.W.
Suite 714
Washington, D.C. 20001

Project Crossroads (Juvenile)
527 Sixth Street, N.W.
Washington, D.C. 20001

APPENDIX E. SUGGESTED READING

American Correctional Association, Juvenile Services Project. *Juvenile Diversion: A Perspective*, College Park, MD (1972).

Bellassai, John P. and Segal, Phyllis N. "Addict Diversion: An Alternative Approach for the Criminal Justice System," 60 *Georgetown Law Review* 667 (1972).

Brakel, S. "Diversion from the Criminal Process: Informal Discretion, Motivation and Formalization," 48 *Denver Law Journal* 211 (1971).

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Danzig, Richard. "Toward the Creation of a Complementary, Decentralized System of Criminal Justice," 26 *Stanford Law Review* 1 (1973).

Davis, Kenneth Culp. *Discretionary Justice, A Preliminary Inquiry*. Baton Rouge: Louisiana State University Press (1969).

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Frankel, Marvin. *Criminal Sentences: Law Without Order*. Hill and Wang (1973).

Goldberg, Nancy E. "Pre-Trial Diversion: Bilk or Bargain," 31 *NLADA Briefcase* 6 (Nov.-Dec. 1973).

LaFaye, Wayne. Arrest, *The Decision to Take a Suspect into Custody*. Boston: Little, Brown and Company (1965).

Morris, Norval. *The Future of Imprisonment*. Chicago and London: University of Chicago Press (1974).